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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[CIS No. 2563-15]

RIN 1615-AC06

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 503

RIN 1205-AB76

Temporary Non-agricultural Employment of H-2B Aliens in the United States

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security; Employment and Training Administration, and Wage and Hour Division, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Homeland Security (DHS) and the Department of Labor (DOL) are jointly issuing regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such

nonimmigrant workers. This interim final rule establishes the process by which employers obtain a temporary labor certification from DOL for use in petitioning DHS to employ a nonimmigrant worker in H-2B status. We are also issuing regulations to provide for increased worker protections for both United States (U.S.) and foreign workers. DHS and DOL are issuing simultaneously with this rule a companion rule governing the methodology to set the prevailing wage in the H-2B program.

DATES: This interim final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Interested persons are invited to submit written comments on this interim final rule on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB76, by any one of the following methods:

- Federal e-Rulemaking Portal www.regulations.gov. Follow the Web site instructions for submitting comments.
- Mail or Hand Delivery/Courier: Please submit all written comments (including disk and CD–ROM submissions) to Adele Gagliardi, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. Comments received by means other than those listed above or received after the comment period has closed will not be reviewed. The Departments will post all comments received on http://www.regulations.gov without making any change to the comments, including any

personal information provided. The http://www.regulations.gov Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Departments caution commenters not to include personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such information will become viewable by the public on the http://www.regulations.gov Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through http://www.regulations.gov will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Departments encourage the public to submit comments through the http://www.regulations.gov Web site.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking portal at http://www.regulations.gov. The Departments will also make all the comments received available for public inspection during normal business hours at the Employment and Training Administration (ETA) Office of Policy Development and Research at the above address. If you need assistance to review the comments, DOL will provide you with appropriate aids such as readers or print magnifiers. DOL will make copies of the rule available, upon request, in large print and as an electronic file on computer disk. DOL will consider providing the interim final rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the ETA Office of Policy

Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

FOR FURTHER INFORMATION CONTACT: For further information on 8 CFR part 214, contact Steven W. Viger, Adjudications Officer (Policy), Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts NW., Washington, DC 20529-2060; Telephone (202) 272-1470 (this is not a toll-free number).

For further information on 20 CFR part 655, subpart A, contact William W. Thompson, II, Acting Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

For further information on 29 CFR part 503, contact Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0071 (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. Executive Summary

The Immigration and Nationality Act (INA) establishes the H-2B nonimmigrant classification for a non-agricultural temporary worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b). In accordance with the INA and as discussed in detail in this preamble, the Department of Homeland Security (DHS) consults with the Department of Labor (DOL) with respect to the H-2B program, and DOL provides advice on whether U.S. workers capable of performing the temporary services or labor are available. See 8 U.S.C. 1184(c)(1), INA section 214(c)(1) (providing for DHS to consult with "appropriate agencies of the government"). Under DHS regulations, an H-2B petition for temporary employment must be accompanied by an approved temporary labor certification from DOL, which serves as DOL's advice to DHS regarding whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 8 CFR 214.2(h)(6)(iii)(A) and (D).

This interim final rule, which is virtually identical to the 2012 final rule that DOL developed following public notice and comment, improves DOL's ability to determine whether it is appropriate to grant a temporary employment certification. For reasons described in further detail below, DOL never implemented the 2012 final rule; as a result, this rulemaking contains a number of improvements to the temporary employment certification process that was in place on March 4, 2015. This interim final rule expands

the ability of U.S. workers to become aware of the job opportunities in question and to apply for opportunities in which they are interested. For example, this interim final rule includes new recruitment and other requirements to broaden the dissemination of job offer information (such as by introducing the electronic job registry and the possibility of additional required contact with community-based organizations). The interim final rule also requires the job offer to remain open to U.S. workers until 21 days before the employer's start date of need, which provides a longer application period that ends closer to the date of need than was previously required. The interim final rule also reverts back to the compliance-based certification model that had been used prior to the 2008 final rule, rather than continuing to use the attestation model. Finally, the interim final rule also adopts an employer registration process that requires employers to demonstrate their temporary need for labor or services before they apply for a temporary labor certification, which expedites the certification process; additionally, the resulting registration may remain valid for up to three years, thereby shortening the employer's certification process in future years.

The interim final rule also provides a number of additional worker protections, such as increasing the number of hours per week required for full-time employment and requiring that U.S. workers in corresponding employment receive the same wages and benefits as the H-2B workers. It also requires that employers must guarantee employment for a total number of work hours equal to at least three-fourths of the workdays in specific periods for both H-2B workers and workers in corresponding employment. The interim final rule requires employers to pay visa and related fees of H-2B workers, and it requires employers to pay the inbound transportation and subsistence costs of workers who

complete 50 percent of the job order period and the outbound transportation and subsistence expenses of employees who complete the entire job order period. Finally, it prohibits employers from retaliating against employees for exercising rights under the H-2B program.

The interim final rule also contains a number of provisions that will lead to increased transparency. It requires employers to disclose their use of foreign labor recruiters in the solicitation of workers; to provide workers with earnings statements, with hours worked and offered and deductions clearly specified; to provide workers with copies of the job order; and to display a poster describing employee rights and protections. The Departments believe that these procedures and additional worker protections will lead to an improved temporary employment certification process.

Summing the present value of the costs associated with this rulemaking in Years 1-10 results in total discounted costs over 10 years of $9.24 million to $10.58 million (with 7 percent and 3 percent discounting, respectively).

Table 1. Summary of Estimated Cost and Transfers by Provision (millions of dollars)

Undiscounted	**Transfers and Costs by Year (in millions of dollars)**		
Cost Component	**Year 1 Costs**	**Year 2-10 Costs**	**Year 1-10 Costs**
Transfers			
Corresponding Workers' Wages – Low	$18.21	$18.21	$182.1
Corresponding Workers' Wages – High	$54.62	$54.62	$546.2
Transportation	$55.19	$55.19	$551.9
Subsistence	$3.13	$3.13	$31.3
Lodging	$1.87	$1.87	$18.66
Visa and Border Crossing Fees	$10.65	$10.65	$106.48
Total Transfers- Low	$87.24	$87.24	$890.43
Total Transfers – High	$125.45	$125.45	$1,254.52
Costs to Employers			

Additional Recruiting	$0.76	$0.76	$7.57
Disclosure of Job Order	$0.23	$0.23	$2.34
Read and Understand Rule	$0.98	$0	$0.98
Document Retention	$0.27	$0	$0.27
Other Provisions[a]	$0.014	$0.014	$0.14
Total Costs to Employers	$2.25	$1.01	$11.30
Costs to Government			
Electronic Job Registry	$0.14	$0.05	$0.56
Enhanced U.S. Worker Referral Period	Not Estimated	Not Estimated	Not Estimated
Total Costs to Government	$0.14	$0.05	$0.56
Total Costs & Transfers			
Total Costs and Transfers – Low	$91.43	$90.09	$902.28
Total Costs and Transfers – High	$127.84	$126.50	$1,266.37
Total Transfers – Low	$89.04	$89.04	$890.43
Total Transfers – High	$125.45	$125.45	$1,254.52
Total Costs	$2.39	$1.05	$11.85

Note: Totals may not sum due to rounding

[a] Includes the sum of: Elimination of Attestation-Based Model; Post Job Opportunity; Workers Rights Poster.

Table 2. Summary of Costs and Transfers – Sum of Present Values

	Transfers and Costs (millions of dollars)
Cost Component	**Year 1-10 Costs**
Present Value – 7% Real Interest Rate	
Total Costs & Transfers – Low	$678.42
Total Costs & Transfers – High	$952.04
Total Transfers – Low	$669.18
Total Transfers – High	$942.80
Total Costs	$9.24
Present Value – 3% Real Interest Rate	
Total Costs & Transfers – Low	$792.92
Total Costs & Transfers – High	$1,112.81

Total Transfers – Low	$782.34
Total Transfers – High	$1,102.23
Total Costs	$10.58

Note: Totals may not sum due to rounding

II. Background

A. The Statutory and Regulatory Framework

The INA establishes the H-2B nonimmigrant classification for a non-agricultural temporary worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b). Section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), requires an importing employer (H-2B employer) to petition DHS for classification of the prospective temporary worker as an H-2B nonimmigrant.[1] DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa or H-2B status. Finally, the INA requires that "[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS], after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. 1184(c)(1), INA section 214(c)(1).

Pursuant to the above-referenced authorities, DHS has promulgated regulations implementing the H-2B program. See, e.g., 73 FR 78104 (Dec. 19, 2008). These

[1] Under section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. 557 (2003) (codifying HSA, tit. XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

regulations prescribe the conditions under which DHS may grant an employer's petition to classify an alien as an H-2B worker. See 8 CFR 214.2(h)(6). U.S. Citizenship and Immigration Services (USCIS) is the component agency within DHS that adjudicates H-2B petitions. Id.

USCIS examines H-2B petitions for compliance with a range of statutory and regulatory requirements. For instance, USCIS will examine each petition to ensure, inter alia, (1) that the job opportunity in the employer's petition is of a temporary nature, 8 CFR 214.2(h)(1)(ii)(D), (6)(ii) and (6)(vi)(D); (2) that the beneficiary alien meets the educational, training, experience, or other requirements, if any, attendant to the job opportunity described in the petition, 8 CFR 214.2(h)(6)(vi)(C); (3) that there are sufficiently available H-2B visas in light of the applicable numerical limitation for H-2B visas, 8 CFR 214.2(h)(8)(ii)(A); and (4) that the application is submitted consistent with strict requirements ensuring the integrity of the H-2B system, 8 CFR 214.2(h)(6)(i)(B), (6)(i)(F).[2]

DHS has implemented the statutory protections attendant to the H-2B program, by regulation. See 8 CFR 214.2(h)(6)(iii), (iv), and (v). In accordance with the statutory mandate at 8 U.S.C. 1184(c)(1), INA section 214(c)(1), that DHS consult with "appropriate agencies of the government" to determine eligibility for H-2B nonimmigrant status, DHS (and the former Immigration and Naturalization Service ("legacy INS")) have long recognized that the most effective administration of the H-2B program requires

[2] DHS also publishes annually a list of countries whose nationals are eligible to participate in the H-2B visa program in the coming year. See 8 CFR 214.2(h)(6)(i)(E); see also, e.g., 79 FR 3214 (Jan. 17, 2014 notice of eligible country list). As part of its adjudication of H-2B petitions, USCIS must determine whether the alien beneficiary is a national of a country on the list; if not, USCIS must determine whether it is in the U.S. national interest for that alien to be a beneficiary of such petition. See 8 CFR 214.2(h)(6)(i)(E).

consultation with DOL to advise whether U.S. workers capable of performing the temporary services or labor are available. See, e.g., Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 FR 2606, 2617 (Jan. 26, 1990) ("The Service must seek advice from the Department of Labor under the H-2B classification because the statute requires a showing that unemployed U.S. workers are not available to perform the services before a petition can be approved. The Department of Labor is the appropriate agency of the Government to make such a labor market finding. The Service supports the process which the Department of Labor uses for testing the labor market and assuring that wages and working conditions of U.S. workers will not be adversely affected by employment of alien workers.").

Accordingly, DHS regulations require that an H-2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification from DOL. 8 CFR 214.2(h)(6)(iii)(A) and (iv)(A).[3] The temporary labor certification serves as DOL's advice to DHS with respect to whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 8 CFR 214.2(h)(6)(iii)(A) and (D). In addition, as part of DOL's certification, DHS regulations require DOL to "determine the prevailing wage applicable to an application for temporary labor certification in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." 8 CFR 214.2(h)(6)(iii)(D).

[3] The regulation establishes a different procedure for the Territory of Guam, under which a petitioning employer must apply for a temporary labor certification with the Governor of Guam. 8 CFR 214.2(h)(6)(iii)(A).

DHS relies on DOL's advice in this area, as DOL is the appropriate government agency with expertise in labor questions and historic and specific expertise in addressing labor protection questions related to the H-2B program. This advice helps DHS fulfill its statutory duty to determine, prior to approving an H-2B petition, that unemployed U.S. workers capable of performing the relevant service or labor cannot be found in the United States. 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1), INA section 214(c)(1). DHS has therefore made DOL's approval of a temporary labor certification a condition precedent to the acceptance of the H-2B petition. 8 CFR 214.2(h)(6)(iii) and (vi). Following receipt of an approved DOL temporary labor certification and other required evidence, USCIS may adjudicate an employer's complete H-2B petition. Id.

Consistent with the above-referenced authorities, since at least 1968,[4] DOL has established regulatory procedures to certify whether a qualified U.S. worker is available to fill the job opportunity described in the employer's petition for a temporary nonagricultural worker, and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 20 CFR part 655, subpart A. This interim final rule establishes the process by which employers obtain a temporary labor certification and the protections

[4] DHS has required a temporary labor certification as a condition precedent to adjudication of an H-2B petition for temporary employment in the United States since 2008. 73 FR 78103. DOL, however, has promulgated regulations governing its adjudication of employer applications for temporary labor certification since 1968. See 33 FR 7570 (May 22, 1968) (DOL final rule on certification of temporary foreign labor for industries other than agriculture and logging). Until 1986, there was a single H-2 temporary worker classification applicable to both temporary agricultural and non-agricultural workers. In 1986, Congress revised the INA to create two separate programs for agricultural (H-2A) and non-agricultural (H-2B) workers. See INA 101(a)(15)(H)(ii), 66 Stat. 163 (June 27, 1952); Immigration Reform and Control Act of 1986, Pub. L. 99-603, sec. 301, 100 Stat. 3359. Under the 1968 final rule, DOL considered, "such matter[s] as the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered." 33 FR at 7571.

that apply to H-2B workers and corresponding workers. As part of DOL's temporary labor certification process, which is a condition precedent for employers seeking to apply for H-2B workers under DHS regulations, 8 CFR 214.2(h)(6)(iii)(D) and (iv), DOL sets the minimum wage that employers must offer and pay foreign workers admitted to the United States in H-2B nonimmigrant status. See 20 CFR 655.10. The companion final wage rule issued simultaneously with this interim final rule establishes DOL's methodology for setting the wage, consistent with the INA and existing DHS regulations.

As discussed above, DHS has determined that the most effective implementation of the statutory labor protections in the H-2B program requires that DHS consult with DOL for its advice about matters with which DOL has unique expertise, particularly questions about testing the U.S. labor market and the methodology for setting the prevailing wage in the H–2B program. The most effective method for DOL to provide this consultation is by the agencies setting forth in regulations the standards that DOL will use to provide that advice. These rules set the standards by which employers demonstrate to DOL that they have tested the labor market and found no or insufficient numbers of qualified, available U.S. workers, and set the standards by which employers demonstrate to DOL that the offered employment does not adversely affect U.S. workers. By setting forth this structure in regulations, DHS and DOL ensure the provision of this advice by DOL is consistent, transparent, and provided in the form that is most useful to DHS.

In addition, effective January 18, 2009, pursuant to 8 U.S.C. 1184(c)(14)(B), INA section 214(c)(14)(B), DHS transferred to DOL its enforcement authority for the H-2B program. See, e.g., 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of, among other things, an H-2B petition and a

DOL-approved temporary labor certification). Under this authority, and after consultation with DHS, DOL established regulations governing enforcement of employer obligations and the terms and conditions of H-2B employment. Accordingly, this interim final rule sets forth enforcement provisions.

As discussed in greater detail below, DOL's authority to issue its own legislative rules to carry out its duties under the INA has been challenged in litigation. On April 1, 2013, the U.S. Court of Appeals for the Eleventh Circuit upheld a district court decision that granted a preliminary injunction against enforcement of the 2012 H-2B rule, 77 FR 10038, on the ground that the employers were likely to prevail on their allegation that DOL lacks H-2B rulemaking authority. Bayou Lawn & Landscape Servs. v. Sec'y of Labor, 713 F.3d 1080 (11th Cir. 2013). As a result of the preliminary injunction in Bayou, DOL continued to operate the H-2B program under the predecessor 2008 rule. On remand, the district court issued an order vacating the 2012 H-2B rule, and permanently enjoined DOL from enforcing the rule on the ground that DOL lacks rulemaking authority in the H-2B program. Bayou Lawn & Landscape Servs. v. Sec'y of Labor, No. 3:12-cv-183 (N.D. Fla. Dec. 18, 2014) (Bayou II). The Bayou II decision is currently on appeal to the Eleventh Circuit. On the other hand, on February 5, 2014, the U.S. Court of Appeals for the Third Circuit held that "DOL *has* authority to promulgate rules concerning the temporary labor certification process in the context of the H-2B program, and that the 2011 Wage Rule was validly promulgated pursuant to that authority." La. Forestry Ass'n v. Perez, 745 F.3d 653, 669 (3d Cir. 2014) (emphasis added).

To ensure that there can be no question about the authority for and validity of the regulations in this area, DHS and DOL (the Departments), together, are issuing this interim final rule. By proceeding together, the Departments affirm that this rule is fully consistent with the INA and implementing DHS regulations and is vital to DHS's ability to faithfully implement the statutory labor protections attendant to the program. See 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1), INA section 214(c)(1); 8 CFR 214.2(h)(6)(iv). This interim final rule implements a key component of DHS's determination that it must consult with DOL on the labor market questions relevant to its adjudication of H-2B petitions. This interim final rule also executes DHS's and DOL's determination that implementation of the consultative relationship may be established through regulations that determine the method by which DOL will provide the necessary advice to DHS. Finally, this interim final rule sets forth enforcement procedures and remedies pursuant to DHS's delegation of enforcement authority to DOL. See 8 U.S.C. 1184(c)(14)(B), INA section 214(c)(14)(B); 8 CFR 214.2(h)(6)(ix).

B. The 2008 Rule and the CATA Litigation

In 2008, DOL issued regulations governing DOL's role in the H-2B temporary worker program. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes, 73 FR 78020 (Dec. 19, 2008) (the 2008 rule). The 2008 rule established, among other things, the framework for DOL to receive, review and issue H-2B labor certifications. The 2008 rule also established a methodology for determining the wage that a prospective H-2B employer must pay, the recruitment

standards for testing the domestic labor market, and the mechanism for processing prevailing wage requests. Id. In addition, the 2008 rule governed the enforcement process to make certain U.S. and H-2B workers are employed in compliance with H-2B labor certification requirements.

On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in Comité de Apoyo a los Trabajadores Agricolas (CATA) v. Solis, No. 2:09-cv-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (CATA I), invalidated various provisions of the 2008 rule and remanded it to DOL. In response to CATA I, DOL's 2012 H-2B rule, which was ultimately enjoined in Bayou, revised the particular provisions that were invalidated by the Court, including specifying when H-2B employers must contact unions as a potential source of labor, and providing a new definition of full-time and a modified definition of job contractor.[5] See CATA I, 2010 WL 3431761 at *26-27.

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[5] Also in response to CATA I, which held that part of the methodology to set the prevailing wage was invalid because it was not adequately explained, 2010 WL 3431761 at *19, DOL issued separately a rule governing the methodology to set the H-2B prevailing wage. See Wage Methodology for the Temporary Non-agricultural Employment H-2B Program, on January 19, 2011, 76 FR 3452 (the 2011 Wage Rule). Shortly before the 2011 Wage Rule came into effect, Congress issued an appropriations rider effectively barring implementation of the 2011 Wage Rule, and the same rider was issued in every appropriations enactment until January 2014. During the period DOL was unable to implement the 2011 Wage Rule, DOL extended the effective date of the 2011 Wage Rule so that it would not come into effect while the agency was without the appropriations necessary to implement it. DOL was never able to implement the 2011 Wage Rule and continued to rely on the 2008 Rule. Therefore, the court in 2013 vacated the problematic provision (20 CFR 655.10(b)(2)) and ordered the DOL to come into compliance in 30 days. Comite de Apoyo a los Trabajadores Agricolas v. Solis, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (CATA II).

In response to the vacatur and 30-day compliance order in CATA II, and the Eleventh Circuit's decision in Bayou Lawn & Landscape Servs., discussed supra, DOL and DHS promulgated an interim final rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, part 2, 78 FR 24047 (Apr. 24, 2013) (2013 IFR), which again revised the wage methodology. The Departments issued the 2013 IFR jointly to dispel questions that arose as a result of Bayou about the respective roles of the two agencies and the validity of DOL's regulations as an appropriate way to implement the interagency consultation specified in section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1). Finally, the U.S. Court of Appeals for the Third Circuit vacated on substantive and procedural APA grounds 20 CFR 655.10(f), which permitted employers to submit employer-conducted surveys. Comite de Apoyo a los Trabajadores Agricolas v. Perez, 774 F.3d 173, 191 (3d Cir. 2014) (CATA III). For a complete history of the regulations governing the methodology to set the prevailing wage in the H-2B program, see the companion rule published in this issue of the Federal Register, Wage Methodology for the Temporary Non-Agricultural Employment H-2B

C. The Perez Vacatur, Good Cause to Proceed Without Notice and Comment Rulemaking, and Request for Comments.

1. The Perez Vacatur and Its Impact on Program Operations

On March 4, 2015, the U.S. District Court for the Northern District of Florida, which previously had vacated DOL's 2012 H-2B rule and enjoined its enforcement in Bayou II, vacated the 2008 rule and permanently enjoined DOL from enforcing it. Perez v. Perez, No. 14-cv-682 (N.D. Fla. Mar. 4, 2015). As in its decision in Bayou II vacating the 2012 H-2B rule, the court in Perez found that DOL lacked authority under the INA to independently issue legislative rules governing the H-2B program. Perez, slip op. at 6. Based on the vacatur order and the permanent injunction in Perez, DOL immediately ceased operating the H-2B program because it no longer has any existing regulation establishing the processes necessary to issue temporary labor certifications. Shortly after the court issued its decision, DOL posted a notice on its website informing the public that "effective immediately, DOL can no longer accept or process requests for prevailing wage determinations or applications for labor certification in the H-2B program."[6] As a result of the Perez vacatur order, DOL was unable to process any H-2B temporary employment certification applications or issue any H-2B certifications as advice to DHS, which effectively shut down the H-2B program for all employers filing new H-2B temporary employment certification applications with DOL. In addition, the Perez vacatur order eliminated the crucial regulatory provision that the "employer must request a prevailing wage determination from the NPC in accordance with the procedures

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Program (2015), which finalizes the 2013 IFR following public input on the proper H-2B wage methodology.

[6] Employment and Training Administration, Announcements, http://www.foreignlaborcert.doleta.gov (Mar. 4, 2015).

established by this regulation" set out at 20 CFR 655.10(a), thus leaving DOL unable to process any prevailing wage requests or issue any prevailing wage determinations.[7]

At the time of the Perez vacatur order on March 4, 2015, DOL had pending over 400 requests to set the prevailing wage for an H-2B occupation, and almost 800 applications for H-2B temporary labor certification representing approximately 16,408 workers. In order to minimize disruption to the H-2B program and to prevent economic dislocation to employers and employees in the industries that rely on H-2B foreign workers and to the general economy of the areas in which those industries are located, on March 16, 2015, DOL filed an unopposed motion requesting a temporary stay of the Perez vacatur order. On March 18, 2015, the court entered an order temporarily staying the vacatur of the H-2B rule until and including April 15, 2015. On April 15, 2015, at the request of proposed intervenors, the court entered a second order extending the temporary stay up to and including May 15, 2015. The court in Perez has requested briefing on several issues, including whether the plaintiff had standing to challenge the 2008 rule. The court's extension of the stay on April 15 occurred late in the day, after DOL had already initiated processes necessary to provide for an orderly cessation of the H-2B program and after DOL had already posted a notice to the regulated community on its

[7] The court order in Perez did not vacate the 2013 IFR, and the court's judgment on DOL's independent regulatory authority did not have a direct impact on the 2013 IFR, which was issued jointly by DOL and DHS. However, the 2013 IFR did only one thing: it made a single change to § 655.10(b)(2) to eliminate the use of skill levels in setting wages based on the OES. The 2013 IFR left untouched all the other provisions in the 2008 wage methodology, and those provisions remained in full force and effect in the 2008 rule following the publication of the 2013 IFR. As a result, the Perez order vacated virtually all of § 655.10, except for § 655.10(b)(2), which was promulgated in the 2013 IFR. Thus, the vacatur eliminated DOL's wage methodology (except for § 655.10(b)(2)) as well as the procedures for requesting and obtaining prevailing wages. Together with the vacatur of § 655.10(f) in CATA III, this ruling left DOL without a complete methodology or any procedures to set prevailing wages in the H-2B program until the court's stay. As explained infra, the Perez court has stayed its vacatur order until May 15, 2015, and at the expiration of the stay, DOL will once again be without a complete methodology or any procedures to set and issue the prevailing wage in the H-2B program.

website that the H-2B program would be closed again the next day. On April 16, 2015, following the court's stay extension, DOL immediately posted a new notice on its website that it would continue to operate the H-2B program and resume normal operations.

DHS is charged with adjudicating petitions for a nonimmigrant worker (commonly referred to as Form I-129 petitions or, in this rule, "H-2B petitions"), filed by employers seeking to employ H-2B workers, but, as discussed earlier, Congress directed the agency to issue its decisions relating to H-2B petitions "after consultation with appropriate agencies of the Government." 8 U.S.C. 1184(c)(1), INA section 214(c)(1). Legacy INS and now DHS have historically consulted with DOL on U.S. labor market conditions to determine whether to approve an employer's petition to import H-2B workers. See 73 FR 78104, 78110 (DHS) (Dec. 19, 2008); 55 FR 2606, 2617 (INS) (Jan. 26, 1990). DOL plays a significant role in the H-2B program because DHS "does not have the expertise needed to make any labor market determinations, independent of those already made by DOL." 73 FR at 78110; see also 55 FR at 2626. Without consulting with DOL, DHS lacks the expertise to adequately make the statutorily mandated determination about the availability of United States workers to fill the proposed job opportunities in the employers' Form I-129 petitions. See 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b); 78 FR 24047, 24050 (DHS-DOL) (Apr. 24, 2013). DHS regulations therefore require employers to obtain a temporary labor certification from DOL before filing a petition with DHS to import H-2B workers. See 8 CFR 214.2(h)(6)(iii)(A), (C), (iv)(A). In addition, as part of DOL's certification, DHS regulations require DOL to "determine the prevailing wage applicable to an application

for temporary labor certification in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." 8 CFR 214.2(h)(6)(iii)(D).

DOL has fulfilled its consultative role in the H-2B program through the use of legislative rules to structure its advice to legacy INS and now DHS for several decades. See 33 FR 7570-71 (DOL) (May 22, 1968); 73 FR 78,020 (DOL) (Dec. 19, 2008). Before DOL issued the 2008 rule, it supplemented its regulations with guidance documents that set substantive standards for wages and recruitment and structured the manner in which the agency processed applications for H-2B labor certification. See 73 FR at 78021-22. One district court has held that DOL's pre-2008 H-2B guidance document was a legislative rule that determined the rights and obligations of employers and employees, and DOL's failure to issue the guidance through the notice and comment process was a procedural violation of the APA. As a result, the court invalidated the guidance. See CATA I, 2010 WL 3431761, at *19, 25. Similarly, the U.S. Court of Appeals for the D.C. Circuit has held that DOL violated the procedural requirements of the APA when it established requirements that "set the bar for what employers must do to obtain approval" of the H-2A labor certification application, including wage and housing requirements, in guidance documents. Mendoza v. Perez, 754 F.3d 1002, 1024 (D.C. Cir. 2014) (setting substantive standards for labor certification in the H-2A program requires legislative rules subject to the APA's notice and comment procedural requirements). The APA therefore prohibits DOL from setting substantive standards for the H-2B program through the use of guidance documents that have not gone through notice-and-comment rulemaking. As a result, if and when the temporary stay concludes, without this interim final rule, DOL will not be able to provide employers with temporary labor certifications

necessary to allow importation of foreign workers under the H-2B program because DOL may not rely on subregulatory guidance standards, and has no prior rule to reinstate. Accordingly, DOL would again be forced to cease H-2B program operations, thus prohibiting DOL from processing temporary employment certification applications and prevailing wage requests, unless a rule was in place.

As with the two weeks in March 2015, the Departments are again facing the prospect of experiencing another program hiatus if and when the temporary stay expires on or before May 15, 2015. DOL's 2008 rule is the only comprehensive mechanism in place for DOL to provide advice to DHS because the 2008 rule sets the framework, procedures, and applicable standards for receiving, reviewing, and issuing H-2B prevailing wages and temporary labor certifications. The 2008 rule sets the recruitment standards for testing the domestic labor market and provides the rules for processing prevailing wage requests. DHS is precluded by its own regulations from accepting any H-2B petition without a temporary labor certification from DOL. See 8 CFR 214.2(h)(6)(iii)(C). Moreover, without advice from DOL, DHS lacks the capability to test the domestic labor market or determine whether there are available U.S. workers to fill the employer's job opportunity. As a result, if and when the stay concludes as currently scheduled on or before May 15, 2015, the vacatur of DOL's 2008 rule will require DOL to once again cease operating the H-2B program, and DOL will again be unable to process employers' requests for temporary employment certification applications until the agencies can put in place a new mechanism for fulfilling the statutory directive to ensure that the importation of foreign workers will not harm the domestic labor market. See 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b). Moreover, if the temporary stay is lifted, the vacatur of

DOL's 2008 rule will void the enforcement regime by which DOL has carried out its statutorily-delegated enforcement authority. See 8 U.S.C. 1184(c)(14)(B), INA section 214(c)(14)(B).

2. Good Cause to Proceed without Notice and Comment and with an Immediate Effective Date

The APA authorizes agencies to issue a rule without notice and comment upon a showing of good cause. 5 U.S.C. 553(b)(B). The APA's good cause exception to public participation applies upon a finding that those procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Although the term is not defined in the APA, the accompanying Senate report described "impracticable" as "a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings." S. Rep. No. 752, 79th Cong., 1st Sess. 200 (1945). The "'[p]ublic interest' supplements …'impracticable' [and] requires that public rule-making procedures shall not prevent an agency from operating." Id.

Under the APA's "good cause" exception to notice and comment, an agency can take steps to minimize discontinuity in its program after the court has vacated a rule. Mid-Tex Elec. Coop. v. FERC, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987) (upholding good cause to issue a post-remand interim rule); see also Shell Oil Co. v. EPA, 950 F.2d 741, 752 (D.C. Cir. 1991) (observing that where the agency had a regulatory void as the result of a vacatur of its rule, it should consider issuing an interim rule under the good cause exception because of the disruptions posed by discontinuity in the regulations); Action on Smoking and Health v. Civil Aeronautics Bd., 713 F.2d 795, 800 (D.C. Cir. 1983) (same). Moreover, courts find "good cause" under the APA when an agency is moving

expeditiously to eliminate uncertainty or confusion that, left to linger, could cause tangible harm or hardship to the agency, the program, program users, or other members of the public. See, e.g., Mid-Tex, 822 F.2d at 1133-34 (agency had good cause to promote continuity and prevent "irremedial financial consequences" and "regulatory confusion"); Nat'l Fed'n of Fed. Employees v. Devine, 671 F.2d 607, 609, 611 (D.C. Cir. 1982) (agency had good cause based on emergency circumstances, including uncertainty created by pending litigation about significant aspects of the program, and potential harm to agency, to program, and to regulated community); Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (agency had good cause where absence of immediate guidance from agency would have forced reliance upon antiquated guidelines, causing confusion among field administrators and economic harm and disruption to industry and consumers); Woods Psychiatric Inst. v. United States, 20 Cl. Ct. 324, 333 (1990), aff'd, 925 F.2d 1454 (Fed. Cir. 1991) (agency had good cause when program would continue to suffer administrative difficulties that had previously resulted in litigation and might continue to result in litigation due to uncertainty and confusion over scope of benefits, program standards, and eligibility requirements). Based on these legal standards and for the reasons set forth below, the Departments conclude that it is impracticable and contrary to the public interest to issue this rule under the APA's standard notice and comment procedures. DOL and those employers and employees who are involved in the H-2B program have already experienced one regulatory lapse and anticipate another, which provides a sound foundation for the Departments' good cause to proceed without notice and comment. Moreover, even in the absence of another regulatory lapse, confusion and disarray will persist in the H-2B program as a result of

uncertainty about the rules governing the program, which includes ambiguity about DOL's ability to enforce protections afforded to U.S. and foreign workers, and this provides further good cause to proceed with this interim final rule without notice and public comment.

As an initial matter, DOL has already had to cease operating the H-2B program for two weeks in March 2015, and faces this prospect again at the expiration of the stay on or before May 15, 2015. Given the expectation of another regulatory void, were the Departments to follow the standard APA procedures, resumption of the H-2B program would be substantially delayed by the Departments' issuance of a notice of proposed rulemaking and request for comment, the time-consuming process involved in analyzing and responding to comments, and the publication of a final rule. Despite the fact that the statutory cap on H-2B visas has been reached for FY 2015, employers would normally now start the process for applying for temporary employment certifications for FY 2016 by: filing requests for Prevailing Wage Determinations (PWDs); performing the required recruitment of U.S. workers; and submitting applications for temporary employment certification. In the absence of a rule, employers would not be able to take such actions.[8] Therefore, DHS and DOL must act swiftly to enable the agencies to meet their statutory obligations under the INA and to prevent further economic dislocation to employers and employees in anticipation of another regulatory void that will occur upon resumption of the Perez vacatur order.

[8] Moreover, there may be petitions on behalf of H-2B workers who are exempt from, or have already been counted toward, the H-2B visa cap. These petitions will be affected if employers of these cap-exempt workers are unable to apply for temporary employment certifications.

Moreover, the on-again-off-again nature of H-2B program operations has created substantial confusion, uncertainty and disarray for the agencies and the regulated community. The original vacatur order in Perez effectively required the agency to immediately cease operation of the H-2B program, leaving unresolved hundreds of time-sensitive pending applications for prevailing wages and certifications. Two weeks later, following the court's stay of the vacatur and upon resumption of the H-2B program, those cases pending on the date of the vacatur created a backlog of applications, while, at the same time, employers began filing new applications for prevailing wages and certifications. DOL worked diligently and quickly to address the backlog and simultaneously keep up with new applications. Then, facing the expiration of the stay on April 15, 2015, DOL once again prepared to cease H-2B operations, which included posting a notice to the regulated community on its website that day announcing another closure, which was then obviated at the last minute by the court's extension of the stay late in the day on April 15. The next day, DOL announced that despite its earlier announcement, it would continue to operate the H-2B program as a result of the stay extension. These circumstances, which are beyond the Departments' ability to control, have resulted in substantial disorder and upheaval for the Departments, as well as employers and employees involved in the H-2B program.

This uncertainty and confusion is particularly applicable to DOL's ability to enforce rights and obligations under the H-2B program. Even if the temporary stay were to continue beyond May 15 or the court in Perez dismisses the case (for example, finding that the plaintiff lacked standing), it is necessary to dispense with notice and comment to ensure that DOL has the continued ability to take enforcement actions to protect H-2B

and U.S. workers. As discussed above, employers have challenged DOL's independent regulatory authority in the H-2B program, and courts have issued decisions both affirming and repudiating that authority. Compare La. Forestry Ass'n v. Perez, 745 F.3d at 669, Bayou, 713 F.3d at 1084, and Perez, at slip op. at 6. As a result, one circuit has already found that DOL lacked independent regulatory authority to issue DOL's 2012 H-2B rule, and a district court has ruled similarly with respect to the 2008 rule, which DOL relied on to fill the regulatory void created in 2012. Based on these adverse precedents, the 2008 rule – the only vehicle under which DOL can presently administer and enforce the H-2B program – will remain vulnerable to challenges by employers in current and future enforcement proceedings based on the ground that the regulations DOL is seeking to enforce are void because DOL exceeded its statutory authority in unilaterally issuing the 2008 rule.[9] In this regard, the statute of limitations under the APA would not likely be available to DOL in such challenges because, even where the statute of limitations for a facial challenge has run, a litigant may challenge statutory authority for a rule in an enforcement proceeding when the rule is applied to it.[10] See Wong v. Doar, 571 F.3d 247, 263 n. 15 (2d Cir. 2009) (statute of limitations for a substantive challenge "begins to run at the time of the adverse agency action on the particular claim"); Indep. Cmty.

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[9] Such challenges cannot be adjudicated before DOL Administrative Law Judges, but may be brought in federal district court. See 2008 rule, 20 CFR 655.75(d) ("The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision."); see also Prince v. Westinghouse Savannah River Co., ARB No. 10-079, slip op. at 9 (ARB Nov. 17, 2010) ("'The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.'") (quoting Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), sec. 5(c)(48), 75 FR 3924 (Jan. 15, 2010)).

[10] The default six-year statute of limitations for civil claims against the government applies to challenges under the APA, and so the statute of limitations for facial challenges to the 2008 Rule, published December 19, 2008, has run. See 28 U.S.C. 2401(a); Harris v. FAA, 353 F.3d 1006, 1009 (D.C. Cir. 2004) ("Unless another statute prescribes otherwise, a suit challenging final agency action [under the APA] must be commenced within six years after the right of action first accrues.")

Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys., 195 F.3d 28, 34 (D.C. Cir. 1999) ("We have frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits."); see also Coal River Energy LLC v. Jewell, 751 F.3d 659, 664 (D.C. Cir. 2014) ("A substantive defense is one based on an argument that a regulation is not authorized by a statute or the Constitution, as opposed to a claim under the APA regarding the method used in promulgating the regulation, such as that it was issued without adequate notice, or that the government inadequately responded to comments."). Therefore, employers subject to enforcement under the 2008 rule have an available defense that DOL is without regulatory authority to enforce rights and obligations in the H-2B program, leaving DOL in an untenable position with respect to its ability to require adherence to program standards. In the absence of this interim final rule, which immediately replaces the 2008 rule, uncertainty, confusion and attendant legal vulnerability arise each time DOL attempts to enforce the provisions of the 2008 rule, putting critical protections for U.S. and H-2B workers in jeopardy.

Accordingly, even if the Perez decision is ultimately dismissed on standing or other grounds or if the stay is subsequently extended, the court's earlier decision – finding on the merits that DOL lacked regulatory authority to issue the 2008 rule – has created significant confusion about the continued viability of the 2008 rule. To leave the 2008 rule in place while the Departments pursue a new notice-and-comment rulemaking would prolong for many months the regulatory confusion about the 2008 rule's status and

DOL's authority to enforce worker protections and wages required under the 2008 rule and 2013 IFR. In the interim, in response to a challenge to any enforcement action under the 2008 rule, DOL may be required to defend the validity of the 2008 rule. Such challenges could lead to inconsistent outcomes, producing further instability in the program. Given the potential for harm to U.S. and foreign workers if DOL is unable to effectively protect their rights, and uncertainty and confusion about the status of the 2008 rule in the regulated community, the Departments conclude that it is impracticable and contrary to the public interest to conduct a rulemaking proceeding under the APA's notice and comment requirements, and that they have good and substantial cause to issue this rule immediately.

Finally, the Departments also have good cause to forego notice and comment because, as explained below, this rule has already been subject to one full round of notice and comment. On March 18, 2011, DOL proposed a regulation and sought public input on all issues addressed in this interim final rule during a 60-day comment period. 76 FR 15130. As noted below, DOL received over 800 comments from a wide variety of stakeholders, and adapted the final rule in 2012 based on those comments. 77 FR 10038 (Feb. 21, 2012). The public has by now had notice and an opportunity to comment on virtually every provision in this interim final rule. The only new provisions in this interim final rule involve transition filing procedures at § 655.4, which are necessary to instruct those program users who have already begun the employment certification process on the procedures to follow under the new regulatory system; electronic filing procedures at § 655.15(c) to permit easier submissions for H-2B program users; the rules that apply to Administrative Law Judge proceedings involving determinations under 8 U.S.C. 1184(c),

section 214(c) of the INA, at 29 CFR 503.40(b); and implementation of the Congressional mandate in § 655.15(f) to permit employers in the seafood industry flexibility with respect to the entry into the U.S. by their H–2B nonimmigrant workers. The first three provisions (§§ 655.4, 655.15(c), 503.40(b)) are procedural in nature, and the last provision incorporates a statutory requirement that DOL and DHS have already implemented. The rulemaking record from the 2011-2012 proceeding remains fresh, and no new information relevant to policy decisions made during that proceeding has come to light. Therefore, the Departments have satisfied the APA's notice-and-comment requirements where, after one full period of notice and comment for a rule, we reinstate a virtually identical rule without an additional notice and comment period. See Am. Mining Cong. v. EPA, 907 F.2d 1179, 1191-1192 (D.C. Cir. 1990); Am. Fed'n of Gov't Employees v. OPM, 821 F.2d 761, 764 (D.C. Cir. 1987). Accordingly, the Departments have good and sufficient reason to rely on the APA's good cause exception, 5 U.S.C. 553(b)(B), to issue without notice and comment this new interim final rule.

The APA also authorizes agencies to make a rule effective immediately upon a showing of good cause instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for notice and comment. Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992); Am. Fed'n of Gov't Employees, AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981); U.S. Steel Corp. v. EPA, 605 F.2d 283, 289-90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day waiting period when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. U.S. Steel Corp., 605 F.2d at 290; United States v. Gavrilovic, 511 F.2d

1099, 1104 (8th Cir. 1977). For the same reasons set forth above, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement given the continuing disruption, uncertainty, and confusion that a 30-day delay would cause in the H-2B program. 5 U.S.C. 553(d)(3).

The Departments underscore that although we are implementing this interim final rule in advance of a period of public comment and without a 30-day delay in the effective date, we seek public input on every aspect of this interim final rule (even though virtually every provision herein has already gone through one round of notice and comment), and will assess that input and determine whether changes are appropriate. As a result, the public participation process will be preserved in this rulemaking proceeding, and we act only under the compulsion of the emergency conditions described above.

3. Request for Comments on all Aspects of this Interim Final Rule

Although this rule is being issued as an interim final rule, the Departments request public input on all aspects of the rule. The regulated community should be familiar with the provisions adopted in this interim final rule because they are largely the same as the provisions adopted in the 2012 H-2B rule, Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 FR 10038 (Feb. 21, 2012). As part of the rulemaking proceeding that culminated in the 2012 H-2B rule, DOL received, reviewed, and considered 869 comments on its proposal. Commenters represented a broad range of constituents of the H-2B program, including small business employers, U.S. and H-2B workers, worker advocacy groups, State Workforce Agencies (SWAs), agents, law firms, employer and industry advocacy groups, union organizations, members of the U.S. Congress, and interested members of the public. Those comments resulted in DOL's

adjustment to or further explanation of that rule, and are incorporated here as well. As a result, to the extent that any provision of part 655 of title 20 or part 503 of title 29 of the Code of Federal Regulations adopted in this rulemaking proceeding requires further interpretation or justification, we refer the public to the explanations of the regulations contained in the prior rulemaking docket. That prior notice and comment proceeding does not foreclose public input in this proceeding, during which the Departments will jointly consider the public comments and revise this interim final rule as appropriate. The Departments invite the public to submit comments on all of the issues, requirements, and procedures addressed in this interim final rule; we will accept and consider these comments prior to issuing a final rule.

III. Revisions to 8 CFR Part 214

Deletion of 8 CFR 214.2(h)(9)(iii)(B)(2)

DHS currently requires all H-2B petitions to be accompanied by an approved temporary labor certification. See 8 CFR 214.2(h)(6)(iv)(A) (stating that an H-2B petition for temporary employment in the United States, except for temporary employment on Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor); 8 CFR 214.2(h)(6)(v) (stating that an H-2B petition for temporary employment on Guam must be accompanied by an approved temporary labor certification issued by the Governor of Guam). These regulatory provisions were enacted as part of DHS's 2008 notice and comment rulemaking on this topic. See DHS Proposed Rule, 73 FR 49109, 48110 (Aug. 20, 2008); DHS Final Rule, 73 FR 78104, 78104 (Dec. 19, 2008).

Due to a drafting oversight, when enacting the requirements above, DHS inadvertently left untouched the provisions at 8 CFR 214.2(h)(9)(iii)(B)(2), which should have been deleted. These provisions can only be read to apply to the time, before 2008, when DHS would accept petitions without a temporary labor certification. The 2008 DHS Proposed Rule (73 FR 49109) and DHS Final Rule (73 FR 78104) make it clear that DHS intended to require a temporary labor certification to be submitted with an H-2B petition, and thus 8 CFR 214.2(h)(9)(iii)(B)(2) cannot be read to have any effect. Finally, the provision requiring that all H-2B petitions must be accompanied by a temporary labor certification went through notice and comment rulemaking. Thus, the deletion of 8 CFR 214.2(h)(9)(iii)(B)(2) should be subject to the good cause exception under 5 U.S.C. 553(b)(B) as such deletion is a housekeeping matter and a minor technical amendment, which makes notice and comment unnecessary.

For these reasons, DHS will rescind 8 CFR 214.2(h)(9)(iii)(B)(2) in this interim final rule, consistent with 5 U.S.C. 553(b)(B).

IV. Revisions to 20 CFR Part 655, Subpart A

A. Introductory Sections

1. § 655.1 Scope and purpose of subpart A

This provision informs program users of the statutory basis and regulatory authority for the H-2B temporary labor certification process. This provision describes the Department's role in receiving, reviewing, adjudicating, and upholding the integrity of an Application for Temporary Employment Certification. DHS regulations at 8 CFR 214.2(h)(6)(iii)(D) recognize the Secretary of Labor as an appropriate authority with whom DHS consults regarding the H-2B program, and recognize the Secretary of Labor's

authority, in carrying out that consultative function, to issue regulations regarding the issuance of temporary labor certifications. The purpose of these regulations is for the Secretary of Labor to determine that: (1) there are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to import foreign workers; and (2) the employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed. See 8 CFR 214.2(h)(6)(iv)(A). It is through the regulatory provisions set forth below that DOL ensures that the criteria for its labor certification determinations are met.

2. § 655.2 Authority of agencies, offices and divisions in the Department of Labor

This section describes the authority of and division of activities related to the H-2B program among DOL agencies. It discusses the authority of the Office of Foreign Labor Certification (OFLC), the office within ETA that exercises the Secretary of Labor's responsibility for determining the availability of qualified U.S. workers and whether the employment of H-2B nonimmigrant workers will adversely affect the wages and working conditions of similarly employed workers. It also discusses the authority of the Wage and Hour Division (WHD), the agency responsible for investigation and enforcement of the terms and conditions of H-2B labor certifications, as delegated by DHS.[11]

3. § 655.3 Territory of Guam

[11] Applications for temporary labor certification are processed by OFLC in the ETA, the agency to which the Secretary of Labor has delegated his responsibilities as described in the DHS H-2B regulations. Enforcement of the attestations made by employers in the course of submission of H-2B applications for labor certification is conducted by WHD within DOL, to which DHS on January 18, 2009 delegated enforcement authority granted to it by the INA. 8 U.S.C. 1184(c)(14)(B), INA section 214(c)(14)(B); 8 CFR 214.2(h)(6)(ix).

Under DHS regulations and pursuant to DHS's consultative relationship with the Governor of Guam related to the H-2B visa program on Guam, the granting of H-2B labor certifications and the enforcement of the H-2B visa program on Guam resides with the Governor of Guam. 8 CFR 214.2(h)(6)(v). Subject to DHS approval, the Governor of Guam is authorized to set the prevailing wage for H-2B job opportunities on Guam. 8 CFR 214.2(h)(6)(v)(E) and (F). To further uniformity of standards through the United States, the Departments have concluded that it would be more appropriate for OFLC to issue H-2B prevailing wages for all workers on Guam, because OFLC already provides prevailing wage determinations (PWDs) for all other U.S. jurisdictions. Therefore, the process for obtaining a prevailing wage in § 655.10 would also apply to H-2B job opportunities on Guam, subject to the transfer of the authority to set the prevailing wage for a job opportunity on Guam to DOL in title 8 of the Code of Federal Regulations. Should such transfer occur, employment opportunities on Guam accordingly would be subject to the same process and methodology for calculating prevailing wages as any other jurisdiction within OFLC's purview. DHS will separately conduct rulemaking intended to make DOL responsible for issuing prevailing wage rates for all H-2B workers on Guam.

4. Special Procedures

Special procedures in DOL's temporary labor certification programs were based upon a determination that variations from the normal labor certification processes were necessary to permit the temporary employment of foreign workers in specific industries or occupations when qualified U.S. workers were not available and the employment of foreign workers would not adversely affect the wages or working conditions of similarly

employed U.S. workers. The 2008 rule provided authority for DOL to "establish or to devise, continue, revise or revoke" special procedures in the H-2B program. 20 CFR 655.3 (2009). The regulation concerning the H-2A temporary agricultural worker program at 20 CFR 655.102 establishes in a virtually identical fashion, as did the 2008 H-2B rule, DOL's authority in the H-2A program to "establish, continue, revise, or revoke special procedures" for certain H-2A occupations. In Mendoza v. Perez, 754 F.3d 1002, 1022 (D.C. Cir. 2014), the D.C. Circuit concluded that 20 CFR 655.102 was "a grant of unconstrained and undefined authority [, and the] purpose of the APA would be disserved if an agency with a broad statutory command ... could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation ... and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations." Accordingly, the court in Mendoza held that for herding occupations the special procedures issued under 20 CFR 655.102 were rules subject to the APA's notice and comment requirements because they possess all the hallmarks of a legislative rule and could not be issued through subregulatory guidance. 754 F.3d at 1024 ("The [special procedures] are necessarily legislative rules because they 'effect[ ] a [substantive] change in existing law or policy,' and 'effectively amend[ ] a prior legislative rule.") (citations omitted).

In light of Mendoza, the Departments are not including in this interim final rule a provision to allow for the creation of special procedures that establish variations for processing certain H-2B Applications for Temporary Employment Certification, similar to a provision included in the 2008 H-2B rule. Special procedures currently in place on

the effective date of this interim final rule will remain in force until we otherwise modify or withdraw them, and DOL will review such procedures expeditiously.

5. § 655.4 Transition Filing Procedures

Generally, DOL will process all applications in accordance with the rules in effect on the date the application was submitted. Accordingly, DOL will continue to process all applications for PWDs and for certification submitted prior to the effective date of this rule in accordance with the 2008 rule and the 2013 IFR. Further, DOL will process all applications for PWDs and for certification submitted on or after the effective date of this rule in accordance with this interim final rule and the companion wage final rule issued simultaneously.

This rule will permit employers submitting an Application for Temporary Employment Certification on or after the effective date of this rule and who have a start date of need prior to October 1, 2015, to rely on the emergency processing provisions in § 655.17. Such an Application for Temporary Employment Certification must include a signed and dated copy of the new Appendix B associated with the ETA Form 9142B containing the requisite program assurances and obligations under this rule. In the case of a job contractor filing as a joint employer with its employer-client, the NPC must receive a separate attachment containing the employer-client's business and contact information (i.e., sections C and D of the ETA Form 9142B) as well as a separate signed and dated copy of the Appendix B for its employer-client, as required by § 655.19.

For these employers with a start date of need before October 1, 2015, the NPC will also waive the regulatory filing timeframe under § 655.15 and process the Application for Temporary Employment Certification and job order in a manner consistent with the

handling of applications under § 655.17 for emergency situations, including the recruitment of U.S. workers on an expedited basis, and make a determination on certification as required by § 655.50. The recruitment of U.S. workers on an expedited basis will consist of placing a new job order with the SWA serving the area of intended employment that contains the job assurances and contents set forth in § 655.18 for a period of not less than 10 calendar days. In addition, employers who have not placed any newspaper advertisements under the 2008 rule must place one newspaper advertisement, which may be published on any day of the week, meeting the advertising requirements of § 655.41, during the period of time the SWA is actively circulating the job order for intrastate clearance. If the Chicago NPC grants a temporary labor certification, the employer will receive an original certified ETA Form 9142B and a Final Determination letter. Upon receipt of the original certified ETA Form 9142B, the employer or its agent or attorney, if applicable, must complete the footer on the original Appendix B, retain the original Appendix B, and submit a signed copy of Appendix B, together with the original certified ETA Form 9142B directly to USCIS. Under the document retention requirements in § 655.56, the employer must retain a copy of the certified ETA 9142B and the original signed Appendix B.

For the convenience of the employer submitting a new Application for Temporary Employment Certification with a start date of need prior to October 1, 2015 and who did not submit an Application for a Prevailing Wage Determination prior to the effective date of this rule, such an employer may submit a completed Application for a Prevailing Wage Determination to the NPC with its emergency Application for Temporary Employment Certification requesting a prevailing wage determination for the job opportunity. Upon

receipt, the NPC will transmit, on behalf of the employer, a copy of the Application for a Prevailing Wage Determination to the NPWC for processing and issuance of a prevailing wage determination using the wage methodology established in § 655.10 of the companion wage rule.

For employers submitting new applications with a start date of need before October 1, 2015, DOL will also waive the requirements in §§ 655.8 and 655.9 of this interim final rule, requiring the employer, and its attorney or agent, as applicable, to provide copies of all agreements with any agent and/or foreign labor recruiter(s), executed in connection with the H-2B temporary employer certification application.[12] In addition, due to the expedited timeframes for recruiting U.S. workers associated with H-2B temporary employment certification applications processed under these transition procedures, DOL will not place for public examination a copy of the job order posted by the state workforce agency (SWA) on DOL's electronic job registry, as specified under § 655.34. However, DOL will implement the new electronic job registry requirement under § 655.34 for all temporary employment certification applications filed with the Chicago NPC where the employer has a start date of need on or after October 1, 2015.

For all employers submitting new applications for employment certification, regardless of the start date of need, DOL will require a period of time to operationalize the registration process for H-2B employers required in § 655.11. As a result, DOL will announce separately in the Federal Register the initiation and implementation of the registration requirements in § 655.11(j). In the meantime, on the effective date of this interim final rule and until such announcement is made in the Federal Register, H-2B

[12] DOL will not publish agent or foreign recruiter names until it makes any necessary updates to its system of records notice required by the Privacy Act (5 U.S.C. 552a).

temporary employment certification applications filed with the NPC will be exempt from the registration requirements of § 655.11, and adjudication of the employer's temporary need will occur during the processing of the application. The exemption will terminate after a separate announcement in the Federal Register, which will provide the public with notice of when DOL will initiate the registration process.

Finally, employers with a prevailing wage determination issued by the NPWC, or who have a pending or granted Application for Temporary Employment Certification on the effective date of this rule may seek a supplemental prevailing wage determination (SPWD) in order to obtain a prevailing wage based on an alternate wage source under the new rule. The SPWD will apply during the validity period of the certification, except that such SPWD will be applicable only to those H-2B workers who are not yet employed in the certified position on the date of the issuance of the SPWD. The SPWD will not be applicable to H-2B workers who are already employed in the certified position at the time of the issuance of the SPWD, and it will not apply to United States workers recruited and hired under the original job order. For seafood employers whose workers' entry into the United States may be staggered under § 655.15(f), an SPWD issued under this provision will apply only to those H-2B workers who have not yet entered the United States and are therefore not yet employed in the certified position at the time of the issuance of the SPWD. In order to receive an SPWD under this provision, the employer must submit a new ETA Form 9141 to the NPWC that contains in Section E.a.5 Job Duties the original PWD tracking number (starting with P-400), the H-2B temporary employment certification application number (starting with H-400), and the words "Request for a Supplemental Prevailing Wage Determination." Electronic submission through the

iCERT Visa Portal System is preferred. Upon receipt of the request, the NPWC will issue to the employer, or if applicable, the employer's attorney or agent, an SPWD in an expedited manner and provide a copy to the Chicago NPC.

6. § 655.5 Definition of terms

The Departments have made a number of changes to the definitions contained in the 2008 rule. Many of the changes clarify definitions in minor ways that do not substantively change the meaning of the term. However, we have also made some substantive changes to definitions, and we discuss below those definitions.

a. "Area of substantial unemployment"

This new term reflects the established definition of area of substantial unemployment in use within ETA as it relates to Workforce Investment Act (WIA) fund allocations, and is the existing definition of area of substantial unemployment within ETA. ETA uses this definition to identify areas with concentrated unemployment and to focus WIA funding for services to facilitate employment in those areas. ETA employs this term both as a way to improve labor market test quality and for the sake of operational simplicity. This existing definition provides the appropriate standard for identifying areas of concentrated unemployment where additional recruitment could result in U.S. worker employment. Also, the process of collecting data and designating an area of substantial unemployment using the existing definition is already established, as discussed in ETA's Training and Employment Guidance Letter No. 5-11, Aug. 12, 2011,[13] providing OFLC with a ready

[13] TEGL 5-11 – Designation of Areas of Substantial Unemployment (ASUs) under the Workforce Investment Act (WIA) for Program Year (PY) 2012 has been added to the ETA Advisory Web site and is available at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3069. With some exceptions, the provisions of the recently enacted Workforce Innovation and Opportunity Act (WIOA), Pub. L. No. 113–128, 128 Stat. 1425 (2014), will supersede WIA as of July 1, 2015. WIOA contains a statutory definition of

resource for identifying areas to focus additional recruitment. Finally, using this definition of area of substantial unemployment in the interim final rule enables an employer to check the list of areas of substantial unemployment ETA publishes to determine whether its job opportunity may fall within an area of substantial unemployment and, as appropriate, be subject to enhanced recruitment.

b. "Corresponding employment"

In this interim final rule, "corresponding employment" means the employment of workers who are not H-2B workers by an employer that has a certified H-2B Application for Temporary Employment Certification when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers. The definition contains exceptions for two categories of incumbent employees (certain employees who have worked full-time for at least one year and certain employees covered by a collective bargaining agreement).

The first category not included in the definition of corresponding employment covers incumbent employees:

1. who have been continuously employed by the H-2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H-2B workers during the 52 weeks prior to the period of employment certified on the Application for Temporary Employment Certification;

"area of substantial unemployment" that is identical to the definition of this term in WIA. See 29 U.S.C. 3162(b)(2)(B), 3172(b)(1)(B)(v)(III).

2. who have worked or been paid for at least 35 hours per week in at least 48 of the prior 52 workweeks; and
3. who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks.

The second and third conditions of this exception must be demonstrated on the employer's payroll records, and the employees' terms and working conditions of employment must not be substantially reduced during the period of employment covered by the job order.

In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation. Second, not included in the definition are incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H-2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause.

To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof. Any work performed by U.S. workers outside the specific period of the job order does not qualify as corresponding employment. Accordingly, the interim final rule does not require employers to offer their U.S. workers (part-time or full-time workers) corresponding employment protections outside of the period of the job order. If, for example, a U.S. worker is in corresponding employment with H-2B workers, the employer must provide

corresponding employment protections during the time period of the job order but may choose not to do so during the time period outside of the job order.

The interim final rule includes these workers within the definition of corresponding employment in order to fulfill the DHS regulatory requirement that an H-2B Petition will not be approved unless the Secretary of Labor certifies that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6)(iv). Congress has long intended that similarly employed U.S. workers should not be treated less favorably than temporary foreign workers. For example, a 1980 report on temporary worker programs stated that U.S. employers were required to offer domestic workers wages equal to foreign workers as a prerequisite for labor certification. See Congressional Research Service: "Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues" 53 (1980); see also H.R. Rep. No. 99-682, pt. 1 at 80 (1986) ("The essential feature of the H–2 program has been and would continue to be the requirement that efforts be made to find domestic workers before admitting workers from abroad. A corollary rule, again preserved in the bill, is that the importation of foreign workers will not be allowed if it would adversely affect the wages and working conditions of domestic workers similarly employed"). The 2008 rule reflected this principle, in part, by requiring that the terms and conditions of offered employment cannot be less favorable than those offered to H-2B workers. 20 CFR 655.22(a) (2009). Thus, the 2008 rule provided for equal treatment of workers newly hired during the 10-day H-2B recruitment process.

The 2008 rule, however, did not protect U.S. workers who engage in similar work performed by H-2B workers during the validity period of the job order, because it did not

protect any incumbent employees. Therefore, for example, a U.S. employee hired three months previously performing the same work as the work requested in the job order, but earning less than the advertised wage, would have been required to quit the current employment and re-apply for the same job with the same employer to obtain the higher wage rate offered to H-2B workers. This was disruptive for the employer and created an additional administrative burden for the SWAs with respect to any workers being referred through them. It also overestimated employees' understanding of their rights under the regulations, and placed workers in insecure situations by requiring them to quit their jobs with the hope of being immediately rehired in order to avail themselves of the regulation's protections. Therefore, the interim final rule does not require incumbent employees to jump through this unnecessary hoop; U.S. workers generally will be entitled to the wage rates paid to H-2B employees without having to quit their jobs and be rehired.

As set out above, there are only two categories of incumbent U.S. employees who will be excluded from the definition of corresponding employment. The first category covers those incumbents who have been continuously employed by the H-2B employer for at least the 52 weeks prior to the date of need, who have averaged at least 35 hours of work or pay over those 52 weeks, and who have worked or been paid for at least 35 hours in at least 48 of the 52 weeks, and whose terms and conditions of employment are not substantially reduced during the period of the job order. The employer may take credit for any hours that were reduced because the employee voluntarily chose for personal reasons not to work hours that the employer offered, such as due to illness or vacation. Thus, for example, assume an employee took six weeks of unpaid leave due to illness,

and the employer offered the employee 40 hours of work each of those weeks. In that situation, the employer could take credit for all those hours in determining the employee's average number of hours worked in the prior year and could take credit for each of those six weeks in determining whether it provided at least 35 hours of work or pay in 48 of the prior 52 weeks. Similarly, if the employer provided a paid day off for Thanksgiving and an employee worked the other 32 hours in that workweek, the employer would be able to take credit for all 40 hours when computing the average number of hours worked and count that week toward the required 48 weeks. In contrast, assume another situation where the employer offered the employee only 15 hours of work during each of three weeks, and the employee did not work any of those hours. The employer could only take credit for the hours actually offered when computing the average number of hours worked or paid during the prior 52 weeks, and it would not be able to count those three weeks when determining whether it provided at least 35 hours of work or pay for the required 48 weeks.

The second category of incumbent workers excluded from the definition of corresponding employment includes those covered by a collective bargaining agreement or individual employment contract that guarantees both an offer of at least 35 hours of work each week and continued employment with the H-2B employer at least through the period of the job order (except that the employee may be dismissed for cause). As noted above, incumbent employees in the first category are year-round employees who began working for the employer before the employer filed an Application for Temporary Employment Certification. They work 35 hours per week for the employer, even during its slow season. The Departments recognize that there may be some weeks when, due to

personal factors such as illness or vacation, the employee does not work 35 hours. The employer may still treat such a week as a week when the employee worked 35 hours for purposes of the corresponding employment definition, so long as the employer offered at least 35 hours of work and the employee voluntarily declined to work, as demonstrated by the employer's payroll records. Thus, these workers have valuable job security that is lacked by H-2B workers and those hired during the recruitment period or the period of the job order. Such full-time, year-round employees may have other valuable benefits as well, such as health insurance or paid time off. Similarly, employees covered by a collective bargaining agreement or an individual employment contract with a guaranteed weekly number of hours and just-cause provisions also have valuable job security; they may also have benefits beyond those guarantees provided by the H-2B program. These valuable terms and conditions of employment may account for any difference in wages between what they receive and what H-2B workers receive. Therefore, these U.S. workers are excluded from corresponding employment if they continue to be employed full-time at substantially the same terms and conditions throughout the period covered by the job order, except that they may be dismissed for cause.

The interim final rule's inclusion of other workers within the definition of corresponding employment is important because the 2008 rule did not protect U.S. workers in the situation where an H-2B employer places H-2B workers in occupations and/or at job sites outside the scope of the labor certification, in violation of the regulations. For example, if an employer submits an application for workers to serve as landscape laborers, but then assigns the H-2B workers to serve as bricklayers constructing decorative landscaping walls, the employer has bypassed many of the H-2B

program's protections for U.S. workers. The employer has deprived such U.S. workers of their right to protections such as domestic recruitment requirements, the right to be employed if available and qualified, and the prevailing wage requirement. The interim final rule guards against this abuse of the system and protects the integrity of the H-2B process by ensuring that the corresponding U.S. workers employed as bricklayers receive the prevailing wage for that work.

The 2008 rule also did not protect U.S. workers in cases where employers placed H-2B workers at job sites outside the scope of the labor certification. For example, an employer may submit an application for workers to serve as landscape laborers in a rural county in southern Illinois, but instead violate its obligations by assigning its H-2B workers to work as landscape laborers in the Chicago area. Because the employer did not fulfill its recruitment obligations in the Chicago area, U.S. workers were not aware of the job opportunity, they could not apply and take advantage of their priority hiring right, and the prevailing wage assigned was not the correct rate for the Chicago area. Such a violation of the employer's attestations would result both in the absence of a meaningful test of the labor market for available U.S. workers and U.S. workers being adversely affected by the presence of underpaid H-2B workers. The interim final rule's definition of corresponding employment ensures that the employer's incumbent landscape laborers who work where the H-2B workers actually are assigned to work will receive the appropriate prevailing wage rate. Paying the proper wage to such workers is necessary to protect against possible adverse effects on U.S. workers due to wage depression from the introduction of foreign workers. Therefore, the definition of corresponding employment

in the interim final rule is necessary to fulfill the responsibility to provide temporary labor certifications only in appropriate circumstances.

c. "Full-time"

The definition of "full-time" means 35 or more hours of work per week. In accord with the decision in CATA I, which invalidated the 2008 rule's definition of full-time employment because DOL did not consider and articulate relevant factors supporting the 30-hour definition, 2010 WL 3431761 at *14, we have continued to carefully consider all pertinent information in determining the threshold number of hours for full-time employment, including national labor market statistics, empirical evidence from a random sample of approved applications, and other employment laws. All available evidence suggests that the 2008 rule's definition of 30 hours or more per workweek was not an accurate reflection of full-time employment. DOL's enforcement experience confirms that the vast majority of H-2B temporary employment certification applications that are the subject of investigations are certified for 35 or more hours per week. Under the H-2A nonimmigrant visa program applicable to agricultural workers, DOL defines full-time as 35 hours per week. The 35-hour floor allows employers access to the H-2B program for a relatively small number of full-time jobs that would not have been eligible under a higher criterion (for example, a 40-hour standard). H-2B employers are and will remain required to accurately represent the actual number of hours per week associated with the job, recruit U.S. workers on the basis of those hours, and pay for all hours of work. Therefore, the employer is obligated to disclose and offer those hours of employment—whether 35, 40, 45, or more—that accurately reflect the job being certified. Failure to do so could result in a finding of violation of these regulations.

d. “Job contractor”

This term means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers. The following examples illustrate the differences between an employer that is a job contractor and an employer that is not. Employer A is a temporary clerical staffing company. It sends several of its employees to Acme Corporation to answer phones and make copies for a week. Although Employer A has hired these employees and will be issuing paychecks to these employees for the time worked at Acme Corporation, Employer A will not exercise substantial, direct day-to-day supervision and control over its employees during their performance of services at Acme Corporation. Rather, Acme Corporation will direct and supervise the Employer A employees during that week. Under this particular set of facts, Employer A would be considered a job contractor. By contrast, Employer B is a landscaping company. It sends several of its employees to Acme Corporation once a week to do mowing, weeding, and trimming around the Acme campus. Among the employees that Employer B sends to Acme Corporation are several landscape laborers and one supervisor. Employer B’s supervisor instructs and supervises the laborers as to the tasks to be performed on the Acme campus. Under this particular set of facts, Employer B would not be considered a job contractor.

Similarly, in the reforestation industry, employers may perform contract work using crews of workers subject to the employer's on-site, day-to-day supervision and control. Such an employer, whose relationship with its employees involves substantial, direct, on-site, day-to-day supervision and control would not be considered a job contractor under this interim final rule. However, if a reforestation employer were to send its workers to another company to work on that company's crew and did not provide substantial, direct, on-site, day-to-day supervision and control of the workers, that employer would be considered a job contractor under this interim final rule. Note that the provision of services to another company, under a contract alone, does not render an employer a job contractor; rather, each employment situation must be evaluated individually to determine the nature of the employer-employee relationship and, accordingly, whether the petitioning employer is in fact a job contractor.

e. Other definitions

As discussed under § 655.6, we have decided to permit job contractors to participate in the H-2B program where they can demonstrate their own temporary need, not that of their clients. The particular procedures and requirements that govern their participation are set forth in § 655.19 and provide in greater detail the responsibilities of the job contractors and their clients. Accordingly, we are adding a definition of "employer-client" to this interim final rule to define the characteristics of the employer that is served by the job contractor and the nature of their relationship.

We have included definitions of job offer and job order to make certain that employers understand the difference between the offer that is made to workers, which must contain all the material terms and conditions of the job, and the order that is the published

document used by SWAs in the dissemination of the job opportunity. The definition of job order reflects that it must include some, but not all, of the material terms and conditions of employment as reflected in § 655.18, which identifies the minimum content required for job orders. The definition of job offer requires an employer's job offer to contain all material terms and conditions of employment.

We have included the definition of strike so that the term is defined more consistently with DOL's 2010 H-2A regulations. The definition recognizes a range of protected concerted activity and clearly notifies employers and workers of their obligations when workers engage in these protected activities.

7. <u>§ 655.6 Temporary need</u>

We will interpret temporary need in accordance with the DHS definition of that term and our experience in the H-2B program. The DHS regulations define temporary need as a need for a limited period of time, where the employer must "establish that the need for the employee will end in the near, definable future." 8 CFR 214.2(h)(6)(ii)(B). The interim final rule, as discussed in further detail below, is consistent with this approach.

a. Job Contractors: We generally conclude that a person or entity that is a job contractor, as defined under § 655.5, has no individual need for workers. Rather, its need is based on the underlying need of its employer-clients. Job contractors generally have an ongoing business of supplying workers to other entities, even if the receiving entity's need for the services is temporary. However, we recognize that we should exclude from the program only those job contractors who have a definitively permanent need for workers, and that job contractors who only have a need for the services or labor to be performed several months out of the year have a genuine temporary need and should not

be excluded. Therefore, § 655.6 permits only those contractors that demonstrate their own temporary need, not that of their employer-clients, to continue to participate in the H-2B program.

Job contractors will only be permitted to file applications based on seasonal need or a one-time occurrence. In other words, in order to participate in the H-2B program, a job contractor would have to demonstrate, just as all employers seeking H-2B workers based on seasonal need have always been required to demonstrate: 1) if based on a seasonal need that the services or labor that it provides are traditionally tied to a season of the year, by an event or pattern and is of a recurring nature; or 2) if based on a one-time occurrence, that the employer has not employed workers to perform the services or labor in the past and will not need workers to perform the services in the future or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. For a job contractor with a seasonal need, the job contractor must specify the period(s) or time during each year in which it does not employ the services or labor. The employment is not seasonal if the period during which the services or labor is not provided is unpredictable or subject to change or is considered a vacation period for the contractor's permanent employees. For instance, a job contractor that regularly supplies workers for ski resorts from October to March but does not supply any workers performing the same services or labor needed by the ski resorts outside of those months would qualify as having a temporary need that is seasonal for such workers.

We are allowing job contractors to be certified based only on seasonal or one-time need because it is extremely difficult, if not impossible, to identify appropriate peakload

or intermittent needs for job contractors with clients who have variable needs. The seminal Immigration and Naturalization Service (INS) decision, Matter of Artee, 18 I. & N. Dec 366 (Comm'r 1982), established that a determination of temporary need rests on the nature of the underlying need for the duties of the position. To the extent that a job contractor is applying for a temporary labor certification, the job contractor whose need rests on that of its clients has itself no independent need for the services or labor to be performed. The Board of Alien Labor Certification Appeals (BALCA) has further clarified the definition of temporary need in Matter of Caballero Contracting & Consulting LLC, 2009-TLN-00015 (Apr. 9, 2009), finding that "the main point of Artee . . . is that a job contractor cannot use [solely] its client's needs to define the temporary nature of the job where focusing solely on the client's needs would misrepresent the reality of the application." The BALCA, in Matter of Cajun Constructors, Inc. 2009-TLN-00096 (Oct. 9, 2009), also decided that an employer by the nature of its business works on a project until completion and then moves on to another has a permanent rather than a temporary need. The limited circumstances under which job contractors may continue to participate in the H-2B program will be subject to the requirements in § 655.19, which sets forth the procedures and requirements governing the filing of applications by job contractors. Contractors have no temporary need apart from the underlying need of the employer on whose behalf they are filing the Application for Temporary Employment Certification. When considering any employer's H-2B Registration, DOL will require that employer to substantiate its temporary need by providing evidence required to support such a need.

b. Duration of Temporary Need. For the reasons described below, DOL is defining temporary need, except in the event of a one-time occurrence, as 9 months in duration, a decrease from the 10-month limitation under DOL's 2008 rule. This definition is consistent with the definition of temporary need in DHS regulations, which provides that "[g]enerally, that period of time will be limited to one year *or less*, but in the case of a one-time event could last up to 3 years." 8 CFR 214.2(h)(6)(ii)(B) (emphasis provided). This interim final rule further provides, consistent with 8 CFR 214.2(h)(6)(ii)(B), that in the case of "extraordinary circumstances," DOL may extend a temporary labor certification for a period beyond nine months, but not to exceed a total period of twelve months.

DHS categorizes and defines temporary need into four classifications: seasonal need; peakload need; intermittent need; and one-time occurrence. A one-time occurrence may be for a period of up to 3 years. The other categories are generally limited to 1 year or less in duration. See 8 CFR 214.2(h)(6)(ii)(B). DOL's temporary need period falls comfortably within the parameters of the general "one year or less" limitation contained in the DHS regulations. Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position. We conclude that a maximum employment period of 9 months establishes the temporariness of the position. Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from a permanent position, particularly one that offers time

off due to a slow-down in work activity. Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate. The approach in the 2008 rule that permitted temporary certifications for periods up to 10 months encompasses job opportunities that we conclude are permanent in nature and inconsistent with congressional intent to limit H-2B visas to employers with temporary or seasonal needs. We conclude that the 9-month limitation that fairly describes the maximum scope of a seasonal need should also be applied to peakload need since there is no compelling rationale for creating a different standard for peakload.

The impact of the change from 10 months, which was the standard in the 2008 rule, to 9 months, may have an adverse impact on some employers. But that impact, standing alone, is not dispositive regarding our legal obligation to protect the wages and working conditions of U.S. workers. DOL previously relied on the standard articulated in Matter of Vito Volpe Landscaping, Nos. 91-INA-300, 91-INA-301, 92-INA-170, 91-INA-339, 91-INA-323, 92-INA-11 (Sept. 29, 1994), which stated that a period of 10 months was not permanent. The Departments may adopt through rulemaking a new standard that is within their respective responsibilities in administering the program. See United States v. Storer Broad., 351 U.S. 192, 203 (1956); Heckler v. Campbell, 461 U.S. 458, 467 (1983); see also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156-57 (2000) (recognizing that "agencies must be given ample latitude to adapt their rules and policies to the demands of changing circumstances"). DOL has determined that 9 months better reflects a recurring seasonal or temporary need and have accordingly adopted a new standard in this interim final rule. The majority of H-2B employer applicants will not be

affected by this change. According to DOL H-2B program data for FY 2010-2014, 65.2 percent of certified and partially certified employer applicants had a duration of temporary need less than or equal to 9 months.

Similarly, we have determined that limiting to 9 months the duration of temporary need on a peakload basis would ensure that the employer is not mischaracterizing a permanent need as one that is temporary. For example, since temporary need on a peakload basis is not tied to a season, under the current 10-month standard, an employer may be able to characterize a permanent need for the services or labor by filing consecutive applications for workers on a peakload basis. To the extent that each application does not exceed 10 months, the 2-month inactive period may correspond to a temporary reduction in workforce due to annual vacations or administrative periods. Increasing the duration of time during which an employer must discontinue operations from 2 months to 3 will ensure that the use of the program is reserved for employers with a genuine temporary need. Similarly, a 9-month limitation is appropriate for ensuring that the employer's intermittent need is, in fact, temporary. In addition, under the interim final rule, each employer with an intermittent need will be required to file a separate H-2B Registration and Application for Temporary Employment Certification to make certain that any disconnected periods of need are accurately portrayed and comply with the 9-month limitation.

c. Peakload need: The Departments will employ the definition of peakload need established in DHS regulations at 8 CFR 214.2(h)(6)(ii)(B)(3).

d. One-Time Occurrence. The Departments will employ the definition of one-time occurrence established in DHS regulations at 8 CFR 214.2(h)(6)(ii)(B)(1). The

Departments do not intend for the 3-year accommodation of special projects to provide a specific exemption for industries like construction in which many of an employer's projects or contracts may prove a permanent rather than a temporary need. Therefore, we will closely review all assertions of temporary need on the basis of a one-time occurrence to ensure that the use of this category is limited to those circumstances where the employer has a non-recurring need which exceeds the 9-month limitation. For example, an employer who has a construction contract that exceeds 9 months may not use the program under a one-time occurrence if it has previously filed an Application for Temporary Employment Certification identifying a one-time occurrence and the prior Application for Temporary Employment Certification requested H-2B workers to perform the same services or labor in the same occupation.

8. § 655.7 Persons and entities authorized to file

The employer, or its attorney or agent, are persons authorized to file an H-2B Registration or an Application for Temporary Employment Certification. The employer must sign the H-2B Registration or Application for Temporary Employment Certification and any other required documents, whether or not it is represented by an attorney or agent.

9. § 655.8 Requirements for agents

Employer's agents are required to provide copies of current agreements defining the scope of their relationships with employers, or other document demonstrating the agent's authority to represent the employer. DOL will review the documents to make certain that there is evidence that a bona fide relationship exists between the agent and the employer and, where the agent is also engaged in recruitment, to ensure that the agreements include

the language required at § 655.20(p) prohibiting the payment of fees by the worker. DOL also reserves the right to further review the agreements in the course of an investigation or other integrity measure. A certification of an employer's application that includes such a submitted agreement in no way indicates a general approval of the agreement or the terms therein. The requirement does not obligate either the agent or the employer to disclose any trade secrets or other proprietary business information. The interim final rule only requires the agent to provide sufficient documentation to clearly demonstrate the scope of the agency relationship. In addition, under this interim final rule, DOL does not plan at present to post these agreements for public viewing. If, however, DOL does so in the future, DOL will continue to follow all applicable legal and internal procedures including those relating to Freedom of Information Act (FOIA) requests to ensure the protection of private data in such circumstances.

We remind both agents and employers that each is responsible for the accuracy and veracity of the information and documentation submitted, as indicated in the ETA Form 9142B and Appendix B, both of which must be signed by the employer and its agent. As discussed under § 655.73(b), agents who are signatories to ETA Form 9142B may now be held liable for their own independent violations of the H-2B program.

Finally, under this provision, where an agent is required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to have a Certificate of Registration, the agent must also provide a current copy of the certificate which identifies the specific farm labor contracting activities that the agent is authorized to perform.

10. <u>§ 655.9 Disclosure of foreign worker recruitment</u>

Paragraph (a) requires an employer and its attorney and/or agent to provide DOL a copy of all agreements with any agent or recruiter that it engages or plans to engage in the recruitment of prospective H-2B workers, regardless whether the agent or recruiter is located in the U.S. or abroad. The written contract must contain the contractual prohibition on charging fees, as set forth in § 655.20(p). At the time of collection, DOL will review the agreements to obtain the names of the foreign labor recruiters (for purposes of maintaining a public list, as described below), and to verify that these agreements include the required contractual prohibition against charging fees. DOL may also further review the agreements in the course of an investigation or other integrity measure. Certification of an employer's application that includes such a submitted agreement, however, does not indicate general approval of the agreement or the terms therein. Where the contract is not in English and the required contractual prohibition is not readily discernible, DOL reserves the right to request further information to ensure that the contractual prohibition is included in the agreement. Agreements between the employer and the foreign labor recruiter will not be made public unless required by law. This interim final rule provides for DOL to obtain the agreements, but only share with the public the identity of the recruiters as discussed further below, but not the full agreements.

Paragraph (b) requires an employer and its attorney or agent, as applicable, to disclose to DOL the identity (name) and geographic location of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H-2B workers for the job opportunities offered by the employer. We interpret the term "working for" to

encompass any persons or entities engaged in recruiting prospective foreign workers for the H-2B job opportunities offered by the employer, whether they are hired directly by the primary recruiter or are working indirectly for that recruiter downstream in the recruitment chain. This requirement encompasses all agreements, whether written or verbal, involving the whole recruitment chain that brings an H-2B worker to the employer's certified H-2B job opportunity in the United States. Employers, and their attorneys or agents, as applicable, are expected to provide these names and geographic locations to the best of their knowledge at the time the application is filed. DOL expects that, as a normal business practice, when completing the written agreement with the primary recruiting agent or recruiter, the employer/attorney/agent will ask whom the recruiter plans to use to recruit workers in foreign countries, and whether those persons or entities plan to hire other persons or entities to conduct such recruitment, throughout the recruitment chain.

Paragraph (c) provides for DOL's public disclosure of the names of the agents and foreign labor recruiters used by employers, as well as the identities and locations of all the persons or entities hired by or working for the primary recruiter in the recruitment of prospective H-2B workers, and the agents or employees of these entities. Determining the identity and location of persons hired by or working for the recruiter or its agent to recruit or solicit prospective H-2B workers – effectively acting as sub-recruiters, sub-agents, or sub-contractors – serves several purposes. It bolsters program integrity by aiding in the enforcement of certain regulatory provisions. This provision will also bring a greater level of transparency to the H-2B worker recruitment process. By maintaining and making public a list of agents and recruiters, DOL will be in a better position to

enforce recruitment violations, and workers will be better protected against fraudulent recruiting schemes because they will be able to verify whether a recruiter is in fact recruiting for legitimate H-2B job opportunities in the United States. As the Government Accountability Office (GAO) explained in a recent report, "[w]ithout accurate, accessible information about employers, recruiters, and jobs during the recruitment process, potential foreign workers are unable to effectively evaluate the existence and nature of specific jobs or the legitimate parties contracted to recruit for employers, potentially making them more vulnerable to abuse." H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, GAO-15-154 (Mar. 2015). A list of foreign labor recruiters will facilitate information sharing between the Departments and the public, and assist us, other agencies, workers, and community and worker advocates to better understand the roles of recruiters and their agents in the recruitment chain and permit a closer examination of applications or certifications involving recruiters who may be engaged in improper behavior. Information about the identity of the international and domestic recruiters of foreign labor will also assist DOL in more appropriately directing its audits and investigations. Strengthening enforcement of recruitment abuses also ensures that employers who comply with the H-2B program requirements are not undercut by unscrupulous employers, such as those who pass recruitment fees on to workers.

B. Prefiling Procedures

1. § 655.10 Prevailing wage

The interim final rule requires employers to request PWDs from the NPWC before posting their job orders with the SWA. The PWD must be valid on the day the job orders

are posted. We encourage employers to continue to request a PWD in the H-2B program at least 60 days before the date the determination is needed. Under the companion H-2B final wage rule, issued simultaneously with this interim final rule, employer-provided surveys may not be used to set the prevailing wage except in limited circumstances. Paragraph (g) provides that if OFLC determines that an employer-provided survey is not acceptable, it will inform the employer in writing of the reasons the survey is being rejected. Employers may request review of this determination through the appeal process in § 655.13 of this interim final rule. Unlike the 2008 rule, this interim final rule does not allow an employer to request a redetermination of the rejection of an employer-provided survey from the certifying officer (CO), but may request review by the NPWC Director as specified in § 655.13. DOL has determined that the 2008 procedures, which allowed an employer to request redetermination from the CO before appeal to the NPWC Director, were unnecessarily burdensome and that streamlining this process will allow for more expeditious resolution of prevailing wage requests.

2. § 655.11 Registration of H-2B employers

The interim final rule bifurcates the current application process into a registration phase, which addresses the employer's temporary need, and an application phase, which addresses the labor market test. This provision requires employers to submit an H-2B Registration and receive an approval before submitting an Application for Temporary Employment Certification and conducting the U.S. labor market test.

Paragraph (a) requires employers to file an H-2B Registration, which must be accompanied by documentation showing: the number of positions the employer desires to fill in the first year of registration; the period of time for which the employer needs the

workers; and that the employer's need for the services or labor is non-agricultural, temporary and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as described in 8 CFR 214.2(h)(6)(ii)(B) and § 655.6 of this interim final rule. The Departments have found that evaluating temporary need is a fact-intensive process which, in many cases, can take a considerable amount of time to resolve. DOL has a longstanding practice of evaluating temporary need as an integral part of the adjudication of the Application for Temporary Employment Certification; the bifurcation of the application process into a registration phase and a labor market test phase shifts the timing of, but does not change the nature of, DOL's review. See Matter of Golden Dragon Chinese Rest., 19 I. & N. Dec. 238, 239 (Comm'r 1984). Separating the two processes will give OFLC the time to make a considered decision about temporary need without negatively impacting an employer's ability to have the workers it needs in place in a timely manner. In addition, we anticipate that many employers, with 3 years of registration validity, will benefit from a one-step process involving only the labor market test in their second and third years after registration, which will allow DOL to process these applications more efficiently. We conclude that enforcement alone cannot ensure program integrity; in the move from an attestation-based model to a compliance-based model, the bifurcation of application processing into registration and labor market test phases contributes to program integrity. Job contractors also must register, and provide documentation that establishes their temporary seasonal need or one-time occurrence during the registration process. Although a job contractor must file an Application for Temporary Employment Certification jointly with its employer-client, in accordance with § 655.19, a job contractor and its employer-client must each file a

separate H-2B Registration. Paragraph (b) requires the employer and, as applicable, its agent and/or attorney, to sign the H-2B Registration.

Paragraph (c) requires employers to file an H-2B Registration no less than 120 and no more than 150 calendar days before the date of initial need for H-2B workers, except where the employer submits the H-2B Registration in support of an emergency filing, discussed further below with reference to paragraph (j). The registration window (i.e., 120 to 150 days before the employer's anticipated date of need) provides enough time for processing the registration before an employer may submit an Application for Temporary Employment Certification (i.e., 75 to 90 days before the employer's anticipated date of need) to assure that the adjudication of the Application for Temporary Employment Certification will not be delayed. In addition, many employers will not have to repeat the registration process with respect to the following 2 years. The registration timeframe also reflects the understanding that some employers may have difficulty accurately predicting their need more than 5 months in advance. The registration window seeks to balance both processing time and accuracy concerns. We anticipate an employer's overall processing time to decrease significantly when the bifurcated process goes into effect.

Paragraph (d) states that the assertion of temporary need will be evaluated based on standards established by DHS in 8 CFR 214.2(h)(6)(ii).[14] The NPC will review the registration under the standards set in paragraph (e) of § 655.11. Paragraph (f) of this provision establishes mailing and postmark requirements.

[14] DHS is the final arbiter in terms of determining temporary need. See 8 CFR 214.2(h)(6)(iii)(A) (stating that a temporary labor certification constitutes advice to DHS as to the availability of qualified U.S. workers and as to any adverse effect hiring an alien worker may have on the wages and working conditions of similarly employed U.S. workers).

Paragraph (g) authorizes the CO to issue one or more Requests for Further Information (RFIs) before issuing a Notice of Decision on the H-2B Registration if the CO determines that he or she could not approve the H-2B Registration for various reasons, including, but not limited to: an incomplete or inaccurate ETA Form 9155; a job classification and duties that do not qualify as non-agricultural; the failure to demonstrate temporary need; and/or positions that do not constitute bona fide job opportunities. In addition, DOL will perform the initial business existence verification and, if questions arise, will request additional documentation of bona fide existence through the RFI process.

Paragraph (h) provides that, if approved, the registration would be valid for a period of up to 3 years, absent a significant change in conditions, enabling an employer to begin the application process at the second phase without having to re-establish temporary need for the second and third years of registration. This provision grants the CO the necessary discretion to approve a registration for a period up to 3 consecutive years, taking into consideration the standard of need and any other factors in the registration. If the H-2B Registration is denied, the CO will send a Notice of Decision stating the reason(s) for the denial and providing an opportunity for administrative review within 10 days of the denial.

Paragraph (i) requires all employers that file an H-2B Registration to retain any documents and records not otherwise submitted proving compliance with this subpart for a period of 3 years from the date of certification of the last Application for Temporary Employment Certification supported by the H-2B Registration, if approved, or 3 years from the date the decision is issued if the H-2B Registration is denied or withdrawn. We

have included corresponding § 655.56 that sets out all document retention obligations for H-2B employers.

Paragraph (j) adds a provision to allow for the transition to the registration process through a future announcement in the Federal Register, until which time the CO will adjudicate temporary need through the application process.

3. § 655.12 Use of registration by H-2B employers

Under this provision, an employer may file an Application for Temporary Employment Certification upon approval of its H-2B Registration, and for the duration of the registration's validity period, which may be up to 3 consecutive years from the date of issuance, provided that the employer's need for workers has not changed. The employer will be required to file a new H-2B Registration if the employer's need for workers increases by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers); if the dates of need of the job opportunity have changed by more than a total of 30 calendar days from the initial year for the entire period of need; if the nature of the job classification and/or duties materially changed; and/or if the temporary nature of the employer's need for services or labor materially changed. We conclude that material changes in the job classification or job duties, material changes in the nature of the employer's temporary need, or changes in the number of workers needed greater than the specified levels, from one year to the next, merit a fresh review through re-registration. We note that the tolerance level for the number of workers requested for the registration process (i.e., 20 percent (or 50 percent for employers requesting fewer than 10 workers)) is the same as the tolerance level in the 2008 rule, the current H-2A regulation, and § 655.35 of this interim final rule, which pertains to amendments to an Application for

Temporary Employment Certification before certification. Under the interim final rule, an H-2B Registration is non-transferrable.

4. § 655.13 Review of prevailing wage determinations

The interim final rule alters the process from the 2008 rule for the review of PWDs to improve clarity and consistency. Specifically, the provision reduces the number of days within which the employer must request review of a PWD by the NPWC Director from 10 calendar days in the 2008 rule to 7 business days from the date of the PWD in this interim final rule. In addition, the NPWC Director will review determinations, and the employer has 10 business days from the date of the NPWC Director's final determination within which to request review by the BALCA.

C. Application for Temporary Employment Certification Filing Procedures

1. § 655.15 Application filing requirements

Under the interim final rule, we have returned to a post-filing recruitment model in order to develop more robust recruitment and to ensure better and more complete compliance by H-2B employers with program requirements. DOL's experience in administering the H-2B program since the implementation of the 2008 rule suggests that the lack of agency oversight during the pre-filing recruitment process has resulted in failures to comply with program requirements. We conclude that the recruitment model adopted in this interim final rule will enhance coordination between OFLC and the SWAs, better serve the public by providing U.S. workers more access to available job opportunities, and assist employers in obtaining the workers that they require in a timelier manner. This provision requires all employers to first obtain a prevailing wage

determination under § 655.10 and register under the procedures set out in § 655.11, unless requirements under §§ 655.4 or 655.17 are met.

Paragraph (a) requires a registered employer to file the Application for Temporary Employment Certification, together with copies of all contracts and agreements with any agent and/or recruiter executed in connection with the job opportunities, and a copy of the job order with the Chicago NPC at the same time it files the job order with the SWA. DOL understands that there are circumstances in which the job order has yet to be created and posted by the SWA, so DOL will require a document that outlines the details of the employer's job opportunity where a copy of the official job order from the SWA's job order system is not yet available; DOL expects the employer to provide the Chicago NPC with an exact copy of the draft the employer provides to the SWA for the creation of the SWA job order. The process relies on the SWAs' significant knowledge of the local labor market and job requirements. The resulting job order will provide accurate, program compliant notification of the job opportunity to U.S. workers. In addition, requiring the employer to simultaneously file the job order with the Chicago NPC and the SWA will enhance coordination between the agencies, resulting in increased U.S. worker access to job opportunities as well as helping employers locate qualified and available U.S. workers. The employer is required to also submit to the NPC any information required under §§ 655.8 and 655.9 (including the identity and location of persons and entities hired by or working with the recruiter or agent or employee of the recruiter to recruit prospective foreign workers for the H-2B job opportunities). Under Paragraph (b), the employer must submit this filing no more than 90 days and no fewer than 75 days before its date of need.

Paragraph (c) permits the employer or its authorized attorney or agent to file electronically H-2B temporary employment certification applications under the H-2B visa category through the iCERT System (http://icert.doleta.gov). An employer or its authorized attorney or agent electing not to use the electronic filing capability must file their H-2B temporary employment certification applications directly with the Chicago NPC using the traditional paper-based filing method. Data from mailed-in H-2B temporary employment certification applications will be entered into the iCERT System's internal case management system by the Chicago NPC and processed in a similar manner as those filed electronically.

Paragraph (d) requires the employer and, as applicable, its attorney and/or agent, to sign the Application for Temporary Employment Certification. When filing an H-2B temporary employment certification application electronically, the iCERT System account holder must upload a signed and dated copy of the Appendix B associated with the H-2B temporary employment certification application containing the requisite program assurances and obligations under this interim final rule. In the case of a job contractor filing as a joint employer with its employer-client, a separate attachment containing the employer-client's business and contact information (i.e., Sections C and D of the ETA Form 9142B) and a separate signed and dated copy of the Appendix B and H-2B Registration for the employer-client must be uploaded prior to electronically submitting the H-2B temporary employment certification application, as required by 20 CFR 655.19. For electronic filing only, an H-2B temporary employment certification application bearing original signatures will no longer be required by the Chicago NPC at the time of filing, because a copy of the signed and dated Appendix B will be uploaded

directly into the iCERT System and the original Appendix B will be retained by the employer, as required by 20 CFR 655.56.

In addition to the H-2B temporary employment certification application, the regulations require an employer to submit all supporting documentation at the time of filing. When filing an H-2B temporary employment certification application electronically, the iCERT System account holder must upload, prior to submission of the application and in an electronic format acceptable to the iCERT System, all required supporting documentation that would normally be sent to the Chicago NPC by U.S. mail, because the system will not permit documents to be uploaded once the H-2B temporary employment certification application has been submitted for processing. An employer who elects to file H-2B temporary employment certification applications by U.S. mail must submit all required documentation in hard copy to the Chicago NPC. To avoid any processing delays, the iCERT account holder is strongly encouraged to preview and check the H-2B temporary employment certification application and all uploaded documents for completeness and accuracy before submitting the application electronically. Any supporting documentation required after the H-2B temporary employment certification application is filed will be requested by the Chicago NPC and must be filed by U.S. mail, electronic mail or facsimile, even if the application itself was submitted electronically.

Where a temporary labor certification is granted, the Chicago NPC will send the approved H-2B temporary employment certification application and a Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if applicable, to the employer's attorney or agent.

For all H-2B temporary employment certification applications granted under this interim final rule, whether filed electronically or mailed, the employer will receive from the Chicago NPC an original certified ETA Form 9142B, but not an Appendix B, issued on security certification paper. A certified ETA Form 9142B is valid when it contains a completed Section K bearing the electronic signature of the OFLC Administrator, and a completed "For Department of Labor Use Only" footer on each page identifying the case number, case status, and validity period. Upon receipt of the original certified ETA Form 9142B, the employer or its agent or attorney, if applicable, must complete the footer on the original Appendix B, retain the original Appendix B, and submit a signed copy of Appendix B, together with the original certified ETA Form 9142B directly to USCIS. Under the document retention requirements in § 655.56, the employer must retain a copy of the temporary labor certification and the original signed Appendix B.

Paragraph (f) requires that, with one exception discussed below applicable to employers in the seafood industry, employers file separate applications when there are different dates of need for the same job opportunity or different worksites within an area of intended employment. Employers must accurately identify their personnel needs and, for each period within their season for which they have more than one date of need, file a separate application for each separate date of need. An application with an accurate date of need will be more likely to attract qualified U.S. workers to fill those open positions, especially when the employer conducts recruitment closer to the actual date of need. This prohibition against staggered entries based on a single date of need is intended to require that employers provide U.S. workers the maximum opportunity to consider the job opportunity and is consistent with USCIS policies. It is intended to provide that U.S.

workers are not treated less favorably than H-2B workers who, for example, may be permitted to report for duty 6 weeks after the stated date of need.

The interim final rule, at § 655.15(f), permits only employers in the seafood industry to stagger the entry of their otherwise admissible H-2B nonimmigrants into the United States under certain circumstances. Under section 108 of the Consolidated and Further Continuing Appropriations Act, 2015 (the "2015 Appropriations Act"), Pub. L. 113-235, 128 Stat. 2130, 2464, permits staggered entry of H-2B nonimmigrants employed by employers in the seafood industry under certain conditions. The Departments have determined that this legislation constitutes a permanent enactment, and so we have incorporated the requirements into this interim final rule.

Under the 2015 Appropriations Act and § 655.15(f), employers in the seafood industry may bring into the United States, in accordance with an approved H-2B petition, nonimmigrant workers at any time during the 120-day period on or after the employer's certified start date of need if certain conditions are met. No additional information or documentation related to this provision should be submitted with an H-2B temporary employment certification application to the Chicago NPC. However, as discussed below, in order for employers to use this provision, H-2B nonimmigrant workers must show to the Department of State's consular officers and to the DHS's U.S. Customs and Border Protection officers, as necessary, the employer's attestation that the conditions set forth in the statute and regulation have been met.

The statute and regulation contain two primary conditions that employers must meet in order to benefit from this exception. First, this rule applies only to employers engaged in a business in the seafood industry. We have added to § 655.5 a definition of

"seafood," which is defined as fresh or saltwater finfish, crustaceans, other forms of aquatic animal life, including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals, and all mollusks.

Second, any seafood industry employer that permits or requires its H-2B nonimmigrant workers to enter the United States between 90 and 120 days after the certified start date of need must complete a new assessment of the local labor market during the period that begins at least 45 days after the certified start date of need and ends before the 90th day after the certified start date of need, which must include: (A) listing the job in local newspapers on two separate Sundays; (B) placing new job orders for the job opportunity with the SWA serving the area of intended employment and posting the job opportunity at the place of employment for at least 10 days; and (C) offering the job to any equally or better qualified U.S. worker who applies for the job and who will be available at the time and place of need. Seafood industry employers who conduct the required additional recruitment should not submit proof of the additional recruitment to OFLC. However, seafood industry employers must retain the additional recruitment documentation, together with their pre-filing recruitment documentation, for a period of 3 years from the date of certification, consistent with the document retention requirements under § 655.56.

In order to comply with this provision, a seafood industry employer must prepare a written, signed attestation indicating its compliance with the conditions outlined above.[15] Employers must download the official attestation, review the conditions contained in the

[15] The official attestation is available in PDF-format on OFLC's Web site at http://www.foreignlaborcert.doleta.gov/form.cfm. The attestation was developed as a result of Congress's original and temporary enactment of legislation permitting seafood industry employers to stagger the entry of their H-2B workers into the U.S. under section 113 of the Consolidated Appropriations Act, 2014, Public Law 113-76, 128 Stat. 5 (Jan. 17, 2014).

attestation, and indicate compliance by signing and dating the attestation. An employer seeking to use this statutory and regulatory provision must provide each H-2B nonimmigrant worker seeking entry into the United States a copy of the signed and dated attestation, with instructions that the worker must present the documentation upon request to the Department of State's consular officers when they apply for an H-2B visa, and/or DHS's U.S. Customs and Border Protection officers when seeking entry into the United States. Without this attestation, an H-2B nonimmigrant may be denied admission to the United States if seeking to enter at any time other than the designated 20-day period (10 days before and after the start date) surrounding the start date stated in the petition. (The attestation is not necessary when filing an amended petition based on a worker that is being substituted under 8 CFR 214.2(h)(6)(viii)). The attestation presented by an H-2B nonimmigrant worker in order to be admitted to the United States in H-2B status must be the official attestation downloaded from OFLC's Web site and may not be altered or revised in any manner.

2. § 655.16 Filing of the job order at the SWA

The interim final rule requires the employer to submit its job order directly to the SWA at the same time it files the Application for Temporary Employment Certification and a copy of the job order with the Chicago NPC, no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need. As discussed above, we are continuing to rely on the SWAs' experience with the local labor market, job requirements, and prevailing practices by requiring the SWA to review the contents of the job order for compliance with § 655.18 and to notify the CO of any deficiencies within 6 business days of the SWA's receipt of the job order. By requiring such concurrent filing

and review, the CO can use the knowledge of the SWA, in addition to its own review, in a single Notice of Deficiency before the employer conducts its recruitment. SWAs can continue to rely on foreign labor certification grant funding to support those functions. We conclude that this continued cooperative relationship between the CO and the SWA will ensure greater program integrity and efficiency.

Under paragraph (c), the SWAs must circulate the job order in intrastate clearance, and in interstate clearance by providing a copy of the job order to other states as directed by the CO. Intrastate clearance refers to placement of the job order within the SWA labor exchange services system of the State to which the employer submitted the job order and to which the NPC sent the Notice of Acceptance, and interstate clearance refers to circulation of the job order to SWAs in other States, including those with jurisdiction over listed worksites and those the CO designates, for placement in their labor exchange services systems. We note that, under § 655.33(b)(4), the CO directs the SWA in the Notice of Acceptance to circulate the job order in the course of interstate clearance, ensuring that the employer is also aware of the job order's exposure in the SWAs' labor exchange services systems.

Posting the job order in the SWA labor exchange system is but one of the recruitment requirements contained in the interim final rule, which together are designed to ensure maximum job opportunity exposure for U.S. workers during the recruitment period. Also, in most cases, the job order will be posted for at least 54 days, since the interim final rule requires the employer to file its application no more than 90 calendar days and no less than 75 calendar days before its date of need and the SWA to post the job order

upon receipt of the Notice of Acceptance and to keep the job order posted until 21 days before the date of need, as discussed in the preamble to § 655.20(t).

3. § 655.17 Emergency situations

The interim final rule permits an employer to file an H-2B Registration fewer than 120 days before the date of need, and/or an Application for Temporary Employment Certification with the job order fewer than 75 days before the date of need, where an employer has good and substantial cause and there is enough time for the employer to undertake an adequate test of the labor market. This emergency provision permits an employer to file fewer than 75 days before the start date of need, but does not expand the earliest date an employer is eligible to submit an H-2B Registration or Application for Temporary Employment Certification. This provision represents a change from the 2008 rule, which did not allow for emergency filings, and affords employers flexibility while maintaining the integrity of the application and recruitment processes.

To rely on this provision, the employer must provide the CO with detailed information describing the "good and substantial cause" necessitating the waiver. Such cause may include the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable human-made catastrophic event that is wholly outside the employer's control, unforeseeable changes in market conditions, or pandemic health issues. The CO's denial of an H-2B Registration in accordance with the procedures under § 655.11 does not, standing alone, constitute good and substantial cause for a waiver request.

In processing an emergency H-2B Registration or Application for Temporary Employment Certification and job order, the CO will review the submissions in a manner consistent with this subpart and make a determination in accordance with § 655.50. If the

CO grants the waiver request, the CO will forward a Notice of Acceptance and the approved job order to the SWA serving the area of intended employment identified by the employer in the job order. If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53. As discussed earlier, for purposes of simultaneous filing, we use the term "job order" in this provision, when the job order has yet to be created and posted by the SWA. As a result, the employer must submit a draft document outlining the details of the employer's job opportunity simultaneously with the Application for Temporary Employment Certification, not the official job order.

Under the interim final rule, an H-2B Registration and/or Application for Temporary Employment Certification processed under the emergency situation provision is subject to the same recruitment activities, audit processes, and enforcement mechanisms as a non-emergency H-2B Registration and/or Application for Temporary Employment Certification. However, DOL intends to subject emergency applications to a higher level of scrutiny than non-emergency applications in order to make certain that the provision is not subject to abuse. The regulation gives the CO the discretion not to accept the emergency filing if the CO concludes there is insufficient time to thoroughly test the U.S. labor market and make a final determination. Moreover, under § 655.46, the CO has the discretion to instruct an employer to conduct additional recruitment. The CO will adjudicate the foreseeability of the emergency based on the precise circumstances of each

situation presented. The burden of proof is on the employer to demonstrate the unforeseeability leading to a request for a filing on an emergency basis.

4. § 655.18 Job order assurances and contents

The job order is essential for U.S. workers to make informed employment decisions. It must include not only standard information about the job opportunity, but also several key assurances and obligations to which the employer is committing by filing an Application for Temporary Employment Certification for H-2B workers and to which U.S. workers are also entitled. The job order must also be provided to H-2B workers with its pertinent terms in a language the worker understands, as required in § 655.20(l) of this interim final rule.

Assurances

There are two overarching assurances in § 655.18(a) with which the employer agrees to comply by filing an Application for Temporary Employment Certification. These assurances, which pertain to the prohibition against preferential treatment and bona fide job requirements, need not be included in the job order verbatim; rather, they are applicable to each job order insofar as they apply to each listed term and condition of employment.

a. Prohibition against preferential treatment, § 655.18(a)(1). Similar to the requirements under § 655.22(a) of the 2008 rule, and as described under § 655.20(q) of this interim final rule, the employer must provide to U.S. workers at least the same benefits, wages, and working conditions that are being or will be offered or provided to H-2B workers. The purpose of § 655.18(a)(1) is to protect U.S. workers by ensuring that employers do not understate wages and/or benefits in an attempt to discourage U.S.

applicants or to provide preferential treatment to temporary foreign workers. Employers are required to offer and provide H-2B workers at least the minimum wages and benefits outlined in these regulations. So long as the employer offers U.S. workers at least the same level of benefits, wages, and working conditions as will be provided to the H-2B workers, the employer will be in compliance with this provision. Section 655.18(a)(1) does not preclude an employer from offering a higher wage rate or more generous benefits or working conditions to U.S. workers, as long as the employer offers to U.S. workers all the wages, benefits, and working conditions offered to and required for H-2B workers pursuant to the certified Application for Temporary Employment Certification.

b. Bona fide job requirements, § 655.18(a)(2). The job qualifications and requirements listed in the job order must be bona fide and consistent with the normal and accepted job qualifications and requirements of employers that do not use H-2B workers for the same or comparable occupations in the same area of intended employment.

Under DOL's longstanding policy, job qualifications and requirements must be customary; i.e., they may not be used to discourage applicants from applying for the job opportunity. Including requirements that do not meet this standard would undermine a true test of the labor market. The standard for employment of H-2B workers is that there are no U.S. workers capable and available to perform such services or labor. For purposes of complying with this requirement, the Departments have clarified in § 655.20(e) the meaning of qualifications and requirements. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. Such characteristics include but are not limited to, the ability to use specific equipment or any education or experience required for performing a certain job task. A requirement,

on the other hand, means a term or condition of employment which a worker is required to accept to obtain or retain the job opportunity, e.g., the willingness to complete the full period of employment or commute to and from the worksite.

This interpretation is consistent with program history, primarily under the General Administration Letter 1-95,[16] where the State Employment Security Agencies (now SWAs) were specifically directed to reject any restrictive job requirements. To the extent an employer has requirements that are related to the U.S. workers' qualifications or availability, DOL will examine those in consultation with the SWAs to determine whether they are normal and accepted. For example, the Departments recognize that background checks are used in private industry and it is not our intent to preclude the employer from conducting such checks to the extent that the requirement is a bona fide, normal and accepted requirement applied by non-H-2B employers for the occupation in the area of employment, and the employer applies the same criteria to both H-2B and U.S. workers. However, where such job requirements are included in the recruitment materials, DOL reserves the right to inquire further as to whether such requirements are normal and accepted by non-H-2B employers and by what methods the employer will administer and evaluate such requirements.

Contents

In addition to complying with the assurances in paragraph (a) of this section, § 655.18(b) requires that the employer include at a minimum the following contents in the job order.

[16] General Administration Letter 1-95, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations (Dec. 31, 1995).

a. Benefits, wages and working conditions, § 655.18(b)(2), (5), (6), (9). Employers must list the following benefits, wages, and working conditions in the job order: the rate of pay, frequency of pay, the availability of overtime, and that the job opportunity concerns a full-time position. These disclosures are critical to any applicant's decision to apply for and accept the job opportunity.

b. Board, lodging, or facilities, § 655.18(b)(10). If an employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, this must be listed in the job order along with any wage deductions related to such provision of board, lodging or other facilities. Assisting workers to secure lodging consists of more than an employer's simple provision of information, such as providing workers coming from remote locations with a list of facilities providing short-term leases, or a list of extended-stay motels. Assistance could be reserving a block of rooms for employees and negotiating a discounted rate on the workers' behalf, or arranging to have housing provided at a subsidized cost for employees. Any such assistance may make it more feasible for a U.S. worker from outside the area of intended employment to accept the job, and therefore it should be included in the job order.

The Departments note that the concept of "facilities" is defined in 29 CFR 531.32, which has been construed and enforced by DOL for several decades. The Departments have concluded that it is beneficial for workers, employers, agents, and the WHD to ground enforcement of H-2B program obligations in DOL's decades of experience enforcing the Fair Labor Standards Act (FLSA), and the decades of court decisions interpreting the regulatory language we are adopting in these regulations. Therefore, the

Departments note throughout this preamble where they rely on FLSA principles to explain the meaning of the requirements of the H-2B program that use similar language.

DOL's longstanding position is that deductions or costs incurred for facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore may not be charged to the worker. See 29 CFR 531.3(d)(1). Thus, housing that is provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer's benefit and convenience and cannot be charged to the workers.

c. Deductions, § 655.18(b)(11). The job order must specify that the employer will make all deductions from the worker's paycheck required by law and specifically list all deductions not required by law that the employer intends to make from the worker's paycheck. This includes, if applicable, any wage deductions for the reasonable cost of board, lodging, or other facilities. Any deductions not disclosed in the job order are prohibited under § 655.20(c) of this interim final rule.

Under the FLSA, there is no legal difference between deducting a cost from a worker's wages and shifting a cost to an employee to bear directly. As the U.S. Court of Appeals for the Eleventh Circuit stated in Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228, 1236 (11th Cir. 2002):

> An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. See 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during employment. See id. § 531.35; Ayres v. 127 Rest. Corp., 12 F.Supp.2d 305, 310 (S.D.N.Y. 1998).

Consistent with the FLSA and the Departments' obligation to prevent adverse effects on U.S. workers by protecting the integrity of the H-2B offered wage, the offered wage will be considered the effective minimum wage for H-2B and corresponding U.S. workers.

d. Three-fourths guarantee, § 655.18(b)(17). The employer must list in the job order that the employer will guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period (or 6-week period if the employment covered by the job order is less than 120 days) and, if the guarantee is not met, the employer will pay the worker what the worker would have earned if the employer had offered the guaranteed number of days, as required by § 655.20(f) of this interim final rule.

e. Transportation and visa fees, § 655.18(b)(12)-(15). The employer must detail in the job order how the worker will be provided with or reimbursed for inbound transportation and subsistence costs if the worker completes 50 percent of the period of employment covered by the job order, consistent with § 655.20(j)(1)(i) of this interim final rule. The employer must also state that it will provide or pay for the worker's outbound transportation and subsistence if the worker completes the job order period or is dismissed early, consistent with § 655.20(j)(1)(ii) of this interim final rule. The employer must also disclose that it will provide or reimburse inbound and outbound transportation and daily subsistence costs for corresponding U.S. workers who are not reasonably able to return to their residence within the same workday. Finally, employers are required to disclose in the job order that they will provide daily transportation to the worksite, if they intend to do so, and that the employer will reimburse H-2B workers for visa and related fees in the first workweek.

f. Employer-provided items, § 655.18(b)(16). The job order must disclose that the employer will provide workers with all tools, supplies, and equipment needed to perform the job at no cost to the employee. This provision gives workers additional protection against improper deductions from wages for items that primarily benefit the employer, and assures workers that they will not be required to pay for items necessary to perform the job.

The Departments note that section 3(m) of the FLSA and DOL regulations at 20 CFR part 531 prohibit deductions that are primarily for the benefit of the employer that bring a worker's wage below the applicable minimum wage, including deductions for tools, supplies, or equipment that are incidental to carrying out the employer's business. Consistent with the FLSA, § 655.22(g)(1) in the 2008 rule (which required all deductions to be reasonable), and the Departments' obligation to prevent adverse effects on U.S. workers, this interim final rule similarly protects the integrity of the H-2B offered wage by treating it as the effective minimum wage. Therefore, deductions for items such as damaged and lost equipment, which are encompassed within deductions for equipment needed to perform a job, would not be permissible where such deductions bring a worker's wage below the offered wage.

Employers must provide standard equipment that allows employees to perform their job fully, but they are not required to provide, for example, equipment such as custom-made skis that may be preferred, but not needed by, ski instructors. This requirement does not prohibit employees from electing to use their own equipment, nor does it penalize employers whose employees voluntarily do so, so long as a bona fide offer of adequate, appropriate equipment has been made.

In addition to the provisions discussed above, this interim final rule requires employers to list in the job order the following information that is essential for providing U.S. workers sufficient information about the job opportunity: the employer's name and contact information (§ 655.18(b)(1)); a full description of the job opportunity (§ 655.18(b)(3)); the specific geographic area of intended employment (§ 655.18(b)(4)); if applicable, a statement that on-the-job training will be provided to the worker (§ 655.18(b)(7)); a statement that the employer will use a single workweek as its standard for computing wages due (§ 655.18(b)(8)); and instructions for inquiring about the job opportunity or submitting applications, indications of availability, and/or resumes to the appropriate SWA (§ 655.18(b)(18)). This last requirement is included to ensure that applicants who learn of the job opening through the electronic job registry are provided with the opportunity to contact the SWA for more information or referral.

The Departments believe that the information employers are required to include in the job order under § 655.18 of this interim final rule is necessary and sufficient to provide the worker with adequate information to determine whether to accept the job opportunity, and notes that the Department of State provides all H-2B nonimmigrants with a detailed worker rights card at the visa application stage.[17]

Finally, the Departments view the terms and conditions of the job order as binding. In the event that an employer does not provide a copy of the job order to workers as required under § 655.20(l) of this interim final rule, the terms and conditions of the job order nevertheless apply.

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[17] The workers rights card is available at http://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce Pamphlet English Double Sided Printing 12-22-2014.pdf.

5. § 655.19 Job contractor filing requirements.

This interim final rule establishes in § 655.6 the limited circumstances under which job contractors may continue to participate in the H-2B program. DOL will no longer accept H-2B temporary employment certification applications from job contractors if the job contractor's employer-clients are not also included on the temporary employment certification applications. However, both the 2008 rule and this interim final rule only permit one H-2B temporary employment certification application to be filed for worksite(s) within one area of intended employment for each job opportunity with an employer. Accordingly, a job contractor and employer-client cannot separately file an individual application for a single job opportunity.

Job contractors and their employer-clients must file a single application when acting as joint employers. Joint employment is defined as circumstances in which two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, in which case the employers may be considered to jointly employ that employee. An employer may be considered a joint employer if it has an employment relationship with an individual, even if the individual may be considered the employee of another employer. See § 655.4. DOL has issued guidance on its Web site which addresses the requirements and procedures for filing and processing applications for joint employers (which could include job contractors and their employer-client(s)) under the H-2B program.[18]

In deciding whether to file as joint employers, the job contractor and its employer-client should understand that employers are considered to jointly employ an employee

[18] See http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2b.

when they each, individually, have sufficient definitional indicia of employment with respect to that employee. As described in the definition of employee in § 655.4, some factors relevant to the determination of employment status include, but are not limited to, the following: the right to control the manner and means by which work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; discretion over when and how long to work; and whether the work is part of the regular business of the employer or employers. Whenever a job contractor and its employer client file applications, each employer is responsible for compliance with H-2B program assurances and obligations. In the event a violation is determined to have occurred, either or both employers can be found to be responsible for remedying the violation and attendant penalties.

D. Assurances and Obligations

1. § 655.20 Assurances and obligations of H-2B employers

Section 655.20 of the interim final rule, which is similar to § 655.22 of the 2008 rule, contains the employer obligations that WHD will enforce to ensure that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. These assurances and obligations are consistent with, and are intended to complement, DHS's regulations where they address similar issues, such as transportation and recruitment fees. Requiring compliance with the following conditions of employment is the most effective way to meet this goal. As discussed in the preamble to § 655.5, workers engaged in corresponding employment are entitled to the same protections and benefits, set forth below, that are provided to H-2B workers.

a. Rate of pay (§ 655.20(a)). Section 655.20(a)(1), like § 655.22(e) in the 2008 rule, requires that employers pay the offered wage during the entire certification period and that the offered wage equal or exceed the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and any local minimum wage. It also requires that such wages be paid free and clear. See 29 CFR 531.35. If, during the course of the period certified in the Application for Temporary Employment Certification, the Federal, State or local minimum wage increases to a level higher than the prevailing wage certified in the Application, then the employer is obligated to pay that higher rate for the work performed in that jurisdiction where the higher minimum wage applies. Section 655.20(a)(2), similarly to § 655.22(g)(1) in the 2008 rule, provides that the wage may not be based on commissions, bonuses, or other incentives unless the employer guarantees the offered wage each workweek.

With respect to productivity standards, § 655.20(a)(3) requires the employer to demonstrate that any productivity standards are normal and usual for non-H-2B employers for the same occupation in the area of intended employment. Unlike in the H-2A program, DOL does not conduct prevailing practice surveys through the SWAs, which would provide such information to enable a CO to make this decision. If an employer wishes to provide productivity standards as a condition of job retention, the burden of proof rests with that employer to show that such productivity standards are normal and usual for employers not employing H-2B workers in order to ensure there is no adverse effect on similarly employed U.S. workers.

Finally, pursuant to § 655.20(a)(4), if an employer pays on a piece-rate basis, it must demonstrate that the piece rate is no less than the normal rate paid by non-H-2B

employers to workers performing the same activity in the area of intended employment, and that each workweek the average hourly piece rate earnings result in an amount at least equal to the offered wage (or the employer must make up the difference).

b. Wages free and clear (§655.20(b)). Section 655.20(b) requires that wages be paid either in cash or negotiable instrument payable at par, and that payment be made finally and unconditionally and free and clear in accordance with WHD regulations at 29 CFR part 531. This assurance clarifies the pre-existing obligation for both employers and employees to ensure that wages are not reduced below the required rate.

c. Deductions (§ 655.20(c)). Section 655.20(c) ensures payment of the offered wage by limiting deductions which reduce wages to below the required rate. The section limits authorized deductions to those required by law, made under a court order, that are for the reasonable cost or fair value of board, lodging, or facilities furnished that primarily benefit the employee, or that are amounts paid to third parties authorized by the employee or a collective bargaining agreement. Similar to § 655.22(g)(1) of the 2008 rule, this section specifically provides that deductions not disclosed in the job order are prohibited. The section also specifies deductions that would never be permissible, including: those for costs that are primarily for the benefit of the employer; those not specified on the job order; kickbacks paid to the employer or an employer representative; and amounts paid to third parties which are unauthorized, unlawful, or from which the employer or its foreign labor contractor, recruiter, agent, or affiliated person benefits to the extent that such deductions reduce the actual wage to below the required wage.

This section refers to the FLSA and 29 CFR part 531 for further guidance. Consistent with these and other authorities administered by DOL, for purposes of § 655.20(c)

deductions must, among other requirements, be truly voluntary, and may not be a condition of employment under the totality of the circumstances in order to be permissible.[19] In evaluating whether an employee voluntarily authorized an otherwise permissible deduction for purposes of § 655.20(c), it is important to evaluate whether the employee had a meaningful choice in light of all the facts presented.

Moreover, for purposes of § 655.20(c), a deduction for any cost that is primarily for the benefit of the employer is never reasonable and therefore never permitted under this interim final rule. Some examples of costs that DOL has long held to be primarily for the benefit of the employer are: tools of the trade and other materials and services incidental to carrying on the employer's business; the cost of any construction by and for the employer; the cost of uniforms (whether purchased or rented) and of their laundering, where the nature of the business requires the employee to wear a uniform; and transportation charges where such transportation is an incident of and necessary to the employment. This list is not an all-inclusive list of employer business expenses. Further, the concept of de facto deductions initially developed under the FLSA, where employees are required to purchase items like uniforms or tools that are employer business expenses, is equally applicable to purchases that bring H-2B workers' wages below the required wage, as the payment of the prevailing wage is necessary to ensure that the employment

[19] The scope and substance of DOL regulations in this interim final rule relating to permissible deductions, prohibited payment of fees by workers, and employer transportation obligations, see, e.g., new 20 CFR 655.20(c), (j), and (o) (and identical provisions in new 29 CFR part 503) reflect DOL statutory and regulatory authorities relating to worker protections, including under the FLSA; DOL H-2B enforcement responsibilities, including pursuant to the DHS delegation to DOL under 8 U.S.C. 1184(c)(14)(B), see also 8 CFR 214.2(h)(6)(ix); and DOL investigative capabilities. Similarly, the scope and substance of DHS's separate and independent regulations concerning prohibited fees and other compensation and transportation obligations, see 8 CFR 214.2(h)(6)(i) and (vi)(E), reflect USCIS operational realities inherent to the H-2B petition adjudication process.

of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. workers. To allow deductions for business expenses, such as tools of the trade, would undercut the prevailing wage concept and, as a result, harm U.S. workers.

d. Job opportunity is full-time (§ 655.20(d)). Section 655.20(d) requires that all job opportunities be full-time temporary positions, consistent with language in § 655.22(h) of the vacated 2008 rule, and that employers use a single workweek as the standard for computing wages due. Additionally, consistent with the FLSA, this section provides that the workweek is a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods which may start on any day or hour of the day. This establishment of a clear period for determining whether the employer has paid the required wage will aid in enforcement.

e. Job qualifications and requirements (§ 655.20(e)). Section 655.20(e), which clarifies § 655.22(h) of the 2008 rule, states that each job qualification and requirement listed in the job order must be consistent with normal and accepted qualifications required by non-H-2B employers for the same occupation in the area of intended employment. Further, the employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. In contrast, a requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. Finally, the CO has the

authority to require the employer to substantiate any job qualifications or requirements specified in the job order.

This provision enables DOL to continue to review the job qualifications and special requirements by looking at what non-H-2B employers determine is normal and accepted to be required to perform the duties of the job opportunity. The purpose of this review is to avoid the consideration (and the subsequent imposition) of requirements on the performance of the job duties that would serve to limit U.S. worker access to the opportunity. OFLC has significant experience in conducting this review and in making determinations based on a wide range of sources assessing what is normal for a particular job, and employers will continue to be held to an objective standard beyond their mere assertion that a requirement is necessary. DOL will continue to look at a wide range of available objective sources of such information, including but not limited to O*NET and other job classification materials and the experience of local treatment of requirements at the SWA level. Ultimately, however, it is incumbent upon the employer to provide sufficient justification for any requirement outside the standards for the particular job opportunity.

f. Three-fourths guarantee (§ 655.20(f)). Section 655.20(f) requires employers to guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period if the period of employment covered by the job order is 120 days or more and each 6-week period, if the period of employment covered by the job order is less than 120 days. If the guarantee is not met, the employer is required to pay the worker what the worker would have earned if the employer had offered the guaranteed number of days. These 12-week periods (6 weeks if the job order

is less than 120 days) begin the first workday after the worker's arrival at the place of employment or the advertised contractual first date of need, whichever is later, and end on the expiration date specified in the job order or in any extensions. A workday is based on the workday hours stated in the employer's job order, and the 12-week periods (6 weeks if the job order is less than 120 days) are based on the employer's workweek for pay purposes, with partial week increases for the initial period and decreases for the last period on a pro rata basis, depending on which day of the workweek the worker starts or ceases work.

If a worker fails or refuses to work hours offered by the employer, the employer may count any hours offered consistent with the job order that a worker freely and without coercion chooses not to work, up to the maximum number of daily hours on the job order, in the calculation of guaranteed hours. The employer may offer the worker more than the specified daily work hours, but the employer may not require the employee to work such hours or count them as offered if the employee chooses not to work the extra hours. However, the employer may include all hours actually worked when determining whether the guarantee has been met. Finally, as detailed in 20 CFR 655.20(g), the CO can terminate the employer's obligations under the guarantee in the event of fire, weather, or other Act of God that makes the fulfillment of the job order impossible, or for a similar man-made catastrophic event such as an oil spill or controlled flooding.

The Departments believe that the interim final rule's approach provides the benefits of having a wage guarantee, while offering employers the flexibility to spread the required hours over a sufficiently long period of time such that the vagaries of the weather or other events out of their control that affect their need for labor do not prevent employers from

fulfilling their guarantee. When employers file applications for H-2B labor certifications, they represent that they have a need for full-time workers during the entire certification period. Therefore, it is important to the integrity of the program, which is a capped visa program, to have a methodology for ensuring that employers have fairly and accurately estimated their temporary need. The guarantee deters employers from misusing the program by overstating their need for full-time, temporary workers, such as by carelessly calculating the starting and ending dates of their temporary need, the hours of work needed per week, or the total number of workers required to do the work available. To the extent that employers more accurately describe the amount of work available and the periods during which work is available, it gives both U.S. and foreign workers a better chance to realistically evaluate the desirability of the offered job. U.S. workers will not be induced to abandon employment, to seek full-time work elsewhere at the beginning of the season or near the end of the season because the employer overstated the number of employees it actually needed to ramp up or to wind down operations. Nor will U.S. workers be induced to leave employment at the beginning of the season or near the end of the season due to limited hours of work because the employer misstated the months during which it reasonably could expect to perform the particular type of work involved in that geographic area. Likewise, H-2B workers will not be induced to try to seek employment not permitted under the terms of their H-2B nonimmigrant status. Not only will the guarantee result in U.S. and H-2B workers actually working most of the hours promised in the job order, but it also will make the capped H-2B visas more available to other employers whose businesses need to use H-2B workers. Therefore, the Departments believe the guarantee is an important element to ensure the integrity of the

temporary labor certification process, to ensure that the availability of U.S. workers for full-time employment is appropriately tested, to ensure that there is no adverse effect on U.S. workers from the presence of H-2B workers who seek work not permitted under the terms of their H-2B nonimmigrant status because the job that was promised does not exist, and to ensure that H-2B visas are available to employers who truly have a need for temporary labor for the dates and for the numbers of employees stated.

DOL's recent experience in enforcing the H-2B regulations demonstrates that its concerns about employers overstating their need for workers are not unfounded. DOL's investigations have revealed that some employers have stated on their H-2B temporary employment certification applications that they would provide 40 hours of work per week when, in fact, their workers averaged far fewer hours of work, especially at the beginning and/or end of the season. Indeed, in some weeks the workers have not worked at all. In addition, there has been testimony before Congress involving similar cases in which employers have overstated the period of need and/or the number of hours for which the workers are needed. For example, H-2B workers testified at a hearing before the Domestic Policy Subcommittee, House Committee on Oversight and Government Reform, on April 23, 2009, that there were several weeks in which they were offered no work; others testified that their actual weekly hours – and hence their weekly earnings – were less than half of the amount they had been promised in the job order. Daniel Angel Castellanos Contreras, a Peruvian engineer, was promised 60 hours per week at $10-$15 per hour. According to Mr. Contreras, "[t]he guarantee of 60 hours per week became an average of only 20 to 30 hours per week – sometimes less. With so little work at such low pay [$6.02 to $7.79 per hour] it was impossible to even cover our expenses in New

Orleans, let alone pay off the debt we incurred to come to work and save money to send home."[20] Miguel Angel Jovel Lopez, a plumber and farmer from El Salvador, was recruited to do demolition work in Louisiana with a guaranteed minimum of 40 hours of work per week. Mr. Lopez testified, "[i]nstead of starting work, however, I was dropped off at an apartment and left for two weeks. Then I was told to attend a two week training course. I waited three more weeks before working for one day on a private home and then sitting for three more weeks."[21] Testimony at the same hearing by three attorneys who represent H-2B workers stated that these witnesses' experiences were not aberrations but were typical. Hearing on the H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers, 111th Cong. (Apr. 23, 2009).

Therefore, spreading the three-fourths guarantee over the entire period covered by the job order would not adequately protect the integrity of the program because it would not measure whether an employer has appropriately estimated its need for temporary workers. It would not prevent an employer from overstating the beginning date of need and/or the ending date of need and then making up for the lack of work in those two periods by offering employees 100 percent of the advertised hours in the middle of the certification period. Indeed the employer could offer employees more than 100 percent of the advertised hours in the peak season and, although they would not be required to

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[20] Testimony of Daniel Angel Castellanos Contreras before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee 2 (Apr. 23, 2009), available at http://oversight.house.gov/wp-content/uploads/2012/01/20090423Contreras.pdf.

[21] Testimony of Miguel Angel Jovel Lopez before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee 2 (Apr. 23, 2009), available at http://oversight.house.gov/wp-content/uploads/2012/01/20090423Lopez.pdf.

work the excess hours, most employees could reasonably be expected to do so in an effort to maximize their earnings.

However, in order to meet the legitimate needs of employers for adequate flexibility to respond to changes in climatic conditions (such as too much or too little snow or rain, or temperatures too high or too low) as well as the impact of other events beyond the employer's control (such as a major customer who cancels a large contract), the Departments are establishing the increment of time for measuring the guarantee at 12 weeks (if the period of employment covered by the job order is at least 120 days) and 6 weeks (if the employment is less than 120 days). The Departments believe this provides sufficient flexibility to employers, while continuing to deter employers from requesting workers for 9 months, for example, when they really only have a need for their services for 7 months. If an employer needs fewer workers during the shoulder months (at the beginning and end of the season) than during the peak months, it should not attest to an inaccurate statement of need by requesting the full number of workers for all the months. Rather, the proper approach it should follow is to submit two applications with separate dates of need, so that it engages in the required recruitment of U.S. workers at the appropriate time when it actually needs the workers.

The Departments remind employers that they may count toward the guarantee hours that are offered but that the employee fails to work, up to the maximum number of hours specified in the job order for a workday; thus, they do not have to pay an employee who voluntarily chooses not to work. Similarly, they may count all hours the employee actually works, even if they are in excess of the daily hours specified in the job order.

Finally, the Departments do not believe it would be appropriate to impose a more protective guarantee, such as a 100 percent, 90 percent, or weekly guarantee. The three-fourths guarantee is a reasonable deterrent to potential carelessness and an important protection for workers, while still providing employers with some flexibility relating to the required hours, given that many common H-2B occupations involve work that can be significantly affected by weather conditions. Moreover, it is not just outdoor jobs such as landscaping that are affected by weather. For example, indoor jobs such as housekeeping and waiting on tables can be affected when a hurricane, flood, unseasonably cool temperatures, or the lack of snow deters customers from traveling to a resort location. The impact on business of such weather effects may last for several weeks, although they are likely to be able to make up for them in other weeks of the season. Moreover, the Departments understand that it is difficult to predict with precision months in advance exactly how many hours of work will be available, especially as the period of time involved is shortened.

g. Impossibility of fulfillment (§ 655.20(g)). Section 655.20(g) allows employers to terminate a job order in certain narrowly-prescribed circumstances when approved by the CO, such as due to fire, weather, other Acts of God, or a similar unforeseeable human-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control, that makes the fulfillment of the job order impossible. In such an event, the employer is required to meet the three-fourths guarantee discussed in paragraph (f) of this section based on the starting date listed in the job order or first workday after the arrival of the worker, whichever is later, and ending on the date on which the job order is terminated due to the event. The employer also is required to

attempt to transfer the H-2B worker (to the extent permitted by DHS) or worker in corresponding employment to another comparable job. Actions employers could take include reviewing the electronic job registry to locate other H-2B-certified employers in the area and contacting any known H-2B employers, the SWA, or ETA for assistance in placing workers. Absent such placement, the employer will be required to comply with the transportation requirements in paragraph (j) of this section. We remind employers that CO approval is required to terminate the job order; simply submitting a request to the CO is insufficient to terminate the three-fourths guarantee.

h. Frequency of pay (§ 655.20(h)). Section 655.20(h) requires that the employer indicate the frequency of pay in the job order and that workers be paid at least every two weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Further, it requires that wages be paid when due.

The requirement that workers be paid at least every 2 weeks is designed to protect financially vulnerable workers. Allowing an employer to pay less frequently than every two weeks would impose an undue burden on workers who are often paid low wages and may lack the means to make their income stretch through a month until they get paid.

i. Earnings statements (§ 655.20(i)). Section 655.20(i) requires the employer to maintain accurate records of worker earnings and provide the worker an appropriate earnings statement on or before each payday, specifying the information that the employer must include in such a statement (including, e.g., the worker's total earnings each workweek, the hourly rate and/or piece rate, the hours offered and worked, and an itemization of all deductions from pay).

The Departments believe that any administrative burden resulting from this provision will be outweighed by the importance of providing workers with this crucial information, especially because an earnings statement provides workers with an opportunity to quickly identify and resolve any anomalies with the employer and hold employers accountable for proper payment. Similar to § 655.122(j)(3) in the H-2A program, the interim final rule requires an employer to record the reasons why a worker declined any offered hours of work, which will support DOL's enforcement activities related to the three-fourths guarantee in § 655.20(f). Additionally, this section, § 655.16(i)(2)(iv), and 29 CFR 503.16(i)(l) require employers to maintain records of any additions made to a worker's wages and to include such information in the earnings statements furnished to the worker. Such additions could include performance bonuses, cash advances, or reimbursements for costs incurred by the worker. This requirement is consistent with the recordkeeping requirements under the FLSA in 29 CFR part 516. See 29 CFR part 785 for guidance regarding what constitutes hours worked.

j. Transportation and visa fees (§ 655.20(j)). Section 655.20(j)(1)(i) requires an employer to provide inbound transportation and subsistence to H-2B employees and to U.S. employees who have traveled to take the position from such a distance that they are not reasonably able to return to their residence each day, if the workers complete 50 percent of the period of employment covered by the job order (not counting any extensions). The interim final rule provides that employers may: arrange and pay for the transportation and subsistence directly; advance, at a minimum, the most economical and reasonable common carrier cost and subsistence; or reimburse the worker's reasonable costs. If the employer advances or provides transportation and subsistence costs to

foreign workers, or it is the prevailing practice of non-H-2B employers to do so, the employer must advance such costs or provide the services to workers in corresponding employment traveling to the worksite. The interim final rule also reminds employers that the FLSA imposes independent wage payment obligations, where it applies.

Section 655.20(j)(1)(ii) requires the employer, at the end of the employment, to provide or pay for the U.S. or foreign worker's return transportation and daily subsistence from the place of employment to the place from which the worker departed to work for the employer, if the worker has no immediate subsequent approved H-2B employment; however, the obligation attaches only if the worker completes the period of employment covered by the job order or if the worker is dismissed from employment for any reason before the end of the period. The employer is required to provide or pay for the return transportation and daily subsistence of a worker who has completed the period of employment listed on the certified Application for Temporary Employment Certification, regardless of any subsequent extensions. An employer is not required to provide return transportation if separation is due to a worker's voluntary abandonment. If the worker has been contracted to work for a subsequent and certified employer, the last H-2B employer to employ the worker is required to provide or pay the U.S. or foreign worker's return transportation. Therefore, prior employers are not obligated to pay for such return transportation costs.

Section 655.20(j)(1)(iii) requires that all employer-provided transportation – including transportation to and from the worksite, if provided – must meet applicable safety, licensure, and insurance standards. Furthermore, all transportation and subsistence costs covered by the employer must be disclosed in the job order (§ 655.20(j)(1)(iv)). Finally,

§ 655.20(j)(2) requires employers to pay or reimburse the worker in the first workweek for the H-2B worker's visa, visa processing, border crossing, and other related fees including those fees mandated by the government (the employer need not, but may, reimburse workers for expenses that are primarily for the benefit of the employee, such as passport expenses).

Under the FLSA the transportation, subsistence, and visa and related expenses for H-2B workers are for the primary benefit of employers, as DOL explained in Wage and Hour's Field Assistance Bulletin No. 2009-2 (Aug. 21, 2009). The employer benefits because it obtains foreign workers where the employer has demonstrated that there are not sufficient qualified U.S. workers available to perform the work; the employer has demonstrated that unavailability by engaging in prescribed recruiting activities that do not yield sufficient U.S. workers. The H-2B workers, on the other hand, only receive the right to work for a particular employer, in a particular location, and for a temporary period of time; if they leave that specific job, they generally must leave the country. Transporting these H-2B workers from remote locations to the workplace thus primarily benefits the employer who has sought authority to fill its workforce needs by bringing in workers from foreign countries. Similarly, because an H-2B worker's visa (including all the related expenses, which vary by country, including the visa processing interview fee and border crossing fee) is an incident of and necessary to employment under the program, the employer is the primary beneficiary of such expenses. The visa does not allow the employee to find work in the U.S. generally, but rather permits the visa holder to apply for admission in H-2B nonimmigrant status, which restricts the worker to the

employer with an approved temporary labor certification and to the particular approved work described in the employer's application.

Therefore, the interim final rule includes a reminder to employers that the FLSA applies independently of the H-2B requirements. Employers covered by the FLSA must pay such expenses to nonexempt employees in the first workweek, to the level necessary to meet the FLSA minimum wage (outside the Fifth Circuit, which covers Louisiana, Mississippi, and Texas). See, e.g., Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892 (9th Cir. 2013); Arriaga v. Florida Pacific Farms, LLC, 305 F.3d 1228 (11th Cir. 2002); Morante-Navarro v. T&Y Pine Straw, Inc., 350 F.3d 1163 (11th Cir. 2003); Gaxiola v. Williams Seafood of Arapahoe, Inc., 2011 WL 806792 (E.D.N.C. 2011); Teoba v. Trugreen Landcare LLC, 2011 WL 573572 (W.D.N.Y. 2011); DeLeon-Granados v. Eller & Sons Trees, Inc., 581 F. Supp. 2d 1295 (N.D. Ga. 2008); Rosales v. Hispanic Employee Leasing Program, 2008 WL 363479 (W.D. Mich. 2008); Rivera v. Brickman Group, 2008 WL 81570 (E.D. Pa. 2008). But see Castellanos-Contreras v. Decatur Hotels, LLC, 622 F.3d 393 (5th Cir. 2010). Payment sufficient to satisfy the FLSA in the first workweek is also required because § 655.20(z) of the interim final rule, like § 655.22(d) in the 2008 H-2B rule, specifically requires employers to comply with all applicable Federal, State, and local employment-related laws. Furthermore, because U.S. workers are entitled to receive at least the same terms and conditions of employment as H-2B workers, in order to prevent adverse effects on U.S. workers from the presence of foreign workers, the interim final rule requires the same reimbursement for U.S. workers in corresponding employment who are unable to return to their residence each workday,

such as those from another state who saw the position advertised in a SWA posting or on DOL's electronic job registry.

The interim final rule separately requires employers to reimburse these inbound transportation and subsistence expenses, up to the offered wage rate, if the employee completes 50 percent of the period of employment covered by the job order. The Departments believe this approach is appropriate and adequately protects the interests of both U.S. and H-2B workers and employers, because it does not require employers to pay the inbound transportation and subsistence costs of U.S. workers recruited pursuant to H-2B job orders who do not remain on the job for more than a very brief period.

Additionally, the interim final rule requires reimbursement of outbound transportation and subsistence if the worker completes the job order period or if the employer dismisses the worker before the end of the period of employment in the job order, even if the employee has completed less than 50 percent of the period of employment covered by the job order. This requirement uses language contained in the DHS regulation at 8 CFR 214.2(h)(6)(vi)(E), which states that employers will be liable for reasonable return transportation costs if the employer dismisses the worker for any reason before the end of the period of authorized admission. See 8 U.S.C. 1184(c)(5)(A), INA section 214(c)(5)(A). For example, if there is a constructive discharge, such as the employer's failure to offer any work or sexual harassment that created an untenable working situation, the requirement to pay outbound transportation applies. However, if separation from employment is due to voluntary abandonment by an H-2B worker or a corresponding worker, and the employer provides appropriate notification specified under

§ 655.20(y), the employer is not responsible for providing or paying for return transportation and subsistence expenses of that worker.

This requirement to pay inbound transportation at the 50 percent point and outbound transportation at the completion of the work period is consistent with the rule under the H-2A visa program. Moreover, the interim final rule fulfills the Departments' obligation to protect U.S. workers from adverse effect due to the presence of temporary foreign workers. As discussed above, under the FLSA, numerous courts have held in the context of both H-2B and H-2A workers that the inbound and outbound transportation costs associated with using such workers are an inevitable and inescapable consequence of employers choosing to participate in these visa programs. Moreover, the courts have held that such transportation expenses are not ordinary living expenses, because they have no substantial value to the employee independent of the job and do not ordinarily arise in an employment relationship, unlike normal daily home-to-work commuting costs. Therefore, the courts view employers as the primary beneficiaries of such expenses under the FLSA; in essence the courts have held that inbound and outbound transportation are employer business expenses just like any other tool of the trade. A similar analysis applies to the H-2B required wage. If employers were permitted to shift their business expenses onto H-2B workers, they would effectively be making a de facto deduction and bringing the worker below the H-2B required wage, thereby risking depression of the wages of U.S. workers in corresponding employment. This regulatory requirement, therefore, ensures the integrity of the full H-2B required wage, rather than just the FLSA minimum wage, over the full term of employment; both H-2B workers and U.S. workers in corresponding employment will receive the H-2B required wage they were promised,

as well as reimbursement for the reasonable transportation and subsistence expenses that primarily benefit the employer, over the full period of employment. To enhance this protection, the interim final rule contains the additional requirement that, where a worker pays out of pocket for inbound transportation and subsistence, the employer must maintain records of the cost of transportation and subsistence incurred by the worker, the amount reimbursed, and the date(s) of reimbursement.

Finally, to comply with this section, transportation must be reimbursed from the place from which the worker has come to work for the employer to the place of employment; therefore, the employer must pay for transportation from the place of recruitment to the consular city and then on to the worksite. Similarly, the employer must pay for subsistence during that period, so if an overnight stay at a hotel in the consular city is required while the employee is interviewing for and obtaining a visa, that subsistence must be reimbursed. See Morales-Arcadio v. Shannon Produce Farms, Inc., 2007 WL 2106188 (S.D. Ga. 2007). Finally, if an employer provides daily transportation to the worksite, the regulation requires both that the transportation must comply with all applicable safety laws and that the employer must disclose the fact that free transportation will be provided in the job order.

k. Employer-provided items (§ 655.20(k)). Section 655.20(k) requires, consistent with the requirement under the FLSA regulations at 29 CFR part 531, that the employer provide to the worker without charge all tools, supplies, and equipment necessary to perform the assigned duties. The employer may not shift to the employee the burden to pay for damage to, loss of, or normal wear and tear of, such items. This provision gives

workers additional protections against improper deductions for the employer's business expenses from required wages.

As discussed above with respect to the disclosure requirement in § 655.18(b), section 3(m) of the FLSA prohibits employers from making deductions for items that are primarily for the benefit of the employer if such deductions reduce the employee's wage below the Federal minimum wage. Therefore an employer that does not provide tools but requires its employees to bring their own would already be required under the FLSA to reimburse its employees for the difference between the weekly wage minus the cost of equipment and the weekly minimum wage. This provision simply extends this protection to cover the required H-2B offered wage, in order to protect the integrity of the required H-2B wage rate and thereby avoid adverse effects on the wages of U.S. workers. However, as discussed above with regard to § 655.18(b), this requirement does not prohibit employees from voluntarily choosing to use their own specialized equipment; it simply requires employers to make available to employees adequate and appropriate equipment.

l. Disclosure of the job order (§ 655.20(l)). Section 655.20(l) requires that the employer provide a copy of the job order to prospective H-2B workers no later than the time of application for a visa and to workers in corresponding employment no later than the first day of work. For H-2B workers changing to a subsequent H-2B employer, the job order must be provided no later than the time the subsequent offer of employment is made. The job order must contain information about the terms and conditions of employment and employer obligations as provided in § 655.18 and must be in a language understandable to the workers, as necessary and reasonable. The purpose of the

disclosure is to provide workers with the terms and conditions of employment and of employer obligations to strengthen worker protection and promote program compliance.

This section does not require written disclosure of the job order at the time of recruitment, as required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). DOL notes that H-2B employers that are subject to MSPA are bound by the requirements of that Act, including disclosure of the appropriate job order at the time of recruitment. The H-2B and MSPA programs are not analogous, however. MSPA workers are often recruited domestically shortly before the start date of the job order, making the provision of the job order at the time of recruitment both logical and practical. In the H-2B program, as in the H-2A program, recruitment is often less directly related to the work start date, making immediate disclosure of the job order less necessary. It thus is more practical to require disclosure of the job order at the time the worker applies for a visa, to be sure that workers fully understand the terms and conditions of their job offer before they make a commitment to come to the United States. To clarify, the time at which the worker applies for the visa means before the worker has made any payment, whether to a recruiter or directly to the consulate, to initiate the visa application process. Worker notification is a vital component of worker protection and program compliance, and the Departments believe that the requirement provides workers with sufficient notice of the terms and conditions of the job so that they can make an informed decision.

In addition, providing the terms and conditions of employment to each worker in a language that the individual understands is a key element of much-needed worker protection. Therefore, DOL intends to broadly interpret the necessary or reasonable qualification and apply the exemption only in those situations where having the job order

translated into a particular language would both place an undue burden on an employer and not significantly disadvantage an H-2B or corresponding worker.

m. Notice of worker rights (§ 655.20(m)). Section 655.20(m) requires that the employer post a notice in English of worker rights and protections in a conspicuous location and if necessary post the notice in other appropriate languages if such translations are provided by DOL.

The poster, which will be printed and provided by DOL, will state that workers who believe their rights under the program have been violated may file confidential complaints and will display the number for WHD's toll-free help line. While the purpose of this section would be undermined if workers cannot read the notice, DOL cannot guarantee that it will have available translations of the notice in any given language, and cannot require employers to display a translation that may not exist. Translations will be made in response to demand; employers and organizations that work with H-2B workers are encouraged to inform DOL about the language needs of the H-2B worker population. If revised versions of the poster are created, DOL expects employers to post the most recent version published by DOL.

n. No unfair treatment (§ 655.20(n)). Section 655.20(n) provides nondiscrimination and nonretaliation protections that are fundamental to the statutes that DOL enforces. Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person's attempt to report or correct perceived violations of the H-2B provisions. Therefore, workers are protected from retaliation, including retaliation based on contact or consultation with an attorney or an employee of a legal assistance organization, or contact with labor unions, worker centers, and

community organizations, which frequently have the first contact with temporary foreign workers when they seek help to correct and/or report perceived violations of the H-2B provisions. This provision applies to oral complaints and complaints made internally to employers, and it applies to current, former and prospective workers. As provided in 29 CFR 503.20, make-whole relief would be available to victims of discrimination and retaliation under this paragraph.

This provision protects against discrimination and retaliation for asserting rights specific to the H-2B program. For example, if workers sought legal assistance in relation to their terms and conditions of employment, such as legal assistance relating to employer-provided housing because an employer charged for housing that was listed as free of charge in the job order, this would be a protected act; however, a routine landlord-tenant dispute may not fall under the protections of this section. This section provides protection to U.S. workers and H-2B workers alike. While H-2B workers are particularly vulnerable to retaliation and need protection against employer retaliatory acts, it is important to encourage all workers to come forward when there is a potential workplace violation. Therefore, the Departments clarify that § 655.20(n) applies equally to H-2B workers and U.S. workers.

o. Comply with the prohibitions against employees paying fees (§ 655.20(o)). Section 655.20(o), similarly to § 655.22(j) in the 2008 rule, prohibits employers and their attorneys, agents, or employees from seeking or receiving payment of any kind from workers for any activity related to obtaining H-2B temporary labor certification or employment, including recruitment costs. However, this provision does allow employers and their agents to receive reimbursement for fees that are primarily for the benefit of the

worker, such as passport fees, which can be used for personal travel or for travel to another job.

p. Contracts with third parties to comply with prohibitions (§ 655.20(p)). Section 655.20(p), similarly to § 655.22(g)(2) in the 2008 rule, requires that an employer that engages any agent or recruiter must prohibit in a written contract the agent or recruiter from seeking or receiving payments from prospective employees. DOL notes that the new requirements at § 655.9 of this interim final rule require disclosure of the employer's agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of prospective H-2B workers, whether in the U.S. or abroad, as well as the identity and geographic location of any persons or entities hired by or working for the recruiter and the agents or employees of those persons and entities. The Departments believe that public disclosure of the identity of recruiters and the entities for which they work is necessary to prevent abuse, and this issue is addressed under § 655.9. DOL will maintain a publicly available list of agents and recruiters who are party to such recruitment contracts, as well as a list of the identity and location of any persons or entities hired by or working for the recruiters to recruit prospective H-2B workers for the H-2B job opportunities offered by the employer.

The difference between § 655.9, which requires the employer to provide copies of such agreements to DOL when an employer files its Application for Temporary Employment Certification, and this provision's requirements is that the requirements in this provision are of an ongoing nature. The employer must always prohibit the seeking or collection of fees from prospective employees in any contract with third parties whom the employer engages to recruit international workers, and is required to provide a copy of such

existing agreements when the employer files its Application for Temporary Employment Certification. For employers' convenience, and to facilitate the processing of applications, the interim final rule contains the exact language of the required contractual prohibition that must appear in such agreements. Further guidance on how DOL interprets the employer obligations in § 655.20(o) and (p) regarding prohibited fees can be found in Field Assistance Bulletin No. 2011-2 (May 2011), available at http://www.dol.gov/whd/FieldBulletins/fab2011_2.htm.

The Departments recognize the complexities of recruiters using subcontractor recruiters and have accounted for this in § 655.20(p) by including language requiring the employer to contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, from seeking or receiving payments from any prospective employees. The specific language covers subcontractors. In addition, the required contractual prohibition applies to the agents and employees of the recruiting agent, and encompasses both direct and indirect fees.

q. Prohibition against preferential treatment of H-2B workers (§ 655.20(q)). Section 655.20(q), similarly to § 655.22(a) in the 2008 rule, prohibits employers from providing better terms and conditions of employment to H-2B workers than to U.S. workers. The substance of this provision is identical to the assurance found at § 655.18(a)(1) of this interim final rule, relating to the job order, and a discussion of it is set forth in the preamble to that section.

r. Non-discriminatory hiring practices § 655.20(r). Section 655.20(r), like § 655.22(c) of the 2008 rule, sets forth a non-discriminatory hiring provision; it clarifies that the

employer's obligation to hire U.S. workers continues throughout the period described in § 655.20(t). Under this provision, rejections of U.S. workers continue to be permitted only for lawful, job-related reasons. This section works together with § 655.20(q), which specifies that job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. Thus, for example, where an employer requires drug tests or criminal background checks for U.S. workers and does not require the same tests and background checks for H-2B workers, the employer has violated this provision. Additionally, where an employer conducts criminal background checks on prospective employees, in order to be lawful and job-related, the employer's consideration of any arrest or conviction history must be consistent with guidance from the Equal Employment Opportunity Commission (EEOC) on employer consideration of arrest and conviction history under Title VII of the Civil Rights Act of 1964. See EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, available at http://www.eeoc.gov/policy/docs/convict1.html; EEOC, Pre-Employment Inquiries and Arrest & Conviction, available at http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm. Thus, employers may reject U.S. workers solely for lawful, job-related reasons, and they must also comply with all applicable employment-related laws, pursuant to § 655.20(z).

s. Recruitment requirements (§ 655.20(s)). Section 655.20(s) requires employers to conduct required recruitment as described in §§ 655.40-.46, including any activities directed by the CO. Such required recruitment activities are discussed in the preamble to those sections.

t. Continuing obligation to hire U.S. workers § 655.20(t). Section 655.20(t) requires employers to hire qualified U.S. workers referred by the SWA or who respond to recruitment until 21 days before the date of need. The provision corrects the inadequacy in the 2008 rule, under which an employer is under no obligation to hire U.S. workers after submitting the recruitment report, which could occur almost four months before the first date of need. U.S. applicants – particularly unemployed workers – applying for the kinds of temporary positions typically offered by H-2B employers are often unable to make informed decisions about jobs several months in advance; it is far more likely that they are in need of a job beginning far sooner. In fact, many of these potential applicants may not even be searching for work as early as several months in advance and are therefore unlikely to see SWA job orders in the 10 days they are posted or the newspaper advertisements on the 2 days they are published in accordance with the 2008 rule's minimum recruitment requirements. This segment of the labor force cannot afford to make plans around the possibility of a temporary job several months in the future. The 2008 rule's recruitment and hiring structure simply cannot be reconciled with the Departments' obligation to protect U.S. workers and ensure that qualified U.S. applicants are unavailable for a job opportunity before H-2B workers are hired.

Requiring a priority hiring period until 21 days before the date of need is consistent with the DHS requirement that H-2B nonimmigrants not be admitted to the United States until 10 days before the date of need, see 8 CFR 214.2(h)(13)(i)(A), since it minimizes the possibility that a U.S. applicant could displace an H-2B nonimmigrant who has been recruited, traveled to the consulate, obtained a visa, or even begun inbound transportation to the worksite. At the same time, the 21-day provision still gives employers certainty

regarding the timing of and need for their efforts to recruit prospective H-2B workers. With regard to travel expenses, the 21-day cutoff will be sufficient to allow for the arrangement of inbound transportation without employers having to bear any risk of last-minute cancellations, pay premiums for refundable fares, or pay visa expenses that are ultimately not needed. Housing arrangements should not present an issue, as § 655.20(q) requires an employer to offer U.S. workers the same benefits that it is offering, intends to offer, or will provide to H-2B workers. If an employer intends to offer housing to H-2B workers, such housing must also be offered to all U.S. applicants who live outside the area of intended employment. Housing secured for workers can just as easily be occupied by U.S. workers as by H-2B workers, or some combination of U.S. and H-2B workers.

The 21-day provision also will prevent H-2B workers from being dismissed after beginning travel from their home to the consulate or even to the United States as the obligation to hire U.S. workers now ends 11 days before the earliest date an H-2B worker may be admitted to the United States. Additionally, in order to create appropriate expectations for potential H-2B workers, when an employer recruits foreign workers, it should put them on notice that the job opportunity will be available to U.S. workers until 21 days before the date of need; therefore, the job offer is conditional upon there being no qualified and available U.S. workers to fill the positions.

The Departments believe this 21-day requirement, which extends the duration of the U.S. worker referral period by as much as 3 months compared to the 2008 rule, is sufficient to protect the interests of U.S. workers. Further, the Departments note that the extended recruitment period is not the only provision of this interim final rule enhancing

U.S. applicants' access to vacancies: the number and breadth of recruitment vehicles in place (i.e., contact of previous workers, a national job registry, a 15-day job posting notice at worksites, among others) have also expanded. The worker protections contained in this interim final rule are intended to encourage U.S. applicants hired to remain on the job. However, provisions such as those found at § 655.20(y) (Abandonment/termination of employment) offer protection to employers from workers who might accept the offer of employment but who subsequently abandon the job, and § 655.20(y) similarly relieves the employer, under certain circumstances, of the responsibilities to provide transportation and to fulfill the three-quarter work guarantee obligation.

The Departments note that regardless of the time when the obligation to hire terminates, the H-2B employer has a high degree of certainty that it will have access to workers, whether from within or outside the United States. Further, the interim final rule's 21-day obligation-to-hire cutoff should provide employers with time to identify foreign workers if they are, in fact, needed and to initiate their travel without substantial uncertainty. However, the primary purpose of this provision is to ensure that available U.S. workers have a viable opportunity to apply for H-2B job opportunities and to facilitate the employment of these workers.

State laws that require employers in some industries to submit requests for background checks or drug testing for their employees 30 to 45 days before the date of need may affect the requirement that such employers continue to hire U.S. workers until 21 days before the date of need. A background check or drug test required for employment in a State, if listed in the job order, would be considered a bona fide job requirement, as long

as it was clearly disclosed in the job order and recruitment materials. An applicant who submitted an application for employment after a State-established deadline and was therefore unable to undergo such an evaluation would be considered not qualified for employment in that State. However, consistent with §§ 655.18(a)(2) and 655.20(e), such a requirement must be disclosed in the job order, and the employer would bear the responsibility of demonstrating that it is bona fide and consistent with the normal and accepted requirements imposed by non-H-2B employers in the same occupation and area of intended employment. Furthermore, employers cannot treat U.S. workers less favorably than foreign workers with regard to start date; employers may not conduct such screening for prospective H-2B workers at a later date if the employer does not provide the same late screening for U.S. workers who submit an application after a State-established deadline.

Finally, given that many employers' workforce needs vary throughout the season and they require fewer workers in slow months at the beginning and end of the season, the Departments wish to remind employers about the requirements of the three-fourths guarantee. Specifically, the guarantee begins on the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later. An employer cannot delay the three-fourths guarantee, such as by telling workers to come to work three weeks after the advertised first date of need, because the employer does not have a need for them at that time (but see the provisions applicable to employers in the seafood industry discussed in the preamble to § 655.15). This means that when workers present themselves at the place of employment on the advertised first date of need, the

three-fourths guarantee is triggered, whether or not the employer has sufficient full-time work for all of them to perform.

u. No strike or lockout (§ 655.20(u)). Section 655.20(u) modifies the no strike or lockout language in the 2008 rule to require employers to assure DOL that there is no strike or lockout at any of the employer's worksites in the area of intended employment for which the employer is requesting H-2B certification, rather than solely no strike or lockout in the positions being filled by H-2B workers, which is the requirement under § 655.22(b) of the 2008 regulations. If there is a strike or lockout at the worksite when the employer requests H-2B workers, the CO may deny the H-2B certification.

This provision is intended to decrease the chances that an unscrupulous employer will circumvent the regulatory requirement by transferring U.S. workers to fill positions vacated by striking workers and employing H-2B workers in the positions those U.S. workers vacated. The Departments believe that this extension will provide added protection for workers whose employers have multiple locations within a commuting distance where transferring employees among locations would be relatively easy.

With respect to annual layoffs that occur due to the end of the peak season, § 655.20(u) is not intended to include employer layoffs; § 655.20(v) addresses employer layoffs. Further, with respect to the ability of a CO to deny an application due to a strike or a lockout and whether that might complicate the application process and increase delays, unsuccessful applications, and last-minute refusals of H-2B workers, DOL does not anticipate that this will be a problem as long as employers do not seek approval of an Application for Temporary Employment Certification while there is a strike or lockout at the worksite.

v. No recent or future layoffs (§ 655.20(v)). Section 655.20(v) modifies the dates of impermissible layoffs of U.S. workers in § 655.22(i) of the 2008 rule, extending the period during which an H-2B employer must not lay off any similarly employed U.S. workers from 120 days after the date of need to the end of the certification period. Further, this section provides that H-2B workers must be laid off before any U.S. worker in corresponding employment. However, the provision specifically permits layoffs due to lawful, job-related reasons, such as the end of the peak season or a natural or manmade disaster, as long as, if applicable, the employer lays off its H-2B workers first.

w. Contact with former U.S. employees (§ 655.20(w)). Section 655.20(w) requires employers to contact former U.S. employees who worked for the employer in the occupation and at the place of employment listed on the Application for Temporary Employment Certification within the last year, including any U.S. employees who were laid off within 120 days before the date of need. This expands the 2008 rule's requirement at § 655.15(h) that employers contact only former employees who were laid off during the 120 days preceding the date of need. The employer is not required to contact those who were dismissed for cause or who abandoned the worksite. Note, however, that voluntary abandonment is different from a constructive discharge, which occurs when the "working conditions have become so intolerable that a reasonable person in the employee's position would have felt compelled to resign." Pennsylvania State Police v. Suders, 542 U.S. 129, 141 (2004). DOL also reminds employers that if qualified former employees apply during the recruitment period they, like all qualified U.S. applicants, must be offered employment.

x. Area of intended employment and job opportunity (§ 655.20(x)). Section 655.20(x) modifies § 655.22(l) of the 2008 rule by additionally prohibiting the employer from placing a worker in a job opportunity not specified on the Application for Temporary Employment Certification, clarifying that an H-2B worker is only permitted to work in the job and in the location that OFLC approves unless the employer obtains a new temporary labor certification.

y. Abandonment/termination of employment (§ 655.20(y)). Section 655.20(y), which is largely consistent with the notification requirement in § 655.22(f) of the 2008 rule, requires that employers notify OFLC within 2 days of the separation of an H-2B worker or worker in corresponding employment if the separation occurs before the end date certified on the Application for Temporary Employment Certification and notify DHS. The section also deems that an abandonment or abscondment begins after a worker fails to report for work without the employer's consent for 5 consecutive working days, and adds language relieving the employer of the subsequent transportation requirements under § 655.22(j) and 29 CFR 503.16(j) if the separation is due to a worker's voluntary abandonment. Additionally, the section clarifies that if a worker voluntarily abandons employment or is terminated for cause, an employer is not required to guarantee three-fourths of the work in the worker's final partial 6- or 12-week period, as described in § 655.22(f) and 29 CFR 503.16(f).

This section provides employers with guidance regarding their notification obligations, which is informed by DOL's enforcement experience with the § 655.22(f) of the 2008 rule, under which neither WHD nor employers expressed confusion or concerns since its introduction in the 2008 rule. DOL's enforcement experience under the H-2A program

suggests that the identical provision in its H-2A regulations has not resulted in confusion for H-2A employers, many of whom also participate in the H-2B program. The written notification required under 20 CFR 655.20(y) must be provided by one of the following means:

1. By electronic mail (e-mail) to: TLC.Chicago@dol.gov mailbox, or
2. Employers without internet access may instead send written notification by:

(a) Facsimile to: (312) 886-1688; or

(b) U.S. Mail to: U.S. Department of Labor, Office of Foreign Labor Certification, Chicago National Processing Center, Attention: H-2B Program Unit, 11 West Quincy Court, Chicago, IL 60604-2105

In order to ensure prompt and effective processing of the notification, DOL requests that the employer's notice include at a minimum the following information:

1. The reason(s) for notification or late notification, if applicable;
2. The H-2B temporary employment certification application Case Number(s);
3. The employer's name; address, telephone number, and Federal Employer Identification Number (FEIN).
4. The date of abandonment or separation from employment; and
5. The number of H–2B worker(s) and/or other worker(s) in corresponding employment who abandoned or was/were separated from employment, and the name(s) of each such H–2B worker and/or worker in corresponding employment and each employee's last known address.

The Chicago NPC will also accept a copy of the written notification of abandonment or separation from employment submitted by the employer to DHS as long as it contains all

of the information listed above and is submitted to the Chicago NPC via one of the means enumerated in this IFR. Employers must retain records in accordance with documentation retention requirements outlined at 29 CFR 503.17. DOL penalties for this violation are different from DHS fines. The notification requirement serves different purposes for DHS and DOL, and DOL concludes it is fair and consistent to treat this violation in the same way it treats other violations of employers' H-2B obligations.

The Departments emphasize that the notification requirements in § 655.20(y) are not intended to be used as threats against vulnerable foreign workers to keep them in abusive work situations. Further, the Departments caution that coercing workers into performing labor by threatening potential deportation or immigration enforcement may violate anti-trafficking laws. The Departments remind the public that DHS regulations already compel employers to notify DHS of early separations to assist the agency in keeping track of foreign nationals in the United States. See 8 CFR 214.2(h)(6)(i)(F), (h)(11)(i). Employers should note that DHS has its own notification requirements under 8 CFR 214.2(h)(6)(i)(F) that employers must comply with if: an H-2B worker fails to report for work within 5 work days after the employment start date; the H-2B labor or services for which H-2B workers were hired were completed more than 30 days early; or an H-2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired. Both OFLC's (which may share information with WHD) and DHS's awareness of early separations are critical to program integrity, allowing the agencies to appropriately monitor and audit employer actions. If not for proper notification, employers with histories of frequent and

unjustified early dismissals of workers could continue to have an Application for Temporary Employment Certification certified and an H-2B Petition approved.

With respect to whether a termination actually was for cause, DOL reminds the public that WHD, as part of its enforcement practices, may investigate conditions behind the early termination of foreign workers to ensure that the dismissals were not affected merely to relieve an employer of its outbound transportation and three-quarter guarantee obligations. Further, § 655.20(n) already protects workers from a dismissal in retaliation for protected activities. However, some employer personnel rules set the abscondment threshold at 3 days. This regulation does not intrude upon or supersede employer attendance policies. The requirement that an employer provide appropriate notification if a worker fails to report for 5 consecutive working days does not preclude an employer from establishing a different standard for dismissing its workers. Further, the Departments do not intend the H-2B regulations to provide job protection to workers in the case of illness or injury that may result in absences and considers such determinations beyond its authority. The rule leaves it largely to employers to determine the worker behaviors that trigger a dismissal for cause, beyond the protected activities described in § 655.20(n) and the requirement in § 655.20(z) that the employer comply with all applicable employment-related laws.

z. Compliance with applicable laws (§ 655.20(z)). Section 655.20(z) requires H-2B employers to comply with all other applicable Federal, State, and local employment laws, similar to the 2008 rule's provision at § 655.22(d), and it explicitly references 18 U.S.C. 1592(a), which prohibits employers from holding or confiscating workers' immigration documents such as passports or visas under certain circumstances. Because the

prohibition must include employers' attorneys and agents in order to achieve the intended worker protection, appropriate language is included in § 655.20(z) of this interim final rule to reflect that coverage.

aa. Disclosure of foreign worker recruitment (§ 655.20(aa)). Section 655.20(aa) requires the employer and its attorney and/or agents to provide a copy of any agreements with an agent or recruiter whom it engages or plans to engage in the recruitment of prospective H-2B workers under this Application for Temporary Employment Certification (§ 655.9), at the time of filing the application (§ 655.15(a)), as well as to disclose those persons and entities hired by or working for the recruiter or agent, and any of their agents or employees who recruit prospective foreign workers for the H-2B job opportunities offered by the employer. The Departments are adding this obligation to the list of Assurances and Obligations in this interim final rule, as it is a critical obligation that will significantly enhance the recruitment process, as explained in the preamble to §§ 655.9 and 655.15.

bb. Cooperation with investigators (§ 655.20(bb)). Section 655.20(bb) requires the employer to cooperate with any DOL employee who is exercising or attempting to exercise DOL's authority pursuant to 8 U.S.C. 1184(c), INA section 214(c). Including this provision in the list of employer obligations will facilitate enforcement if an employer fails to cooperate in any administrative or enforcement proceeding, and if that failure is determined to be a violation under these regulations. Requirements for employer cooperation with WHD investigations are set forth more fully in 29 CFR 503.25.

E. Processing of an Application for Temporary Employment Certification

1. § 655.30 Processing an application and job order

Under this provision, upon receipt of an Application for Temporary Employment Certification and copy of the job order, the CO will promptly conduct a comprehensive review. The CO's review of the Application for Temporary Employment Certification, in most cases[22], will no longer entail a determination of temporary need following H-2B Registration. Instead, this aspect of the CO's review is limited to verifying that the employer previously submitted a request for and was granted H-2B Registration, and that the terms of the Application for Temporary Employment Certification have not significantly changed from those approved under the H-2B Registration.

The interim final rule also requires the use of next day delivery methods, including electronic mail, for any notice or request sent by the CO requiring a response from the employer and the employer's response to such a notice or request. This provision also contains a long-standing program requirement that the employer's response to the CO's notice or request must be sent by the due date or the next business day if the due date falls on a Saturday, Sunday, or a Federal holiday.

2. § 655.31 Notice of deficiency

This provision requires the CO to issue a formal Notice of Deficiency where the CO determines that the Application for Temporary Employment Certification and/or job order contains errors or inaccuracies, or fails to comply with applicable regulatory and program requirements. The CO must issue the Notice of Deficiency within 7 business

[22] As provided in the discussion of § 655.11, each employer filing an Application for Temporary Employment Certification is required under the interim final rule to establish temporary need through the registration process. However, in limited circumstances where the employer has applied for a temporary labor certification on an emergency basis under emergency procedures in § 655.17 without an approved H-2B Registration, the CO may be required to also make a determination of temporary need.

days from the date on which the Chicago NPC receives the employer's Application for Temporary Employment Certification and job order. Once the CO issues a Notice of Deficiency to the employer, the CO will provide the SWA and the employer's attorney or agent, if applicable, a copy of the notice. The Notice of Deficiency will include the specific reason(s) why the Application for Temporary Employment Certification and/or job order is deficient, identify the type of modification necessary for the CO to issue a Notice of Acceptance, and provide the employer with an opportunity to submit a modified Application for Temporary Employment Certification and/or job order within 10 business days from the date of the Notice of Deficiency. The Notice of Deficiency will also inform the employer that it may, alternatively, request administrative review before an Administrative Law Judge (ALJ) within 10 business days of the date of the Notice of Deficiency and instruct the employer how to file a request for such review in accordance with the administrative review provision under this subpart. Finally, the Notice of Deficiency will inform the employer that failing to timely submit a modified Application for Temporary Employment Certification and/or job order, or request administrative review, will cause the CO to deny that employer's Application for Temporary Employment Certification. The CO may issue multiple Notices of Deficiency, if necessary, to provide the CO with the needed flexibility to work with employers seeking to resolve deficiencies that are preventing acceptance of their Application for Temporary Employment Certification. For example, there are situations in which a response to a Notice of Deficiency raises other issues that must be resolved, requiring the CO to request more information. The CO will have the ability to address these situations.

3. § 655.32 Submission of a modified application or job order

The interim final rule permits the CO to deny any Application for Temporary Employment Certification where the employer neither submits, following request by the CO, a modification nor requests a timely administrative review, and such a denial cannot be appealed. The interim final rule also requires the CO to deny an Application for Temporary Employment Certification if the modification(s) made by the employer do not comply with the requirements for certification in § 655.50. A denial of a modified Application for Temporary Employment Certification may be appealed.

If the CO deems a modified application acceptable, the CO will issue a Notice of Acceptance and require the SWA to modify the job order in accordance with the accepted modification(s), as necessary. In addition to requiring modification before the acceptance of an Application for Temporary Employment Certification, this provision permits the CO to require the employer to modify a job order at any time before the final determination to grant or deny the Application for Temporary Employment Certification if the CO determines that the job order does not contain all the applicable minimum benefits, wages, and working conditions. The CO's ability to require modification(s) of a job order strengthens H-2B program integrity. In some cases, information may come to the CO's attention after acceptance indicating that the job order does not contain all the applicable minimum benefits, wages, and working conditions that are required for certification. This provision enables the CO to ensure that the job order meets all regulatory requirements.

The provision requires the CO to update the electronic job registry to reflect the necessary modification(s) and to direct the SWA(s) in possession of the job order to

replace the job order in their active files with the modified job order. The provision also requires the employer to disclose the modified job order to all workers recruited under the original job order or Application for Temporary Employment Certification.

4. § 655.33 Notice of acceptance

The interim final rule requires the CO to issue a formal notice accepting the employer's Application for Temporary Employment Certification for processing. Specifically, the CO will send a Notice of Acceptance to the employer (and the employer's attorney or agent, if applicable), with a copy to the SWA, within 7 business days from the CO's receipt of the Application for Temporary Employment Certification or modification, provided that the Application for Temporary Employment Certification and job order meet all the program and regulatory requirements.

The Notice of Acceptance directs the SWA: (1) to place the job order in intra- and interstate clearance, including (i) circulating the job order to the SWAs in all other States listed on the employer's Application for Temporary Employment Certification and job order as anticipated worksites and (ii) to any States to which the CO directs the SWA to circulate the job order; (2) to keep the job order on its active file and continue to refer U.S. workers to the employer until the end of the recruitment period defined in § 655.40(c), as well as transmit those instructions to all other SWAs to which it circulates the job order; and (3) to circulate a copy of the job order to certain labor organizations, where the job classification is traditionally or customarily unionized.

The Notice of Acceptance will direct the employer to recruit U.S. workers in accordance with employer-conducted recruitment provisions in §§ 655.40-655.46, as well as to conduct any reasonable additional recruitment the CO directs, consistent with §

655.46, within 14 calendar days from the date of the notice. The Notice of Acceptance will inform the employer that such employer-conducted recruitment is required in addition to SWA circulation of the job order in intrastate and interstate clearance under § 655.16. In addition, the Notice of Acceptance will require the employer to submit a written report of its recruitment efforts as specified in § 655.48. Finally, the Notice of Acceptance may require the employer to contact appropriate designated community-based organizations with the notice of the job opportunity.

5. § 655.34 Electronic job registry

The CO will post employers' H-2B job orders, including modifications and/or amendments approved by the CO, on an electronic job registry to disseminate the job opportunities to the widest audience possible. The electronic job registry was initially created to accommodate the posting of H-2A job orders, and DOL will expand it to include H-2B job orders. DOL will inform the public when the electronic job registry is available for the H-2B program. Once the registry is operational, the CO will post the job orders on the electronic job registry, after accepting an Application for Temporary Employment Certification, for the duration of the recruitment period, as provided in § 655.40(c). Although a job order may be circulated among multiple SWAs, only the job order placed with the initial SWA, which identifies all work locations, will be posted on the electronic job registry. The electronic job registry will be accessible via the internet to anyone seeking employment. We will work with the SWAs to devise procedures to further publicize the electronic job registry. At the conclusion of the recruitment period, we will maintain the job order on the electronic job registry in inactive status, making the information available for a variety of other public examination purposes.

6. § 655.35 Amendments to an application or job order

This provision permits an employer to request to amend its Application for Temporary Employment Certification and/or job order to increase the number of workers, to change the period of employment, or to make other changes to the application, before the CO makes a final determination to grant or deny the Application for Temporary Employment Certification. The provision permits an employer to seek such amendments only before certification, not after certification. This provision provides clarity to employers and workers alike of the limitations on and processes for amending an Application for Temporary Employment Certification and the need to inform any U.S. workers already recruited of the changed job opportunity. The provision recognizes that business is not static and employers can face changed circumstances from varying sources – from climatic conditions to cancelled contracts. Accordingly, we include this provision to provide some flexibility to enable employers to assess and respond to such changes.

In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. We do not intend this provision to allow employers to amend their applications beyond the parameters contained in § 655.12; rather, part of the CO's review will involve comparing the requested amendments to the content of the approved H-2B Registration.

We have included certain limitations to ensure that these job opportunities are not misrepresented or materially changed as a result of such amendments. We expect that these parameters, which limit the extent of the change in number of workers or period of need permitted, and the CO review process to control the frequency with which post-

acceptance and pre-certification job order amendments are requested or approved and maintain the integrity of the H-2B Registration process.

Specifically, the employer may request an amendment of the Application for Temporary Employment Certification and/or job order to increase the number of workers initially requested. However, amendments to increase the number of workers must be limited to no more than 20 percent (50 percent for employers requesting fewer than 10 workers) above the number specified in the H-2B Registration. In addition, the provision permits minor changes to the period of employment at any time before the CO's final determination. However, such amendments to the period of employment may not exceed 14 days and may not cause the total period to exceed 9 months, except in the event of a demonstrated one-time occurrence. This limitation to 14 days is designed to ensure that the employer had a legitimate need before initiating the registration process, and accurately estimated its dates of need. Although an H-2B registration covers the entire period of need for up to 3 years, this provision, by contrast, allows an employer to request a change of up to 14 days from the from the period listed on its Application for Temporary Employment Certification, allowing for up to 2 such changes from the initial dates provided in the registration, as long as the deviations do not result in a total period of need exceeding 9 months.

Under this provision, the employer must request any amendment(s) to the Application for Temporary Employment Certification and/or job order in writing and any such amendment(s) will not be effective until approved by the CO. After reviewing an employer's request to amend its Application for Temporary Employment Certification and/or job order, the CO will approve these changes if the CO determines the proposed

amendment(s) are justified and will not negatively affect the CO's ability to make a timely temporary labor certification determination, including the ability to adequately test the U.S. labor market. Changes will not be approved that affect the underlying H-2B registration. Once the CO approves an amendment to the Application for Temporary Employment Certification and/or job order, the CO will submit to the SWA any necessary change(s) to the job order and update the electronic job registry to reflect the approved amendment(s).

F. Recruitment Requirements

This interim final rule maintains and expands some of the requirements relating to the recruitment of U.S. workers that were contained in the 2008 rule. The Departments conclude that, with expanded requirements, including the requirement that the employer contact its former U.S. workers and the requirement to conduct additional recruitment at the discretion of the CO, recruitment is more likely to identify qualified and available U.S. workers than under the 2008 rule and will better protect against the potential for adverse effect.

1. § 655.40 Employer-conducted recruitment

Unlike under the 2008 rule, this interim final rule requires that the employer conduct recruitment of U.S. workers after its Application for Temporary Employment Certification is accepted for processing by the CO.

Paragraph (a) contains the general requirement that employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the Application for Temporary Employment Certification and provides that U.S. applicants can be rejected only for lawful job-related

reasons. This general requirement to test the U.S. labor market is needed to ensure that the importation of foreign workers will not have an adverse effect on U.S. workers.

Paragraph (b) requires that employers complete specific recruitment steps outlined in §§ 655.42 through 655.46 within 14 days from the date of the Notice of Acceptance unless otherwise instructed by the CO. This paragraph further requires that all employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48. We conclude that a 14-day recruitment period provides an appropriate timeframe for the employer to conduct the recruitment described in §§ 655.42 through 655.46, especially when combined with the longer SWA referral period discussed further below.

Paragraph (c) requires that employers must continue to accept referrals and applications of all U.S. applicants interested in the position until 21 days before the date of need. Separate from the employer-conducted recruitment, this interim final rule at § 655.16 requires the SWA, upon acceptance of the job order and Application for Temporary Employment Certification by the CO, to circulate the job order, and § 655.34 of this interim final rule provides that the CO will post the job order to the electronic job registry. The requirement that employers continue to accept all qualified U.S. applicants referred for employment by the SWA or who apply for the position directly with the employer until 21 days before the date of need balances the need to ensure an adequate test of the U.S. labor market without requiring the employer to incur any additional costs in conducting independent recruitment efforts beyond the sources and the 14 days specified in the Notice of Acceptance.

Paragraph (d) provides that where the employer wishes to conduct interviews with U.S. workers, it must do so by telephone or at a location where workers can participate at little or no cost to the workers. This provision does not require employers to conduct employment interviews under this provision. Rather, employers are barred from offering preferential treatment to potential H-2B workers, including any requirement to interview for the job opportunity. In addition, this interim final rule ensures that employers conduct a fair labor market test by requiring employers that conduct interviews to conduct them by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Accordingly, an employer who requires a U.S. worker to undergo an interview must provide such worker with a reasonable opportunity to meet such a requirement. The purpose of these requirements is to ensure that that the employer does not use the interview process to the disadvantage of U.S. workers.

To ensure no adverse effect to U.S. workers, paragraph (e) requires that the employer must consider all U.S. applicants for the job opportunity and that the employer must accept and hire any applicants who are qualified and who will be available for the job opportunity.

Paragraph (f) requires the employer to prepare a recruitment report meeting the requirements of § 655.48.

2. <u>§ 655.41 Advertising Requirements</u>

Section 655.41 of this interim final rule requires that all employer recruitment contain terms and conditions of employment no less favorable than those offered to the

prospective H-2B workers and provide the terms and conditions of employment necessary to apprise U.S. workers of the job opportunity.

Paragraph (a) requires that all recruitment must, at a minimum, comply with the assurances applicable to job orders as set forth in § 655.18(a). While this requires advertising to conform to the job order assurances and include the minimum terms and conditions of employment, it does not require an advertisement to include the full text of the assurances applicable to job orders. Consistent with § 655.18(a), all job qualifications and requirements listed in the employer's advertising must be bona fide and consistent with normal and accepted job qualifications and requirements.

Paragraph (b) provides a list of the minimum terms and conditions of employment that must be included in all advertising, including a requirement that the employer make the appropriate disclosure when it is offering or providing board, lodging or facilities, as well as identify any deductions, if applicable, that will be applied to the employee's pay for the provision of such accommodations. In requiring that advertisements comply with the assurances from the job order and meet minimum content requirements, but not requiring that advertisements contain all of the text of the assurances from the job order, we strike a balance between the employer's cost in placing potentially lengthy advertisements and the need to ensure that entities disclose all necessary information to all potential applicants. In addition, as a continuing practice in the program, employers will be able to use abbreviations in the advertisements so long as the abbreviation clearly and accurately captures the underlying content requirement.

In order to help employers comply with these requirements, we provide below specific language which is sufficient on the issues of transportation; the three-fourths guarantee;

and tools, equipment, and supplies to apprise U.S. applicants of those required items in the advertisement. As provided above, the employer may also abbreviate some of this language so long as the underlying guarantee can be clearly understood by a prospective applicant. The following statements in an employer's advertisements are permitted:

> 1. Transportation: Transportation (including meals and, to the extent necessary, lodging) to the place of employment will be provided, or its cost to workers reimbursed, if the worker completes half the employment period. Return transportation will be provided if the worker completes the employment period or is dismissed early by the employer. 2. Three-fourths guarantee: For certified periods of employment lasting fewer than 120 days: The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 6-week period of the total employment period. For certified periods of employment lasting 120 days or more: The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 12-week period of the total employment period. 3. Tools, equipment and supplies: The employer will provide workers at no charge all tools, supplies, and equipment required to perform the job.

The interim final rule at § 655.41(b)(14) requires all employer advertisements to direct applicants to apply for the job at the nearest SWA office because we conclude that allowing SWAs to apprise job applicants of the terms and conditions of employment is an essential aspect of ensuring an appropriate labor market test. However, notwithstanding the many benefits of being referred to the job opportunity by the SWA, U.S. workers may contact the employer directly, and the interim final rule at § 655.41(b)(1) requires that employers include their contact information to enable such direct contact. We anticipate that the enhanced role of the SWA in employee referrals and the additional duties inherent in that role will be offset through the elimination of the requirement for the SWA to conduct employment verification activities as discussed further below.

3. <u>§ 655.42 Newspaper advertisements</u>

As under the 2008 rule, this interim final rule at § 655.42(a) requires the employer to place two advertisements in a newspaper of general circulation for the area of intended employment that is appropriate to the occupation and the workers likely to apply for the job opportunity, at least one appearing in a Sunday edition. In addition this paragraph requires the employer to place the advertisement(s) in a language other than English where the CO determines it is appropriate. Further, we eliminate the employer's option under the 2008 rule to replace one of the newspaper advertisements with an advertisement in a professional, trade, or ethnic newspaper.

Newspapers of general circulation remain an important source for recruiting U.S. workers, particularly those interested in positions typically found in the H-2B program. Low-wage workers are less likely to have internet access than more skilled workers, and are thus more likely to search for jobs using traditional means. Particularly given that the CO has authority to require the newspaper advertisement to be published in a language other than English, newspapers continue to be a valuable source for recruitment. In addition, newspaper advertisements are also recognized as information sources likely to generate informal, word of mouth referrals. No single alternative method of advertising uniformly applies to the variety of H-2B job opportunities or is likely to reach as broad a potential audience for these types of job opportunities.

Paragraph (b) provides the CO with discretion to direct the employer, in place of a Sunday edition, to advertise in the regularly published daily print edition with the widest circulation in the area of intended employment if the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition. This provision is similar to the 2008 rule, which required an employer to advertise in the regularly published daily

edition with the widest circulation in the area of intended employment if the job opportunity was located in such an area.

Paragraph (c) provides that the newspaper advertisements must meet the requirements in § 655.41.

Paragraph (d) requires the employer to maintain documentation of its newspaper advertisements in the form of copies of newspaper pages (with date of publication and full copy of the advertisement), tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication furnished by the newspaper containing the text of the printed advertisements and the dates of publication, consistent with the document retention requirements in § 655.56. It further requires that if the advertisement was required to be placed in a language other than English, the employer must maintain a translation and retain it in accordance with § 655.56.

4. <u>§ 655.43 Contact with former U.S. employees</u>

This provision requires employers to make reasonable efforts to contact by mail or other effective means its former U.S. workers who were employed by the employer in the same occupation at the place of employment during the previous year before the date of need listed in the <u>Application for Temporary Employment Certification</u>. This requirement expands the 2008 rule's requirement that employers contact former U.S. workers who have been laid off within 120 days of the employer's date of need. However, employers are not required to contact U.S. workers who were terminated for cause or who abandoned the worksite, as defined in § 655.20(y). The Departments believe that this provision will help ensure that the greatest number of U.S. workers,

particularly those that have previously held these positions, have awareness of and access to these job opportunities.

Each employer must provide its former U.S. employees a full disclosure of the terms and conditions of the job order, and solicit their return to the job. Employers will be required to maintain documentation to be submitted in the event of an audit or investigation sufficient to prove contact with its former employees consistent with document retention requirements under § 655.56. This documentation may consist of a copy of a form letter sent to all former employees, along with evidence of its transmission (postage account, address list, etc.).

Although the requirement focuses on a longer period of time than the requirement under the 2008 rule, it is unlikely that it will impose a significantly greater burden on employers. Typically, employers will have laid off seasonal or temporary U.S. workers at the end of the period of need, which was up to 10 months under the 2008 rule. This means that such workers are those whom the employer would have been required to contact under § 655.15(h) under the 2008 rule. If for some reason, the employer did lay off some workers who were hired to work during the employer's period of temporary need, before the end of the period of need — e.g., additional workers who were hired for a period of peakload need within the longer period of temporary need, the Departments believe that it would be most appropriate to give those workers the first opportunity to take the jobs. Generally, however, there will be little practical difference between the operation of the previous requirement and the operation of this requirement in the interim final rule except perhaps for seasonal jobs. In a seasonal program, reaching back to contact former employees who were employed over a cycle of a full year would be the

minimum amount of time necessary to capture all of the seasonal activities for which H-2B workers are sought. For example, an oceanfront resort employer hires workers at the start of its season in May and releases them in September. The employer then seeks H-2B workers the following March, more than 60 days before the usual date of need. Reaching that particular workforce requires the employer to reach back to the time those employees were hired—the previous May—to ensure that the group of employees most likely to return to the employment are given the opportunity to do so.

The Departments recognize that collective bargaining agreements may require the employer to contact laid-off employees in accordance with specific terms governing recall and a recall period. The requirement in this section that the employer contact former employees employed by the employer during the prior year would not substitute for the terms in a collective bargaining agreement. The employer is separately obligated to comply with the terms and conditions of the bargaining agreement, which may include recall provisions that cover workers employed by the employer beyond the prior year.

The Departments also recognize that some unscrupulous employers may use termination as a means of retaliating against workers who complain about unlawful treatment or exercise their rights under the program. However, the requirement in this interim final rule that each employer affirmatively attest that it has not engaged in unfair treatment as defined in § 655.20(n), i.e., that it has not retaliated against complaining employees, acts as a backstop against this prohibited activity and the possibility that an employer would be released from contacting such workers.

5. <u>§ 655.44</u>

[Reserved]

6. § 655.45 Contact with bargaining representative, posting requirements, and other contact requirements

Paragraph (a) of this section requires employers that are party to a CBA to provide written notice to the bargaining representative(s) of the employer's employees in the job classification in the area of intended employment by providing a copy of the Application for Temporary Employment Certification and the job order. The employer must maintain documentation that the application and job order were sent to the bargaining representative(s). This requirement will provide that each employer's existing U.S. workers receive timely notice of the job opportunities, thereby increasing the likelihood that those workers will apply for the available positions for the subsequent temporary period of need, and other U.S. workers, possibly including former workers, will be more likely to learn of the job opportunities as well. This paragraph further requires such employers to include information in their recruitment reports that confirms that the bargaining representative(s) was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

Paragraph (b) requires that, where there is no bargaining representative of the employer's employees, the employer must post a notice to its employees of the job opportunities for at least 15 consecutive business days in at least two conspicuous locations at the place of intended employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which work will be performed by the H-2B workers. Web posting can fulfill this requirement in some circumstances.

The posting of the notice at the employer's worksite, in lieu of formal contact with a representative when one does not exist, is intended to provide that all of the employer's U.S. workers are afforded the same access to the job opportunities for which the employer intends to hire H-2B workers. In addition, the posting of the notice may result in the sharing of information between the employer's unionized and nonunionized workers and therefore result in more referrals and a greater pool of qualified U.S. workers. This interim final rule provides a degree of flexibility for complying with this requirement; specifically, the regulation includes the language "or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers." This permits the employer to devise an alternative method for disseminating this information to the employer's employees, for example, by posting the notice in the same manner and location as for other notices, such as safety and health occupational notices, that the employer is required by law to post. This provision further provides that electronic posting, such as displaying the notice prominently on any internal or external Web site that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as the posting otherwise meets the requirements of this section. Finally, this paragraph requires the notice to meet the requirements of § 655.41 and that the employer maintain a copy of the posted notice and identify where and when it was posted in accordance with §655.56.

Paragraph (c) provides, in addition to the requirements for notification to bargaining representatives or employees in this section, that the CO may also require the employer to contact community-based organizations to disseminate the notice of the job opportunity.

Community-based organizations are an effective means of reaching out to domestic workers interested in specific occupations. ETA administers our nation's public exchange workforce system through a series of One-Stop Career Centers. These One-Stop Centers provide a wide range of employment and training services for workers through job training and outreach programs such as job search assistance, job referral and job placement services, and also provide recruitment services to businesses seeking workers. Community-based organizations with employment programs including workers who might be interested in H-2B job opportunities have established relationships with the One-Stop Career Center network. The One-Stop Center in or closest to the area of intended employment will be, in most cases, the designated point of contact the CO will give employers to use to provide notice of the job opportunity. This provides the employer with access not only to the community-based organization, but to a wider range of services of assistance to its goal of meeting its workforce needs. This contact is to be made when designated specifically by the CO in the Notice of Acceptance as appropriate to the job opportunity and the area of intended employment.

We note that, not unlike additional recruitment (discussed below), contact with community-based organizations is intended to broaden the pool of potential applicants and assist the many unemployed U.S. workers with finding meaningful job opportunities. These organizations are especially valuable because they are likely to serve those workers in greatest need of assistance in finding work and individuals who may be seeking positions in H-2B occupations that require little or no specialized knowledge. Although we will not require each employer to make this type of contact, this provision, where

directed by the CO, will assist with fulfilling the intent of the H-2B program and enhancing the integrity of the labor market test.

7. § 655.46 Additional employer-conducted recruitment

Where the CO determines that the employer-conducted recruitment described in §§ 655.42 through 655.45 is not sufficient to attract qualified U.S. workers who are likely to be available for a job opportunity, § 655.46 of this interim final rule provides the CO with discretion to require the employer to engage in additional reasonable recruitment activities. Paragraph (a) provides the CO with discretion to order additional reasonable recruitment where the CO has determined that there is a likelihood that U.S. workers are qualified and who will be available for the work, including, but not limited to, where the job opportunity is located in an Area of Substantial Unemployment. This discretion may be exercised, including in Areas of Substantial Unemployment where appropriate, where additional recruitment efforts will likely result in more opportunities for and a greater response from available and qualified U.S. workers. In addition, we recognize that the increased rate of technological innovation, including its implications for communication of information about job opportunities, is changing the way many U.S. workers search for and find jobs. In part due to these changes, the inclusion of this requirement is intended to allow the CO flexibility to keep pace with the ever-changing labor market trends.

Areas of Substantial Unemployment by their nature have a higher likelihood of worker availability; DOL's recognition of worker availability in these areas is a strong indicator that these open job opportunities may have more receptive potential populations. However, Areas of Substantial Unemployment are only one example of a situation in which the CO has discretion to order additional recruitment. This discretion

permits DOL to ensure the appropriateness and integrity of the labor market test and determine the appropriate level of recruitment based on the specific situation. The COs (with advice from the SWAs, which are familiar with local employment patterns and real-time market conditions), are well-positioned to judge where additional recruitment may or may not be required as well as the sources that should be used by the employer to conduct such additional recruitment. It is also within the CO's discretion to determine that such additional efforts are unlikely to result in additional meaningful applications for the job opportunity.

Additional positive recruitment under this paragraph will be conducted in addition to, and occur within the same time period as, the circulation of the job order and the other mandatory employer-conducted recruitment described above. Thus, additional recruitment will not result in any delay in certification.

Paragraph (b) provides that, if the CO elects to require additional recruitment, the CO will describe the number and type of additional recruitment efforts required. This paragraph also provides a non-exclusive list of the types of additional recruitment that may be required by the CO, including, where appropriate: advertising on the employer's Web site or another Web site; contact with additional community-based organizations that have contact with potential worker populations; additional contact with labor unions; contact with faith-based organizations; and reasonable additional print advertising. When assessing the appropriateness of a particular recruitment method, the CO will take into consideration all options at her/his disposal, including relying on the SWA experience and expertise with local labor markets, where appropriate, and will consider both the cost and the likelihood that the additional recruitment will identify qualified and available

U.S. workers, and where appropriate opt for the least burdensome method(s). CO-ordered efforts to contact community-based organizations and/or One-Stop Career Centers under this section are in addition to the requirements in §§ 655.16 and 655.45.

Paragraph (c) provides that, where the CO requires additional recruitment, the CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the additional recruitment requirements were met. Documentation must be maintained as required in § 655.56.

8. <u>§ 655.47 Referrals of U.S. workers</u>

Section 655.47 of this interim final rule requires that SWAs refer for employment only individuals who have been informed of the material terms and conditions of the job opportunity and are qualified and will be available for employment. Unlike the 2008 rule, this interim final rule does not require that the SWAs conduct employment (I-9) eligibility verification.

In light of limited resources, we have determined that the requirement under the 2008 rule that SWAs conduct employment eligibility verification of job applicants was duplicative of the employer's responsibility under the INA. In addition, the INA provides that SWAs may, but are not required to, conduct such verification for those job applicants they refer to employers. DHS regulations permit employers to rely on the employment eligibility verification voluntarily performed by a State employment agency in certain limited circumstances.

The elimination of the requirement that SWAs conduct employment eligibility verification will allow the SWAs to focus their staff and resources on ensuring that U.S. workers who come to them are apprised of job opportunities for which the employer

seeks to hire H-2B workers, which is one of the basic functions of the SWAs under their foreign labor certification grants, and to ensure such workers are qualified and available for the job opportunities. This does not mean that every referral must be assisted by SWA staff. To the contrary, many H-2B referrals are not staff-assisted but are instead self-referrals (e.g., electronic job matching systems), and we have no intention of interfering with the current processes established by most SWAs to handle these job orders, since the material terms and conditions of employment will be available for self-review by U.S. applicants. However, to the extent that SWA staff is directly involved in a referral, we expect that the referrals made would be only of qualified workers. If staff are directly involved in the screening process, SWAs will be required to ascertain that the unemployed U.S. applicants who request referral to the job opportunity are sufficiently informed about the job opportunity, including the start and end dates of employment, and that they commit to accepting the job offer if extended by the employer. We do not expect this to be an additional burden on SWA staff.

The Departments do not presume that the judgment of the SWAs as to an applicant's qualifications is irrebuttable or a substitute for the employer's business judgment with respect to any candidate's suitability for employment. However, to the extent that the employer does not hire a SWA referral who was screened and assessed as qualified, the employer will have a heightened burden to demonstrate to DOL that the applicant was rejected only for lawful, job-related reasons.

9. <u>§ 655.48 Recruitment report</u>

Consistent with the requirements of the 2008 rule, paragraph (a) continues to require the employer to submit to the Chicago NPC a signed recruitment report. Unlike the 2008

rule, however, this interim final rule requires the employer to send the recruitment report on a date specified by the CO in the Notice of Acceptance instead of at the time of filing its Application for Temporary Employment Certification. This change accommodates the new recruitment model under this interim final rule under which the employer does not begin its recruitment until directed by the CO in the Notice of Acceptance. In addition, paragraph (a) clarifies that where recruitment is conducted by a job contractor or its employer-client, both joint employers must sign the recruitment report, consistent with § 655.19(e).

Paragraph (a) further details the information the employer is required to include in the recruitment report, including the recruitment steps undertaken and their results, as well as other pertinent information. The provision requires the employer to provide the name and contact information of each U.S. worker who applied or was referred for the job opportunity. This reporting allows DOL to ensure the employer has met its obligation and the agency has met its responsibility to determine whether there were insufficient U.S. workers who are qualified and available to perform the job for which the employer seeks certification. In addition, when WHD conducts an investigation, WHD may contact U.S. workers listed in the report to verify the reasons given by the employer as to why they were not hired, where applicable.

Paragraph (b) requires the employer to update the recruitment report throughout the referral period to ensure that the employer accounts for contact with each prospective U.S. worker. The employer is not required to submit the updated recruitment report to DOL, but is required to retain the report and make it available in the event of a post-certification audit, a WHD investigation, or upon request by the CO.

DOL notes that it continues to reserve the right to post any documents received in connection with the Application for Temporary Employment Certification and will redact information accordingly.

G. Temporary Labor Certification Determinations

1. § 655.50 Determinations

This section corresponds to 20 CFR 655.32(a) and (b) in the 2008 rule. Paragraph (a) generally authorizes the OFLC Administrator and center-based COs to certify or deny Applications for Temporary Employment Certification for H-2B workers. It also authorizes the Administrator to redirect applications to the OFLC National Office. Paragraph (b) requires the CO to determine whether to certify (including partially certify) or deny an application. It requires the CO to certify an application only when the employer has fully complied with requirements for H-2B temporary labor certification, including the criteria established in § 655.51.

2. § 655.51 Criteria for certification

This section requires, as conditions of certification, that the employer have a valid H-2B Registration and have demonstrated full compliance with the requirements of this subpart. In making a determination about the availability of U.S. workers for the job opportunity, the CO will treat, as available, individuals whom the employer rejected for any reason that was not lawful or job-related. Paragraph (c) makes clear that DOL will not grant certification to employers that have failed to comply with one or more sanctions or remedies imposed by final agency actions under the H-2B program.

3. § 655.52 Approved certification

This section generally corresponds to 20 CFR 655.32(d) in the 2008 rule, but has been updated to better reflect current practices and DOL's experience. In cases where the application is approved, this interim final rule requires that the CO use electronic mail or other next day delivery methods to send the Final Determination letter to the employer and, when applicable, a copy to the employer's representative. The requirement for next-day delivery is designed to add efficiency and economy to the certification process. The requirement to advise the employer's attorney or agent, when applicable, is based on DOL's program experience with complications or miscommunications that can arise between employers and their agents or attorneys. Even when an employer is represented, it makes sense for that employer to receive and maintain the original, approved certification, as the employer attests to and is primarily responsible for meeting the obligations created by the Application for Temporary Employment Certification. Should the Application for Temporary Employment Certification be filed electronically, the employer must retain the approved temporary labor certification. As noted earlier in the discussion about electronic filing, upon receipt of the original certified ETA Form 9142B, the employer or its agent or attorney, if applicable, must complete the footer on the original Appendix B, retain the original Appendix B, and submit a signed copy of Appendix B, together with the original certified ETA Form 9142B directly to USCIS. Under the document retention requirements in § 655.56, the employer must retain a copy of the temporary labor certification and the original signed Appendix B.

4. § 655.53 Denied certification

This section generally corresponds to 20 CFR 655.32(e) in the 2008 rule, but has been updated in ways similar to § 655.52, above. In cases where the application is denied, this

provision, as in § 655.52, requires that the CO use electronic mail or other means of next day delivery to send the Final Determination letter to the employer and, when applicable, a copy to the employer's attorney or agent. The Final Determination letter must state the reasons for the denial, and cite the relevant regulatory provisions that govern. The letter must also advise the employer of its right to seek administrative review of the determination and of the consequences, should the employer elect not to appeal.

5. § 655.54 Partial certification

This section generally corresponds to 20 CFR 655.32(f) in the 2008 rule. It grants the CO authority to issue a partial certification that reflects either a shorter-than-requested period of need or a lower-than-requested number of H-2B workers, or both. For each qualified, available U.S. worker the SWA has referred or who applies directly with the employer, and whom the employer has accepted or has rejected for reasons that are unlawful or unrelated to the job, the CO will reduce by one the number of H-2B workers certified. To issue a partial certification, the CO will amend the application and return it and a Final Determination letter to the employer, with a copy to the employer's representative. The letter must state the reasons for the reduction, and governing legal authority; when appropriate, address the availability of U.S. workers in the occupation; explain the employer's right to seek administrative review; and describe the consequences, should the employer elect not to appeal.

6. § 655.55 Validity of temporary employment certification

This section mirrors 29 CFR 503.18 and corresponds to 20 CFR 655.34(a) and (b) in the 2008 rule, establishing the period of time and scope for which an Application for Temporary Employment Certification is valid. Under this provision, a temporary labor

certification is valid only for the period of authorized employment. The certification is also valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services, and the employer listed on the approved application. The sponsoring employer may not transfer the certification to another employer, except where the other employer is a successor in interest to the sponsoring employer. These limitations on validity are critical to the integrity of the certification and the broader H-2B program. They are also consistent with the prohibition on transfers of an H-2B Registration, and with the features DOL has put in place for certifications in the permanent program. See Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity; Final Rule, 72 FR 27904, 27918 (May 17, 2007).

7. § 655.56 Document retention requirements of H-2B employers

This section brings together recordkeeping requirements that appeared in separate paragraphs throughout the 2008 rule, including 20 CFR 655.6(e), 655.10(i), and 655.15(c) and (j). These requirements are similar to those in the WHD provisions of this interim final rule, at 29 CFR 503.17. Under § 655.56, employers must retain documents and records proving compliance with this subpart and the WHD regulation at 29 CFR part 503, including but not limited to the documents listed in paragraph (c). Paragraph (c) lists, among other things, the H-2B Registration, the H-2B Petition, documents related to recruitment of U.S. workers, payroll records, and copies of contracts with agents or recruiters. Paragraph (b) requires the employer to retain relevant records for three years from the date of certification (for approved applications), date of adjudication (for denied applications), or date DOL received the employer's letter of withdrawal (for withdrawn

applications). Employers must be prepared to produce these records and documents for DOL or for other federal agencies in the event of an audit or investigation. Under paragraph (d), employers must make these documents and records available to WHD within 72 hours following a request. This interim final rule also provides that, if the Application for Temporary Employment Certification and the H-2B Registration are filed electronically, the employer must sign and retain a copy of each adjudicated Application for Temporary Employment Certification, including any approved modifications, amendments, or extensions.

This requirement is substantively similar to the record retention requirement currently in place for H-2B employers. In addition, employers keeping records under this provision may keep those records electronically. Hence, this requirement does not create significant additional burden. Further, the records this provision covers serve a critical purpose in the operation and integrity of the H-2B program. For example, in the past, DOL has used employer records to make basic decisions related to the certification, verify compliance with program requirements, and confirm the nature of payments under contracts with agents or recruiters.

8. § 655.57 Determinations based on the unavailability of U.S. workers

This section addresses employers for which certified numbers have been reduced due to the existence of qualified, available U.S. workers who later fail to report for work or fail to stay for the period of the contract. In such cases, the employer may request a new determination from the CO, who must make a determination within 72 hours after receiving the complete request. The employer must submit its request directly to the CO, attach a statement signed by the employer, and include contact information for every U.S.

worker whom the employer claims has become unavailable and the reason for nonavailability.

If the CO denies a new determination, the employer may appeal. If the CO cannot identify sufficient available U.S. workers, the CO will grant the employer's request for a new determination. However, even when the CO makes a new determination, the employer may submit additional requests for new determinations in the future.

H. Post Certification Activities

Sections 655.60 through 655.63 concern actions an employer may take after an Application for Temporary Employment Certification has been adjudicated, including making a request for extension of certification, appealing a decision of the CO, and withdrawing an Application for Temporary Employment Certification. In addition, this interim final rule codifies the DOL's practice of maintaining a publicly-accessible electronic database of employers that have applied for H-2B certification.

1. § 655.60 Extensions

Under the interim final rule, there will be instances when an employer will have a reasonable need for an extension of the time period that was not foreseen at the time the employer originally filed the Application for Temporary Employment Certification. This provision provides flexibility to the employer in the event of such circumstances while maintaining the integrity of the certification and the determination of temporary need.

The provision requires that the employer submit its request to the CO in writing and provide documentation showing that the extension is needed and that the employer could not have reasonably foreseen the need. Except in extraordinary circumstances, extensions are available only to employers whose original certified period of employment

is less than the 9-month maximum period allowable in this subpart.[23] Extensions differ from amendments to the period of need because extensions are requested after certification, while amendments are requested before certification. Extensions will only be granted if the employer demonstrates that the need for the extension arose from unforeseeable circumstances, such as weather conditions or other factors beyond the control of the employer (including unforeseen changes in market conditions). If an employer receives an extension, the employer must immediately provide a copy of the approved extension to its workers. An employer denied an extension may appeal the decision by following the procedures set forth in § 655.61.

2. <u>§ 655.61 Administrative Review</u>

This provision sets forth the procedures for BALCA review of a decision of a CO. Subparagraph (a) provides the timeframe within which requests must be made and sets forth the various requirements related to the request, including that requests must contain only legal argument and be limited to evidence that was actually submitted to the CO before the date the CO's determination was issued. This provision does not provide for de novo review.

The substance of this provision is the same as that in the 2008 rule. However, this provision does not refer to the particular decision of the CO that may be appealed, such as the denial of temporary labor certification. Rather, this provision refers generally to the decisions of the CO that may be appealed, where authorized in this subpart. These decisions are identified in the section of the interim final rule that discusses the CO's

[23] If extraordinary circumstances warrant an extension beyond the 9-month period, consistent with DHS regulations, the maximum period of H-2B employment including the extension period generally cannot exceed one year. See 8 CFR 214.2(h)(6)(ii)(B).

authority and procedure for making that particular decision. Additionally, this provision increases from 5 business days to 7 business days: the time in which the CO will assemble and submit the appeal file in § 655.61(b); the time in which the CO may file a brief in § 655.61(c); and the time BALCA should provide a decision upon the submission of the CO's brief in § 655.61(f).

3. § 655.62 Withdrawal of an Application for Temporary Employment Certification

Under this provision, an employer may withdraw an Application for Temporary Employment Certification before it is adjudicated. Such request must be made in writing.

4. § 655.63 Public Disclosure

This provision codifies DOL's practice of maintaining, apart from the electronic job registry, an electronic database accessible to the public containing information on all employers that apply for H-2B temporary labor certifications. The database will continue to include non-privileged information such as the number of workers the employer requests on an application, the date an application is filed, and the final disposition of an application. The continued accessibility of such information will increase the transparency of the H-2B program and process and provide information to those currently seeking such information from the Departments through FOIA requests.

I. Integrity Measures

Sections 655.70 through 655.73 have been grouped together under the heading Integrity Measures, describing those actions DOL plans to take to ensure that an Application for Temporary Employment Certification filed with DOL in fact complies with the requirements of this subpart.

The Departments have not elected to establish procedures to allow for workers and organizations of workers to intervene and participate in the audit, revocation, and debarment processes. Such procedures would be administratively infeasible and inefficient and would cause numerous delays in the adjudication process. For example, we would have to identify which workers and/or organizations of workers should receive notice and should be allowed to intervene. Processing delays would be exacerbated by the fact that once identified, we would have to provide additional time and resources to notify the parties and provide them with the opportunity to prepare and present their information, regardless of whether they have any specific interest or information about the particular proceedings at hand. Workers and worker advocates continue to have the opportunity to contact the OFLC or WHD with any findings or concerns that they have about a particular employer or certification, even without a formal notice and intervention process in place.

1. § 655.70 Audits

This section outlines the process under which the CO will conduct audits of adjudicated temporary employment certification applications. These provisions are similar to the 2008 rule. The Departments' mandate to ensure that qualified workers in the United States are not available and that the foreign worker's employment will not adversely affect wages and working conditions of similarly employed U.S. workers serves as the basis for the Departments' authority to audit adjudicated applications, even if the employer's application was ultimately withdrawn after adjudication or denied. Adjudicated applications include those that have been certified, denied, or withdrawn after certification. There is real value in auditing those applications because they could

be used to establish a record of employer compliance or non-compliance with program requirements and because the information they contain assists DOL in determining whether it needs to further investigate or debar an employer or its agent or attorney from future labor certifications.

Paragraph (a) provides the CO with sole discretion to choose which Applications for Temporary Employment Certification will be audited, including selecting applications using a random assignment method. When an Application for Temporary Employment Certification is selected for audit, paragraph (b) requires the CO to send a letter to the employer and, if appropriate, a copy of the letter to the employer's attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO. Paragraph (b) also provides that an employer's failure to fully comply with the audit process may result in the revocation of its certification or in debarment, under §§ 655.72 and 655.73, respectively, or require the employer to undergo assisted recruitment in future filings of an Application for Temporary Employment Certification, under § 655.71.

Paragraph (c) permits the CO to request additional information and/or documentation from the employer as needed in order to complete the audit. Paragraph (d) provides that the CO may provide any findings made or documents received in the course of the audit to DHS or other enforcement agencies, as well as WHD. The CO may also refer any findings that an employer discriminated against a qualified U.S. worker to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

2. § 655.71 CO-ordered assisted recruitment

Paragraph (a) of this provision permits the CO to require an employer to participate in assisted recruitment for any future Application for Temporary Employment Certification, if the CO determines as a result of an audit or otherwise that a violation that does not warrant debarment has occurred. This provision will also assist those employers that, due to either program inexperience or confusion, have made mistakes in their Application for Temporary Employment Certification that indicate a need for further assistance from DOL.

Under paragraph (b) the CO will notify the employer (and its attorney or agent, if applicable) in writing of the requirement to participate in assisted recruitment for any future filed Application for Temporary Employment Certification for a period of up to 2 years. The assisted recruitment will be at the discretion of the CO, and determined based on the unique circumstances of the employer.

As set forth in paragraph (c), the assisted recruitment may consist of, but is not limited to, reviewing the employer's advertisements before posting and directing the employer where such advertisements are to be placed and for how long, requiring the employer to conduct additional recruitment, requesting and reviewing copies of all advertisements after they have been posted, and requiring the employer to submit proof of contact with past U.S. workers, and proof of SWA referrals of U.S. workers. If an employer materially fails to comply with the requirements of this section, paragraph (d) provides that the employer's application will be denied and the employer may be debarred from future program participation under § 655.73.

3. § 655.72 Revocation

Under this section, OFLC can revoke an approved H-2B temporary labor certification under certain conditions, including where there is fraud or willful misrepresentation of a material fact in the application process as defined in § 655.73(d), or a substantial failure to comply with the terms and conditions of the certification, as defined in § 655.73(d) and (e). Discussion of the standards used in determining willful misrepresentations and substantial failures is discussed in the preamble to 29 CFR 503.19 (Violations) of this interim final rule. OFLC may also revoke a certification upon determining that the employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit, or law enforcement function, or that the employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary of Labor, with respect to the H-2B program.

The procedures for revocation begin with OFLC sending the employer a Notice of Revocation. Upon receiving the Notice of Revocation, the employer has two options: (1) it may submit rebuttal evidence or (2) appeal the revocation under the procedures in § 655.61. If the employer does not file rebuttal evidence or an appeal within 10 business days of the date of the Notice of Revocation, the Notice will be deemed final agency action and will take effect immediately at the end of the 10-day period. If the employer chooses to file rebuttal evidence, and the employer timely files that evidence, OFLC will review it and inform the employer of the final determination on revocation within 10 business days of receiving the rebuttal evidence.

If OFLC determines that the certification should be revoked, OFLC will inform the employer of its right to appeal under § 655.61. The employer must file the appeal of

OFLC's determination within 10 business days, or OFLC's decision becomes the final decision of the Secretary and will take effect immediately after the 10-day period.

If the employer chooses to appeal either in lieu of submitting rebuttal evidence, or after OFLC makes a determination on the rebuttal evidence, the appeal will be conducted under the procedures contained in § 655.61. The timely filing of either the rebuttal evidence or an administrative appeal stays the revocation pending the outcome of those proceedings. If the temporary labor certification is ultimately revoked, OFLC will notify DHS and the Department of State.

Section 655.72(c) lists an employer's continuing obligations to its H-2B and corresponding workers if the employer's H–2B certification is revoked. The obligations include reimbursement of actual inbound transportation, visa, and other expenses (if they have not been paid), payment of the workers' outbound transportation expenses, payment to the workers of the amount due under the three-fourths guarantee; and payment of any other wages, benefits, and working conditions due or owing to workers under this subpart.

When an employer's certification is revoked, the revocation applies to that particular certification only; violations relating to a particular certification will not be imputed to an employer's other certifications in which there has been no finding of employer culpability. However, in some situations, OFLC may revoke all of an employer's existing labor certifications where the underlying violation applies to all of the employer's certifications. For instance, if OFLC finds that the employer meets either the basis for revocation in subparagraph (a)(3) of this section (failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit,

or law enforcement function) or in subparagraph (a)(4) of this section (failure to comply with sanctions or remedies imposed by WHD or with decisions or orders of the Secretary of Labor with respect to the H-2B program), this finding could provide a basis for revoking any and all of the employer's existing labor certifications. Additionally, where OFLC finds that violations of paragraphs (a)(1) or (a)(2) of this section affect all of the employer's certifications, such as where an employer misrepresents its legal status, OFLC also may revoke that employer's certifications. Lastly, where an employer's certification has been revoked, OFLC would take a more careful look at the employer's other certifications to determine if similar violations exist that would warrant their revocation.

The Departments recognize the seriousness of revocation as a remedy; accordingly, the bases for revocation reflect violations that significantly undermine the integrity of the H-2B program. OFLC intends to use the authority to revoke only when an employer's actions warrant such a severe consequence. OFLC does not intend to revoke certifications if an employer commits minor mistakes.

4. § 655.73 Debarment

This interim final rule revises the debarment provision from the 2008 rule to strengthen the enforcement of H-2B labor certification requirements and to clarify the basis under which debarment may be applied. Under § 655.73(a), OFLC may debar an employer if it finds that the employer: willfully misrepresented a material fact in its H-2B Registration, approved Application for Temporary Employment Certification, or H-2B Petition; substantially failed to meet any of the terms and conditions of H-2B Registration, approved Application for Temporary Employment Certification, or H-2B Petition; or

willfully misrepresented a material fact to the Department of State during the visa application process. Section 655.73(a)(2) defines a "substantial failure" to mean a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents, in accordance with the statutory definition of "substantial failure" in 8 U.S.C. 1184(c)(14)(D), INA section 214(c)(14)(D).

Section 655.73(d) provides the standard for determining whether a violation was willful. Section 655.73(e) describes the factors that OFLC may consider in determining whether a violation constitutes a significant deviation from the terms and conditions of the H-2B Registration, approved Application for Temporary Employment Certification, or H-2B Petition. This list of factors is not exclusive, but it offers some guidance as to what OFLC generally considers when determining whether a violation would warrant debarment. The factors are the same factors used by WHD to determine whether a violation is significant under 29 CFR 503.19(c) of this interim final rule. The preamble for 29 CFR 503.19 explains these definitions in detail.

Section 655.73(f) provides a comprehensive but not exhaustive list of violations that would warrant debarment where the standards in § 655.73(d)-(e) are met. This is an updated list of debarrable violations from the 2008 rule. The most significant differences are that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment and that the following violations would be considered debarrable:

- Improper layoff or displacement of U.S. workers or workers in corresponding employment (§ 655.73(f)(4));

- A violation of the requirements of § 655.20(o) or (p) concerning fee shifting and related matters (§ 655.73(f)(10));
- A violation of any of the anti-discrimination provisions listed in § 655.20(r) (§ 655.73(f)(11));
- Failure to comply with the assisted recruitment process (§ 655.73(f)(7)); and
- A material misrepresentation of fact during the registration or application process (§ 655.73(f)(14)).

The procedures for debarment are similar to the debarment procedures contained in the 2008 rule. They begin with OFLC sending the employer, attorney, or agent a Notice of Debarment. Upon receiving the Notice of Debarment, the party has two options: it may submit rebuttal evidence or request a hearing. If the party does not file rebuttal evidence or request a hearing within 30 days, the Notice will be deemed final agency action and will take effect immediately at the end of the 30-day period. If the party timely files rebuttal evidence, OFLC will review it and inform the party of the final determination on debarment within 30 days of receiving the rebuttal evidence. If OFLC determines that the party should be debarred, OFLC will inform the party of its right to request a hearing. The party must request a hearing of OFLC's determination within 30 days, or OFLC's decision becomes the final decision of the Secretary of Labor and will take effect immediately at the end of the 30-day period. The timely filing of either the rebuttal evidence or a hearing request stays the debarment pending the outcome of those proceedings.

If the employer chooses to request a hearing either in lieu of submitting rebuttal evidence, or after OFLC makes a determination on the rebuttal evidence, the hearing will

be conducted before an Administrative Law Judge (ALJ) under the procedures contained in 29 CFR part 18. After the hearing, the ALJ must affirm, reverse, or modify OFLC's determination. The ALJ's decision becomes the final agency action unless either party seeks review of the decision with the Administrative Review Board (ARB) within 30 days. If the ARB declines to accept the petition or does not issue a notice accepting the petition for review within 30 days, the ALJ's decision becomes the final agency action. If the ARB accepts the petition for review, the ALJ's decision is stayed until the ARB issues a decision.

Paragraph (h) of this section provides that copies of final DOL debarment decisions will be forwarded to DHS and DOS promptly. See also 8 CFR 214.1(k) (stating that upon debarment by the Department of Labor, USCIS may deny any petition filed by that petitioner for nonimmigrant status under section 101(a)(15)(H) for a period of at least 1 year but not more than 5 years). Where it is warranted, DOL will notify additional agencies, such as DOJ, of the violations.

WHD also has independent debarment authority under this interim final rule. See 29 CFR 503.24 and the corresponding preamble. Section 655.73(h) clarifies that while WHD and OFLC will have concurrent debarment jurisdiction, the two agencies will coordinate their activities so that a specific violation for which debarment is imposed will be cited in a single debarment proceeding. An important distinction between the OFLC and WHD debarment procedures is that the WHD debarment procedures do not provide for a 30-day rebuttal period because WHD debarments arise from investigations during which the employer has ample opportunity to submit any evidence and arguments in its favor.

Finally, § 655.73(i) provides that an employer, agent, or attorney who is debarred by OFLC or WHD from the H-2B program will also be debarred from all other foreign labor certification programs administered by DOL for the time period in the final debarment decision. Many employers, agents and attorneys participate in more than one foreign labor certification program administered by DOL. However, under the 2008 rule, a party that was debarred under the H-2B program could continue to file applications under DOL's other foreign labor programs. Under this interim final rule DOL will refuse to accept applications filed by or on behalf of a debarred party under the H-2B program in any of DOL's foreign labor certification programs.

Although DOL does not have the authority to routinely seek debarment of entities that are not listed on the ETA Form 9142, in appropriate circumstances, DOL may pierce the corporate veil in order to more effectively remedy the violations found. Piercing the corporate veil may be necessary to foreclose the ability of individual principals of a company or legal entity to reconstitute under another business entity.

Debarment of agents and attorneys

This interim final rule does not limit debarment to employers. Under § 655.73(b), agents and attorneys of the employer may be debarred for their own violations as well as their participation in an employer's violation (under the 2008 rule agents could only be debarred for their participation in an employer's violation). As discussed under § 655.8, the Departments have had concerns about the role of agents in the program, and whether their presence and participation have contributed to problems with program compliance, such as the passing on of prohibited costs to employees. However, the Departments recognize that the vast majority of employers file H-2B temporary employment

certification applications using an agent, and that many of these agents are intimately familiar with the H-2B program requirements, and help guide employers through the process. The Departments believe that, in order to improve program integrity and compliance, these agents and attorneys should be accountable for their own program violations, just as their employer-clients are.

The agents and attorneys who file applications on behalf of employers certify under penalty of perjury on the ETA Form 9142B Application for Temporary Employment Certification that everything stated on the application is true and correct. However, for example, a bad actor agent may pass on prohibited fees to workers in violation of the prohibition on collecting such fees in § 655.20(o) and 29 CFR 503.16(o) while affirming that everything on the application is true and correct, including the employer's declaration that its agents and/or attorneys have not sought or received prohibited fees. In addition, § 655.20(p) and 29 CFR 503.16(p) require an employer to contractually prohibit an agent or recruiter from seeking or receiving payments from prospective employees. This creates a potential loophole, under which an employer may contractually prohibit the attorney or agent from collecting prohibited fees, yet the attorney or agent independently charges the workers for prohibited fees. In this situation, the employer will not be debarred for the independent violation of the agent or attorney because the employer has not committed any violation, provided the employer did not know or have reason to know of such independent violation. The 2008 rule did not provide a mechanism for holding the attorney or agent accountable for such a violation absent a link to an employer violation. This interim final rule closes that loophole by applying debarment to independent violations by attorneys and agents, recognizing that

agents and attorneys should be held accountable for their own independent willful violations of the H-2B program, separate from an employer's violation. This concept applies throughout the program sanction sections, including the OFLC and WHD debarment provisions at § 655.73(b) and 29 CFR 503.24(b), as well as the WHD sanctions and remedies section, as discussed further in the preamble at 29 CFR 503.20. These enhanced compliance measures apply only to the agents and attorneys who are signatories on the ETA Form 9142, as these agents and attorneys have become directly involved with the H-2B program and have made attestations to DOL.

The Departments do not intend to make attorneys or agents strictly liable for debarrable offenses committed by their employer clients, nor do we intend to debar attorneys who obtain privileged information during the course of representation about their client's violations or whose clients disregard their legal advice and commit willful violations. DOL will be sensitive to the facts and circumstances in each particular instance when considering whether an attorney or agent has participated in an employer's violation; DOL will seek to debar only those attorneys or agents who work in collusion with their employer-clients to either willfully misrepresent material facts or willfully and substantially fail to comply with the regulations. Similarly, where employers have colluded with their agents or attorneys to commit willful violations, we will consider debarment of the employer as well.

OFLC and WHD publicly post a list of employers, agents, or attorneys who have been debarred under all of the labor certification programs. Where circumstances warrant, DOL may decide to report debarred attorneys to State bar associations using the information provided in the ETA Form 9142, which provides a field for the attorney's

State bar association number and State of the highest court where the attorney is in good standing.

Period of debarment

Under this interim final rule, an employer, attorney, or agent may not be debarred for less than 1 year nor more than 5 years from the date of the final debarment decision. This increases the maximum debarment period, which was 3 years in the 2008 rule. The 1 to 5-year range for the period of debarment is consistent with the H-2B enforcement provisions in the INA, and the Departments believe that it is appropriate to apply the same standard in our regulations. 8 U.S.C. 1184(c)(14)(A)(ii), INA section 214(c)(14)(A)(ii); see also 8 CFR 214.1(k). The Departments do not intend to debar employers, attorneys, or agents who make minor, unintentional mistakes in complying with the program, but rather those who commit a willful misrepresentation of a material fact, or a substantial failure to meet the terms and conditions, in the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition. Additionally, just because OFLC has the authority to debar a party for up to 5 years does not mean that would be the result for all debarment determinations, as OFLC retains the discretion to determine the appropriate period of debarment based on the severity of the violation.

The debarment timeline varies greatly depending on the timing of when violations are discovered through OFLC audits, WHD targeted investigations, or WHD investigations initiated by complaints. In other words, there is no one time within a season when a debarment proceeding might be initiated. Additionally, various factors affect the timing of an investigation that may lead to debarment, including the complexity of the case and

the number of violations involved. Parties subject to debarment also have the right to appeal the debarment decision. Thus, DOL cannot ensure any particular timing for the debarment process, or that the timing would align before an employer obtains authorization to bring in H-2B workers for another season.

V. Addition of 29 CFR Part 503

Effective January 18, 2009, pursuant to INA section 214(c)(14)(B), DHS transferred to DOL enforcement authority for the provisions in section 214(c)(14)(A)(i) of the INA that govern petitions to admit H-2B workers. See also 8 CFR 214.2(h)(6)(ix) (stating that the Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H–2B worker). This enforcement authority has been further delegated within the DOL to the Administrator of WHD.[24] The 2008 rule contained the regulatory provisions governing ETA's processing of the employer's Application for Temporary Employment Certification and WHD's enforcement responsibilities in ensuring that the employer had not willfully misrepresented a material fact or substantially failed to meet a condition of such application or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker.

The Departments have carefully reviewed the 2008 rule, and this interim final rule provides substantive changes to both the certification and enforcement processes to enhance protection of U.S. and H-2B workers.

[24] Sec'y of Labor Order No. 01-2014 (Dec. 19, 2014).

This interim final rule includes a new part, 29 CFR part 503, to further define and clarify the protections for workers. This part and 20 CFR part 655, subpart A, have added workers in corresponding employment to the protected worker group, imposed additional recruitment obligations and employer obligations for laid off U.S. workers, and increased wage protections for H-2B workers and workers in corresponding employment. Additionally, the Departments have enhanced WHD's enforcement role in administrative proceedings following a WHD investigation, such as by allowing WHD to pursue debarment rather than simply recommending to ETA that it debar an employer as it did under the 2008 rule.

To ensure consistency and clear delineation of responsibilities between DOL agencies implementing and enforcing H-2B provisions, this new part 503 was written in close collaboration with ETA and is being published concurrently with ETA's interim final rule in 20 CFR part 655, subpart A, to amend the employer certification process.

A. General Provisions and Definitions

Sections 503.0 through 503.8 provide general background information about the H-2B program and its operation. Section 503.1 is similar to the 2008 rule provision at 20 CFR 655.1; it explains the standards governing the H-2B program, the respective roles of ETA and WHD, and the consultative role played by DOL. Section 503.2 is similar to the 2008 rule provision at 20 CFR 655.2; it explains in particular that WHD does not enforce compliance with the provisions of the H-2B program in the Territory of Guam. Section 503.3 describes how DOL will coordinate both internally and with other agencies.

1. § 503.4 Definition of terms

This section contains definitions that are identical to those contained in 20 CFR part 655, subpart A, except that this section contains only those definitions applicable to this part. The preamble to 20 CFR 655.5 contains the relevant discussion of these definitions.

2. § 503.5 Temporary need

This section mirrors the requirements set forth in 20 CFR 655.6; the preamble to that section includes a full discussion of this provision.

3. § 503.6 Waiver of rights prohibited

This section prohibits an employer from seeking to have workers waive or modify any rights granted them under these regulations. Under this provision, any agreement purporting to waive or modify such rights is void, with limited exceptions. The Departments recognize the vulnerability of foreign H-2B workers, and believe that the non-waiver principle is important to ensure that unscrupulous employers do not induce waiver of rights under the program. Such waiver would also undermine the required H-2B wages and working conditions, which are necessary to prevent an adverse effect on U.S. workers. This provision is also consistent with similar prohibitions against waiver of rights under other laws, such as the Family and Medical Leave Act, see 29 CFR 825.220(d), and the H-2A program, see 29 CFR 501.5.

4. § 503.7 Investigation authority of Secretary of Labor

This section retains the authority established under 20 CFR 655.50 of the 2008 rule, and affirms WHD's authority to investigate employer compliance with these regulations and WHD's obligation to protect the confidentiality of complainants. This section also discusses the reporting of violations. Complaints may be filed by calling WHD at 866-

4US-WAGE or by contacting a local WHD office. Contact information for local offices is available online at http://www.dol.gov/whd/america2.htm.

5. § 503.8 Accuracy of information, statements, data

This section notes that information, statements, and data submitted in compliance with 8 U.S.C. 1184(c), INA section 214(c), or these regulations are subject to 18 U.S.C. 1001, under which entities that make false representations to the government are subject to penalties, including a fine of up to $250,000 and/or up to 5 years in prison.

B. Enforcement Provisions

1. § 503.15 Enforcement

This section provides that the investigation, inspection, and law enforcement functions that carry out the provisions of 8 U.S.C. 1184(c), INA section 214(c), and the regulations in this interim final rule pertain to the employment of H-2B workers, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. WHD investigates complaints filed by both foreign and U.S. workers affected by the H-2B program, as well as concerns raised by other federal agencies, such as DHS or DOS, regarding particular employers and agents. WHD also conducts targeted or directed (i.e., not complaint-based) investigations of H-2B employers to evaluate program compliance. WHD's enforcement authority is outlined in the preamble under 20 CFR 655.2 and the addition of 29 CFR part 503, and was discussed in detail in the 2008 rule, 73 FR 78020, 78046-47 (civil monetary penalties and remedies). The Departments reaffirm that DOL -- and within DOL, WHD -- is authorized to conduct the enforcement activities described in this interim final rule.

Corresponding workers, as defined under 20 CFR 655.5, are included in these enforcement provisions in order to ensure that U.S. workers are not adversely affected by the employment of H-2B workers. The preamble at 20 CFR 655.5 discusses the rationale for including corresponding workers in this interim final rule. The Departments believe that giving corresponding workers this means of redress is critical to effectuating their mandate to ensure that the certification and employment of H-2B aliens does not harm similarly-situated U.S. workers. Further, it helps to prevent situations where U.S. workers who are employed alongside H-2B workers are not afforded the pay, benefits, and worker protections that their H-2B counterparts enjoy.

2. <u>§ 503.16 Assurances and obligations of H-2B employers.</u>

The assurances and obligations described in this section are identical to those in 20 CFR 655.20. The preamble to 20 CFR 655.20 contains the relevant discussion of the assurances and obligations for employers participating in the H-2B program.

3. <u>§ 503.17 Document retention requirements of H-2B employers</u>

The document retention requirements in this section are similar to those in 20 CFR 655.56, with minor differences related to OFLC's and WHD's separate interests. The preamble to 20 CFR 655.56 discusses these recordkeeping requirements. Employers must retain documents and records proving compliance with the regulations, including but not limited to the specific documents listed in this section that require, for example, retention of documentation showing employers' recruitment efforts, workers' earnings, and reimbursement of transportation and subsistence costs incurred by workers. This section does not require employers to create any new documents, but simply to preserve those documents that are already required for participation in the H-2B program. The

Departments believe that these documentation retention requirements and a retention period of 3 years will be sufficient for purposes of WHD's enforcement responsibilities in this interim final rule, which, as discussed in the preamble introducing this part, have been augmented by the addition of workers in corresponding employment to the protected worker group, additional recruitment obligations and employer obligations for laid off U.S. workers, and increased wage protections for H-2B workers and workers in corresponding employment.

Employers are required to make such records available to WHD within 72 hours following a request by WHD. This time frame is the same under the FLSA, where employers who maintain records at a central recordkeeping office, other than in the place(s) of employment, are required to make records available within 72 hours following notice from WHD. See 29 CFR 516.7. This provision, which has been in place for decades, has not created undue burden for employers; indeed, as many H-2B employers are likely covered by the FLSA, this provision results in no additional burden. A full discussion of the use of electronic records can be found in the preamble to 20 CFR 655.56.

4. <u>§ 503.18 Validity of temporary labor certification</u>

This section mirrors 20 CFR 655.55, and corresponds to 20 CFR 655.34 (a) and (b) in the 2008 rule, providing the time frame and scope for which an <u>Application for Temporary Employment Certification</u> is valid. It explains that the temporary labor certification is only valid for the period of time between the beginning and ending dates of employment, and is only valid for the number of H-2B positions, the job classification and specific services to be performed, and the employer listed on the certification.

Further, the certification may not be transferred to another employer unless that employer is a successor in interest to the employer to which the certification was issued.

5. § 503.19 Violations

Under this section, the Departments specify the types of violations that may be cited as a result of an investigation. However, the definitions and concepts used in this section apply to all violations under the H-2B program, regardless of whether the violation results in revocation imposed by OFLC pursuant to 20 CFR 655.72, debarment imposed by OFLC pursuant to 20 CFR 655.73 or WHD pursuant to § 503.24, monetary or other remedies assessed by WHD pursuant to § 503.20, or civil money penalties assessed by WHD pursuant to § 503.23.

Under paragraphs (a)(1) and (3) of this section, a violation may consist of a willful misrepresentation of a material fact on the H-2B Registration, the Application for Temporary Employment Certification, or the H-2B Petition, or to the Department of State during the visa application process. Under paragraph (a)(2) of this section, a violation may consist of a substantial failure to meet any of the conditions of the H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition. A "substantial failure" is defined as "a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents."

Violations under the H-2B program, both in the 2008 rule and this interim final rule, have been defined in accordance with the INA's provisions regarding H-2B violations. Specifically, INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A), sets forth two potential violations under the H-2B program: (1) "a substantial failure to meet any of the conditions of the petition" and (2) "a willful misrepresentation of a material fact in such

petition." The INA further defines a "substantial failure" to be a "willful failure to comply . . . that constitutes a significant deviation from the terms and conditions of a petition." 8 U.S.C. 1184(c)(14)(D), INA section 214(c)(14)(D). The H-2B Petition includes the approved Application for Temporary Employment Certification. See § 503.4; 20 CFR 655.5.

Based on this statutory language, it is the Departments' view that non-willful violations are not cognizable under the H-2B program. In this interim final rule, the basis for determining violations continues to be either a misrepresentation of material fact or a substantial failure to comply with terms and conditions, both of which will be determined to be a violation if the evidence surrounding the violation establishes that it is willful. See § 503.19(a)(1) & (2) (WHD violations, which lead to remedies, civil monetary penalties, and/or debarment), 20 CFR 655.72(a)(1) & (2) (OFLC revocation), 20 CFR 655.73(a)(1)-(3) (OFLC debarment). Paragraph (b) of this section sets out when a violation qualifies as willful. To determine whether a violation is willful, DOL will consider whether the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions. See § 503.19(b); 20 CFR 655.73(d). This is consistent with the longstanding definition of willfulness. See McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988); see also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

Further, tracking the INA language, 8 U.S.C. 1184(c)(14)(D), INA section 214(c)(14)(D), a substantial failure continues to be defined as willful as well as a significant deviation from the terms or conditions of a petition. See § 503.19(a)(2), 20

CFR 655.72(a)(2), 20 CFR 655.73(a)(2). Paragraph (c) of this section provides guidance on determining whether a failure to comply constitutes a significant deviation from the terms and conditions of the H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition, and provides a non-exhaustive list of factors that WHD may consider. The factors are the same factors used by OFLC to determine whether a substantial failure is a "significant deviation" for purposes of debarment under 20 CFR 655.73 and are similar to the factors used by WHD to determine the amount of civil monetary penalties (CMPs) to be assessed under § 503.23.

When WHD encounters violations that do not rise to the level of willfulness, it puts the party on notice regarding future compliance. WHD will consider subsequent violations committed with the knowledge that such acts or omissions violate H-2B program requirements to be willful. In evaluating whether a first-time violation constitutes a willful violation, WHD will look at all circumstances, including the fact that employers submit a signed Application for Temporary Employment Certification attesting under penalty of perjury that that they know and accept the obligations of the program, which are listed clearly in Appendix B of the Application, as well as submitting a signed H-2B Petition, which requires employers to certify under penalty of perjury that the information is true and accurate to the best of their knowledge. See § 503.19(d).

6. § 503.20 Sanctions and remedies – general

This section sets forth the remedies that WHD will pursue when it determines that there has been a violation(s), as described in § 503.19. These remedies are largely the same types of remedies WHD pursued in its enforcement under the 2008 rule, see 20 CFR 655.65, upon determining that a violation had occurred. Remedies include but are

not limited to the recovery of unpaid wages, recovery of prohibited recruitment fees paid or impermissible deductions, and wages due for improperly placing workers in areas of employment or in occupations other than those identified on the Application for Temporary Employment Certification; enforcement of the provisions of the job order, 8 U.S.C. 1184(c), INA section 214(c), 29 CFR part 655, subpart A, or the regulations in this part; assessment of civil money penalties (CMPs); and make-whole relief for any person who has been discriminated against, as well as reinstatement and other make-whole relief for U.S. workers who were improperly denied employment. These remedies may be sought from the employer, the employer's successor in interest, or from the employer's agent or attorney, as appropriate. WHD may also seek debarment, concurrent with ETA's debarment authority. WHD's debarment authority is discussed under § 503.24.

a. Liability for prohibited fees collected by foreign labor recruiters. As the preamble to the 2008 rule emphasized, see 73 FR 78037, and as DHS regulations have made clear, see 8 CFR 214.2(h)(6)(i)(B), the recruitment of foreign workers is an expense to be borne primarily by the employer and not by the foreign worker, who generally should not have to pay a fee as a condition of obtaining access to the job opportunity. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported. The Departments are concerned about the exploitation of workers who have heavily indebted themselves to secure a place in the H-2B program, and believe that such exploitation may adversely affect the wages and working conditions of U.S. workers, driving down wages and working conditions for all workers, foreign and domestic. The Departments' general

prohibition on collecting placement or recruitment fees, directly or indirectly, as a condition of H-2B employment is consistent with Executive Order and regulatory changes in the federal contracting arena, prohibiting charging of recruitment fees to employees as part of the Federal Government's efforts to enhance protections against trafficking in persons. See, e.g., Strengthening Protections Against Trafficking in Persons in Federal Contracts, Exec. Order No. 13627 (Sept. 25, 2012); 80 FR 4967 (Jan. 29, 2015); see also 8 U.S.C. 1375b (requiring pamphlet advising of temporary workers' rights and available protections against human trafficking).

The Departments believe that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country. However, the Departments recognize that an employer's ability to control the actions of agents and subcontractors across international borders is constrained, just as the Departments' ability to enforce regulations across international borders is constrained. As discussed in the preamble to 20 CFR 655.20(p), the Departments are requiring that the employer, as a condition of applying for temporary labor certification for H-2B workers, contractually forbid any foreign labor contractor or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages in recruitment of prospective H-2B workers to seek or receive payments from prospective employees. DOL will attempt to ensure the bona fides of such contracts and will work together with DHS, whose regulations also generally preclude the approval of an H-2B Petition and provide for denial or revocation if the employer knows or has reason to know that the worker has paid, or has agreed to pay, prohibited fees to a recruiter, facilitator, agent, and similar employment service as a condition of an offer or maintaining condition of H-2B employment. See 8 CFR

214.2(h)(6)(i)(B). As explained in WHD Field Assistance Bulletin No. 2011-2, any fee that facilitates an employee obtaining the visa in order to be able to work for that employer will be considered a recruitment fee, which must be borne by the H-2B employer. This is consistent with the DHS regulations. Although employees may voluntarily pay some fees to independent third-party facilitators for services such as assisting the employee to access the internet or in dealing with DOS, such fees may be paid by employees only if they are truly voluntary and not made a condition of access to the job opportunity.

When employers use recruiters, and in particular when they impose the contractual prohibition on collecting prohibited fees, they must make it abundantly clear that the recruiter and its agents or employees, whether in the United States or abroad, are not to receive remuneration from the foreign worker recruited in exchange for access to a job opportunity or in exchange for having that worker maintain that job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or continued to use a recruiter about whom the employer had received credible complaints, could be an indication that the contractual prohibition was not bona fide. In addition, where WHD determines that workers have paid these fees and the employer cannot demonstrate the requisite bona fide contractual prohibitions, WHD will require the employer to reimburse the workers in the amount of these prohibited fees. However, where an employer has complied in good faith with this provision and has contractually prohibited the collection of prohibited fees from workers, and exercised reasonable diligence to ensure that its agents and others involved in the recruitment

process, whether in the United States or abroad, adhere to this contractual prohibition, there is no willful violation.

b. Agent and attorney liability. For the reasons stated in the discussion under Debarment of Agents and Attorneys in 20 CFR 655.73, agent and attorney signatories to Form 9142B will be liable for their independent willful violations of the H-2B program, as well as their participation in an employer's violation. As noted earlier under § 503.19 a willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions. Under § 503.20(b), remedies will be sought directly from the employer or its successor, or from the employer's agent or attorney, where appropriate. For example, it would be appropriate to seek reimbursement of prohibited fees to affected workers from an attorney or agent, as opposed to an employer, where the employer has contractually prohibited the attorney or agent from collecting such fees, the employer has exercised reasonable diligence in determining such fees were not collected, yet the agent or attorney does so unbeknownst to the employer, despite the employer having affirmed on the Application for Temporary Employment Certification that everything in the application is true and correct, including the employer's attestation that "[t]he employer and its attorney, agents and/or employees have not sought or received payment of any kind from the H-2B worker for any activity related to obtaining temporary labor certification, including but not limited to payment of the employer's attorney or agent fees, application fees, or recruitment costs." On the other hand, it would not be

appropriate to hold the attorney or agent liable for unpaid wages when an employer fails to pay the required wage during the period of the application where the attorney or agent was uninvolved in such a violation.

c. Make-whole relief. Make-whole relief in this section means that the party subjected to the violation is restored to the position, both economically and in terms of employment status, that the party would have occupied had the violation never taken place. Make-whole relief includes equitable and monetary relief such as reinstatement, hiring, front pay, reimbursement of monies illegally demanded or withheld, or the provision of specific relief such as the cash value of transportation or subsistence payments that the employer was required to, but failed to provide, in addition to the recovery of back wages, where appropriate.

d. Workers who have returned to their home countries. The Departments recognize that workers who have been subjected to H-2B violations often return to their home countries, and that it is more difficult for workers who live outside the United States to participate in investigations or proceedings and recover damages. The Departments do not prohibit such participation by workers who may have returned to their home country, and DOL often distributes back wages to workers who have experienced violations and have returned to their home countries. Where appropriate given the circumstances in any specific investigation or proceeding, the Departments might seek a means for the worker to travel to the U.S. to participate in such proceedings.

7. § 503.21 Concurrent actions

Under this section, the Departments clarify the different roles and responsibilities of OFLC and WHD, and note that both agencies have concurrent jurisdiction to impose

debarment. Section 503.3(c) is intended to protect the employer from being debarred by both entities for a single violation.

8. § 503.22 Representation of the Secretary of Labor

The Solicitor of Labor will continue to represent the Administrator, WHD and the Secretary of Labor in all administrative hearings under 8 U.S.C. 1184(c)(14), INA section 214(c), and these regulations.

9. § 503.23 Civil money penalty assessment

This interim final rule utilizes a CMP assessment scheme similar to the CMP assessment contained in the 2008 rule, with additional and clarifying language specifying that WHD may find a separate violation for each failure to pay an individual worker properly or to honor the terms or conditions of the worker's employment, as long as the violation meets the willfulness standard and/or substantial failure standard in § 503.19. CMPs represent a penalty for non-compliance, and are payable to WHD for deposit with the Treasury.

Similar to the CMPs in the 2008 rule, the CMP assessments set CMPs at the amount of back wages owed for violations related to wages and impermissible deductions or prohibited fees, and at the amount that would have been earned but for an illegal layoff or failure to hire, up to $10,000 per violation. There is also a catch-all CMP provision for any other violation that meets the standards in § 503.19. Section 503.23(e) sets forth the factors WHD will consider in determining the level of penalties to assess for all violations but wage violations, which are similar to the factors WHD used to determine the level of CMPs assessed under 20 CFR 655.65(g) in the 2008 rule. The maximum

CMP amount is set at $10,000 in order to be consistent with the statutory limit under 8 U.S.C. 1184(c)(14)(A), INA section 214(c)(14)(A).

10. § 503.24 Debarment

Under this section, WHD has the authority, upon finding a violation that meets the standards in § 503.19, to debar an employer, agent or attorney for not less than 1 year or more than 5 years. Section 503.24(a) contains a non-exhaustive list of acts or omissions that may constitute debarrable violations. Section 503.24(e) clarifies that while WHD and OFLC will have concurrent debarment jurisdiction, the two agencies will coordinate their activities so that a specific violation for which debarment is imposed will be cited in a single debarment proceeding. While OFLC has more expertise in the application and recruitment process, and will retain specific authority to debar for failure to comply with the Notice of Deficiency and assisted recruitment processes, WHD has extensive expertise in conducting workplace investigations under numerous statutes, and has been enforcing H-2B program violations since the 2008 rule became effective on January 18, 2009.

Providing WHD with the ability to order debarment, along with or in lieu of other remedies, will streamline and simplify the administrative process, and eliminate unnecessary bureaucratic hurdles by removing extra steps. Under the 2008 rule, WHD conducted investigations of H-2B employers and assessed back wages, civil money penalties, and other remedies, which the employer had the right to challenge administratively. However, WHD could not order debarment, no matter how egregious the violations, and instead was required to take the extra step of recommending that OFLC issue a Notice of Debarment based on the exact same facts, which then had to be

litigated again by OFLC. Allowing WHD to impose debarment along with the other remedies it can already impose in a single proceeding will simplify and speed up this duplicative enforcement process, and result in less bureaucracy for employers who have received a debarment determination. Instead, administrative hearings and appeals of back wage and civil money penalties, which the WHD already handles, will now be consolidated with challenges to debarment actions based on the same facts, so that an employer need only litigate one case and file one appeal rather than two. This means that both matters can be resolved more expeditiously.

Moreover, WHD has extensive debarment experience under regulations implementing other programs, such as H-2A, H-1B, the Davis-Bacon Act, and the Service Contract Act. See, e.g., 29 CFR 5.12. As discussed in the preamble to the 2008 rule, "[t]he debarment of entities from participating in a government program is an inherent part of an agency's responsibility to maintain the integrity or that program." 73 FR 78020, 78044. WHD can assist OFLC to regulate the entities that appear before DOL, and in particular, can take more efficient action to debar based on violations WHD finds as a result of its investigations.

WHD's debarment procedures at § 503.24(d) include procedural protections similar to the procedures in OFLC's debarment proceedings at 20 CFR 655.73, including notice of debarment, the right to a hearing before an Administrative Law Judge (ALJ), and the right to seek review of an ALJ's decision by the Administrative Review Board (ARB). However, an important distinction between the OFLC and WHD debarment procedures is that the WHD debarment procedures do not provide for a 30-day rebuttal period because WHD debarments arise from investigations during which the employer has ample

opportunity to submit any evidence and arguments in its favor. During the course of an investigation, WHD contacts and interviews both the employer and workers. WHD investigators discuss potential violations with the employer and, when requested, with his or her legal representative, providing the employer ample notice and an opportunity to provide any information relevant to WHD's final determination. Rather than a formal, 30-day rebuttal period, employers have numerous opportunities during the course of a WHD investigation and during a final conference to provide critical information regarding violations that may lead to debarment.

The discussion of the time period for debarment in the preamble to OFLC's debarment provision at 20 CFR 655.73 applies equally to WHD's period of debarment. For the reasons stated under Debarment of Agents and Attorneys in 20 CFR 655.73, WHD may also debar agents and attorneys for their own independent violations as well as their participation in employer violations.

Section 503.24(f) provides that an employer, agent, or attorney who is debarred by OFLC or WHD from the H-2B program will also be debarred from all other foreign labor certification programs administered by DOL for the time period in the final debarment decision. Many employers, agents and attorneys participate in more than one foreign labor certification program administered by DOL. However, under the 2008 rule, a party that was debarred under the H-2B program could continue to file applications under DOL's other foreign labor programs. Under this interim final rule, DOL will refuse to accept applications filed by or on behalf of a debarred party under the H-2B program in any of DOL's foreign labor certification programs. Paragraph (e) of this section also

provides that copies of final debarment decisions will be forwarded to DHS and DOS promptly.

Although DOL does not have the authority to routinely seek debarment of entities that are not listed on the ETA Form 9142, in appropriate circumstances, DOL may pierce the corporate veil in order to more effectively remedy the violations found. Piercing the corporate veil may be necessary to foreclose the ability of individual principals of a company or legal entity to reconstitute under another business entity.

11. § 503.25 Failure to cooperate with investigators

This provision prohibits interference or refusal to cooperate with a DOL investigation or enforcement action. In addition, it describes the penalties for failure to cooperate. Specifically, it notes the federal criminal laws prohibiting interference with federal officers in the course of official duties and permits WHD to recommend revocation to OFLC, initiate debarment proceedings, and/or assess CMPs for failures to cooperate that meet the violation standards set forth in § 503.19.

12. § 503.26 Civil money penalties - payment and collection

This provision instructs employers regarding how to submit payment of any CMPs owed. This section is administrative in nature and slightly modifies the provision from the 2008 rule at 20 CFR 655.65(j).

C. Administrative Proceedings

This interim final rule generally adopts the applicable administrative proceedings from the 2008 rule at 20 CFR 655.70-655.80. See 29 CFR 503.40-503.56. As explained in § 503.40(a), these procedures and rules prescribe the administrative appeal process that will be applied with respect to a WHD determination to assess CMPs, to debar, to enforce

provisions of the job order or obligations under 8 U.S.C. 1184(c), INA section 214(c), 20 CFR part 655, subpart A, or the regulations in this part, and/or to the collection of monetary relief. Paragraph (b) of § 503.40 provides that the administrative appeals process prescribed by subpart C will apply to determinations (as described in paragraph (a)) involving the H-2B Petition regardless of the date of the violation. As discussed supra, WHD has been delegated enforcement authority for the provisions of section 214(c)(14)(A)(i) of the INA. Under this authority, WHD may impose administrative remedies (including civil money penalties) that it determines to be appropriate where it finds, after notice and the opportunity for a hearing, a violation of the H-2B Petition (i.e., a substantial failure to meet any of the conditions of or a willful misrepresentation of a material fact on the H-2B Petition). The administrative appeals process prescribed by subpart C of this interim final rule will apply to such determinations and hearings, regardless of the date of the violation, as subpart C contains procedural rules; therefore, they apply to the enforcement proceedings for violations that occurred before the enactment of this interim final rule.

The administrative procedures begin with WHD notifying the party in writing regarding WHD's determination (§§ 503.41, 503.42). A party that wishes to appeal WHD's determination must request an ALJ hearing within 30 days after the date of the determination (§ 503.43). The determination will take effect unless the appeal is timely filed, staying the determination pending the outcome of the appeal proceedings (§ 503.43(e)).

The ALJ hearing will be conducted in accordance with 29 CFR part 18 (§ 503.44). The ALJ will prepare a decision following a hearing within 60 days after completion of

the hearing and closing of the record (§ 503.50(a)). This decision will constitute the final agency order unless a party petitions the ARB to review the decision within 30 days and the ARB accepts a party's petition for review (§ 503.50(e)).

A party that wishes to review the ALJ's decision must, within 30 days, petition the ARB to review the decision, specifying the issue(s) stated in the ALJ decision giving rise to the petition and the reason(s) why the party believes the decision is in error (§ 503.51(a)-(b)). If the ARB does not accept the petition for review within 30 days, the decision of the ALJ is deemed the final agency action (§ 503.51(c)). When the ARB determines to review a petition, either on its own or by accepting a party's petition, it will serve notice on the ALJ and all parties to the proceeding (§ 503.51(d)). The ARB will notify the parties of the issue(s) raised, the form in which submissions will be made and the timeframe for doing so (§ 503.53). Upon receipt of the ARB's notice, the Office of Administrative Law Judges (OALJ) will forward a copy of the hearing record to the ARB (§ 503.52).

Section 503.54 provides the requirements for submission of documents to the ARB. The ARB's decision will be issued within 90 days from the notice granting the petition (§ 503.55). The official record of every completed administrative hearing will be maintained by the Chief ALJ, or, where the case was the subject of administrative review, the ARB (§ 503.56).

For the reasons stated in the preamble under Integrity Measures (20 CFR 655.70-655.73), the Departments have not adopted additional procedures allowing workers a right to intervene and participate in every case. The importance of worker communication with WHD by filing complaints, participating in investigations, and

serving as witnesses in administrative or judicial proceedings cannot be overstated; it is essential in carrying out WHD's enforcement obligations. However, WHD notes that workers already participate in WHD investigations, which involve interviews with workers regarding program compliance. It is WHD's practice to provide notice to the individual complainants and their designated representatives and/or any third-party complainants when WHD completes an investigation by providing them a copy of the WHD Determination Letter. To further protect their interests, workers can seek, and have sought, intervention upon appeal to an ALJ. See 20 CFR 18.10(c) and (d).

VI. Administrative Information

A. Executive Orders 12866 and 13563

Under Executive Order (E.O.) 12866 and E.O. 13563, the Departments must determine whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and to review by the OMB. Section 3(f) of the E.O. defines an economically significant regulatory action as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Departments have determined that this rule is an economically significant regulatory action under section 3(f)(1) of E.O. 12866. This regulation would have an annual effect on the economy of $100 million or more; however, it would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. The Departments also have determined that this rule is a significant regulatory action under sec. 3(f)(4) of E.O. 12866. Accordingly, OMB has reviewed this rule.

The results of the Departments' cost-benefit analysis under this Part (VI.A) are meant to satisfy the analytical requirements under Executive Orders 12866 and 13563. These longstanding requirements ensure that agencies select those regulatory approaches that maximize net benefits — including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity — unless otherwise required by statute. The Departments did not use the cost-benefit analysis under this Part (VI.A) for purposes forbidden by or inconsistent with the Immigration and Nationality Act, as amended

Need for Regulation

The Departments have determined that there is a need for this interim final rule in light of the litigation, described in the preamble, challenging DOL's authority to independently issue its own legislative rules in the H-2B program. See Bayou Lawn & Landscape Servs. et al. v. Sec'y of Labor, 613 F.3d 1080 (11th Cir. 2013) (holding that employers are likely to prevail on their allegation that DOL lacks H-2B rulemaking authority). But see La. Forestry Ass'n v. Perez, 745 F.3d 653 (3d Cir. 2014) (holding that DOL *does* have H-2B rulemaking authority). In particular, because of the district court's order in

Perez v. Perez, No. 14-cv-682 (N.D. Fla. Mar. 4, 2015), vacating the 2008 rule and permanently enjoining DOL from enforcing it, DOL immediately ceased processing requests for prevailing wage determinations and applications for temporary labor certification in the H-2B program. Although on March 18, 2015, the Perez district court temporarily stayed the vacatur order, DOL cannot operate the H-2B program and cannot fulfill its consultative role and provide advice to DHS without regulations that set the framework, procedures, and applicable standards for receiving, reviewing, and issuing H-2B prevailing wages and temporary labor certifications.[25] Without advice from DOL, DHS in turn has no means by which to adequately test the domestic labor market or determine whether there are available U.S. workers to fill the employer's job opportunity. Moreover, DHS is precluded by regulation from processing any H-2B petition without a temporary labor certification from DOL. See 8 CFR 214.2(h)(6)(iii)(C). Therefore, the Departments have determined that this interim final rule is necessary in order to ensure the continued operation and enforcement of the H-2B program.

1. Alternatives

The Departments considered a number of alternatives: (1) promulgating the policy changes contained in the interim final rule; (2) issuing the 2008 rule as the interim final rule; (3) and adopting various aspects of those two rules. The Departments conclude that this interim final rule retains the best features of the 2008 rule and adopts additional provisions to allow DOL to best achieve its policy objectives, consistent with its mandate under the H-2B program.

[25] On April 15, 2015, the federal district court in the Northern District of Florida issued an order effectively permitting DOL to continue issuing temporary labor certifications under the H-2B program through May 15, 2015.

DOL had previously examined these same issues in a notice-and-comment rulemaking that was finalized in 2012; before issuing the 2012 final rule, DOL carefully considered the hundreds of substantive comments that were received and made a number of modifications to the provisions that had been in the proposed rule based upon those comments. DOL's implementation of the 2012 final rule was enjoined in the Bayou litigation, and DOL continued to operate the H-2B program based on the 2008 rule.

However, in light of the Perez vacatur order, the Departments have reevaluated the policy choices made in both the 2008 and the 2012 final rules, to determine the best ways for DOL to fulfill its responsibility to grant H-2B temporary labor certifications only when there are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and when the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. The Departments conclude, as DOL discussed in the preamble to the 2012 final rule, that the provisions of the 2008 rule do not adequately protect U.S. workers and fail to ensure the integrity of the program. The Departments conclude that the policy choices made in this interim final rule best allow DOL to fulfill its responsibilities under the H-2B program and to provide the appropriate consultation to DHS.

3. Economic analysis

DOL derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 rule, against the benefits and costs associated with the implementation of the provisions in this interim final rule. The benefits and costs of the provisions of this interim final rule are estimated as incremental impacts relative to the

baseline. Thus, benefits and costs attributable to the 2008 rule are not considered as benefits and costs of this interim final rule. We explain how the actions of workers, employers, and government agencies resulting from the interim final rule are linked to the expected benefits and costs.

DOL sought to quantify and monetize the benefits and costs of this interim final rule where feasible. Where DOL was unable to quantify benefits and costs—for example, due to data limitations—DOL described them qualitatively. The analysis covers 10 years (2015 through 2024) to ensure it captures major benefits and costs that accrue over time.[26] DOL has sought to present benefits and costs both undiscounted and discounted at 7 percent and 3 percent.

In addition, DOL provides an assessment of transfer payments associated with certain provisions of the interim final rule.[27] Transfer payments, as defined by OMB Circular A-4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect, but do not result in additional benefits or costs to society. The rule would alter the transfer patterns and increase the transfers from employers to workers. The primary recipients of transfer payments reflected in this analysis are U.S. workers and H-2B workers. The primary payors of transfer payments reflected in this analysis are H-2B employers, and under the rule, those employers who choose to participate are likely to be those that have the greatest need to access the H-2B program. When summarizing the benefits or costs of

[26] For the purposes of the cost-benefit analysis, the 10-year period starts on June 1, 2015.

[27] The specific provisions associated with transfer payments are: wages paid to corresponding workers; payments for transportation, subsistence, and lodging for travel to and from the place of employment; and visa-related fees.

specific provisions of this interim final rule, DOL presents the 10-year averages to reflect the typical annual effect.

The inputs used to calculate the costs of this interim final rule are described below.

a. Number of H-2B workers

DOL estimates that from FY 2013-2014, an average of 87,998 H-2B positions were certified per year. Because the number of H-2B visas is statutorily limited, only a portion of these certified positions were ultimately filled by foreign workers.

The number of visas available in any given year in the H-2B program is 66,000, assuming no statutory changes in the number of visas available. Some costs, such as travel, subsistence, visa and border crossing, and reproducing the job order apply to these 66,000 workers. Employment in the H-2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in this program. The H-2B program's annual cap of 66,000 visas issued per year (33,000 allocated semi-annually) represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (134.8 million).[28] The number of visas per year does not fully capture the number of H-2B workers in the United States at any given time as there are exceptions to the H-2B cap; additionally, a nonimmigrant's H-2B classification may be extended for qualifying employment for a total stay of up to three years without being counted against the cap. DOL assumes that half of all H-2B workers entering the United States (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H-2B workers employed at

[28] U.S. Bureau of Labor Statistics (BLS). 2015. Employees on Nonfarm Payrolls by Major Industry Sector, 2005-2014. Available at http://www.bls.gov/webapps/legacy/cesbtab1.htm.

any given time. This suggests that 57 percent of H-2B workers (66,000/115,500) are new entrants in a given year. Extending the analysis to the 115,500 H-2B workers we estimate are in the country at any given time, the number of H-2B workers represents approximately 0.09 percent of total nonfarm employment.

According to H-2B program data for FY 2013-2014, the average annual numbers of H-2B positions certified in the top five industries were as follows:

Landscaping Services – 33,438
Construction – 8,357
Amusement, Gambling, and Recreation – 7,939
Food Services and Drinking Places – 7,098
Janitorial Services – 5,857[29]

These employment numbers represent the following percentages of the total employment in each of these industries:[30]

Landscaping Services – 5.78 percent (33,438/578,970) Construction – 0.11 percent (8,357/7,316,240)
Amusement, Gambling, and Recreation – 0.52 percent (7,939/1,518,405)
Food Services and Drinking Places – 0.07 percent (7,098/10,057,301)
Janitorial Services – 0.59 percent (5,857/991,423)

As these data illustrate, the H-2B program represents a small fraction of the total employment even in each of the top five industries in which H-2B workers are found.

b. Number of affected employers

[29] Another industry, Forest Services, made the initial list of the top five industries, but it is not included in this analysis because the only data available for forestry also include various agriculture, fishing and hunting activities. Relevant data for forestry only were not available.

[30] U.S. Census Bureau. 2015. Available at http://www.census.gov/econ/census/. DOL obtained 2012 Economic Census data for the following industries: Landscaping Services; Janitorial Services; Food Services and Drinking Places; and Amusement, Gambling, and Recreation. The 2012 Economic Census did not publish data for the Construction industry because the data did not meet publication standards. In its place, DOL uses 2007 Economic Census data for the Construction industry.

DOL estimates that from FY 2013-2014, an average of 4,657 unique employers applied for H-2B workers,[31] and of these, an average of 3,955 were granted certifications. Several of the interim final rule's provisions (the requirement for employers to translate the job order from English to a language understood by the foreign workers, and payment of visa and visa-related fees) will predominantly or only apply to employers that ultimately employ H-2B workers. As there is no available source of data on the number of H-2B employer applicants who ultimately employ H-2B workers, DOL conservatively assumes that all certified H-2B employer applicants who are granted certification for H-2B workers will ultimately employ H-2B workers.

c. Number of corresponding workers

Several provisions of the interim final rule extend to workers in corresponding employment, defined as those non-H-2B workers who perform work for an H-2B employer, where such work is substantially the same as the work included in the job order, or is substantially the same as other work performed by H-2B workers.[32] Corresponding workers are U.S. workers employed by the same employer performing substantially the same tasks at the same locations as the H-2B workers, and they are entitled to at least the same terms and conditions of employment as the H-2B workers. Corresponding workers might be temporary or permanent; that is, they could be employed under the same job order as the H-2B workers for the same period of employment, or they could have been employed before the H-2B workers, and might

[31] DOL estimates the number of unique employer applicants for FY 2013-2014 by multiplying the number of unique employers granted certification (3,955) by the ratio of unique applicants to unique employers granted certification over FY 2007-2009 (1.1774).

[32] This analysis sometimes uses the shorthand "U.S. workers" to refer to these workers.

remain after the H-2B workers leave. However, the interim final rule excludes two categories of workers from the definition of corresponding employment. Corresponding workers are entitled to the same wages and benefits that the employer provides to H-2B workers, including the three-fourths guarantee, during the period covered by the job order. The corresponding workers would also be eligible for the same transportation and subsistence payments as the H-2B workers if they travel a long distance to reach the job site and cannot reasonably return to their residence each workday. In addition, as a result of the enhanced recruiting in this rule, including the new electronic job registry, certain costs may be avoided as employers are able to find U.S. workers in lieu of some H-2B workers. DOL believes that the costs associated with hiring a new U.S. worker would be lower than the costs associated with hiring an H-2B worker brought to the United States from abroad because the costs of visa and border crossing fees to be paid for by the employer will be avoided and travel costs may likely be less (or zero for workers who are able to return to their residence each day).

There are no reliable data sources on the number of corresponding workers at work sites for which H-2B workers are requested or the hourly wages of those workers. DOL does not systematically collect data regarding what have been defined as corresponding employees, and therefore cannot identify the numbers of workers to whom the obligations would apply. DOL extensively examined alternative data sources that might be used to accurately estimate the number of corresponding workers.

First, DOL evaluated whether WHD field staff could provide reliable information on the number of corresponding workers employed by H-2B employers based on the data gathered during investigations. This information has not been relevant to WHD

investigations because the 2008 rule did not have a definition of corresponding employees and did not protect such incumbent workers; it protected only workers who were newly hired in response to the employer's required H-2B recruitment activities. Anecdotal information from investigations indicates that the number of U.S. workers similarly employed varies widely among the companies investigated. However, no reliable data on the number of workers in corresponding employment compared to the number of H-2B workers is available, because no definition of corresponding employment existed in the 2008 rule. It also is unclear whether the limited numbers available in WHD investigations reflect the number of U.S. workers who were working during the pay period that WHD conducted the on-site investigation or the number who worked there at any point during the two-year period typically covered by an investigation. Further, there is no data regarding the length of the employment of the U.S. workers. Therefore, it is impossible to compare the pattern of employment of U.S. and H-2B workers. Finally, the limited data that is available did not represent a random sample of H-2B employers, but just the subset of employers that WHD had some reason to investigate.

Second, DOL reviewed a random sample of 225 certified and partially certified applications from FY 2010 submitted by employers in response to Requests for Information (RFIs) during the application process. While the 2011 version of ETA Form 9142B includes an optional item on the number of non-family full-time equivalent employees, that number includes all employees and not only the employees in corresponding employment. (See also the instructions to the Form 9142, which inform the employer to "[e]nter the number of full-time equivalent (FTE) workers the employer

employs.”) Moreover, even if this number accounted for the number of corresponding employees, none of the applications in the random sample used the 2011 version of the form. Of the 225 applications reviewed, two applications gave the current number of employees as part of the other information submitted. Additionally, DOL examined data in 34 payroll tables that were provided to supplement the application. The payroll tables reported data by month for at least one year from 2007 to 2010 and included information such as the total number of workers, hours worked, and earnings for all workers performing work covered by the job order. These workers were broken down into categories for permanent workers (those already employed and performing the certified job) and for temporary workers (both H-2B workers and U.S. workers similarly employed who responded to the job order). DOL divided the total payroll by the total hours worked across the two categories of workers to estimate an average hourly wage per permanent and temporary worker. DOL compared the total number of workers in months where permanent workers were paid either more than or less than temporary employees for those months in which both were employed.

DOL found 7,548 temporary and 10,310 permanent worker-months (defined as one worker, whether full- or part-time, employed one month) in the 34 payroll tables examined. Of these, permanent employees were paid more than temporary employees in 9,007 worker-months, and were paid less than temporary employees in 1,303 worker-months. This suggests that the rule would have no impact on wages for 87 percent of permanent workers (9,007/10,310). Conversely, 13 percent of permanent workers (1,303/10,310) were paid less than temporary employees and would receive an increase in wages as a result of the rule. Calculating the ratio of 1,303 permanent worker-months

to 7,548 temporary worker-months when permanent workers are paid less than temporary workers suggests that for every temporary worker-month, there are 0.17 worker-months where the permanent worker wage is less than the temporary worker wage. Extrapolating this ratio based on DOL's estimate that there are a total of 115,500 H-2B employees at any given time, suggests that 19,939 permanent workers (115,500 x 0.17) would be eligible for pay raises due to the rule.

DOL also calculated the percentage difference in the corresponding and temporary worker wages in months where temporary workers were paid more. On average, corresponding workers earning less than temporary employees would need their wages to be increased by 4.5 percent to match temporary worker wages.

For several reasons, however, DOL did not believe it was appropriate to use the data in the payroll tables to extrapolate to the entire universe of H-2B employers. First, because of the selective way in which these payroll records were collected by DOL, the distribution of occupations represented in the payroll tables is not representative of the distribution of occupations in H-2B temporary employment certification applications. The 34 payroll tables examined by DOL included the following occupations:

Nonfarm Animal Caretakers (12 payroll tables)
Landscaping and Groundskeeping Workers (4 payroll tables)
Maids and Housekeeping Cleaners (4 payroll tables)
Cooks (2 payroll tables)
Waiters and Waitresses (2 payroll tables)
Forest and Conservation Workers (2 payroll tables)
Dishwashers (1 payroll table)
Dining Room and Cafeteria Attendants and Bartender Helpers (1 payroll table)
Separating, Filtering, Clarifying, Precipitating, and Still Machine Setters, Operators, and Tenders (1 payroll table)
Food Cooking Machine Operators and Tenders (1 payroll table)
Floor Sanders and Finishers (1 payroll table)
Production Workers, All Other (1 payroll table)
Receptionists and Information Clerks (1 payroll table)

Grounds Maintenance Workers, All Other (1 payroll table)

The four payroll tables for landscaping and groundskeeping workers made up only 12 percent of the payroll tables, while applications for these workers represented 35 percent of FY 2010 applications.[33] Conversely, the 12 payroll tables from nonfarm animal caretakers made up 35 percent of the payroll tables in the sample, while applications for such workers made up only six percent of the FY 2010 applications.[34]

Second, the total number of payroll tables or payroll records provided to DOL was very small. DOL found only 34 payroll tables in 225 randomly selected applications. Furthermore, payroll records in H-2B temporary employment certification applications are provided in specific response to an RFI or in the course of a post-adjudication audit. In both instances the primary purpose of these records is to demonstrate compliance with program requirements, usually either to demonstrate proactively that the need for workers is a temporary need, or to demonstrate retroactively compliance with the wage obligation. Because payroll tables were submitted in response to an RFI rather than as a matter of routine in the application process, it is not clear that the data in the limited number of payroll tables for a given occupation are representative of all workers within that occupation in the H-2B program. Something triggered the RFI, presumably some indication that the need for temporary workers was not apparent, and therefore these applications are not representative of the 85 percent of applications that did not require a payroll table.

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[33] Applications for landscaping and groundskeeping workers similarly made up 35 percent of the total number (1,893/5,467) of applications in FY 2014.

[34] In FY 2014, applications for nonfarm animal caretakers made up only 3 percent of the total number of applications (178/5,467).

Third, the payroll wage information in these tables is provided at the group level, and DOL is unable to estimate how many individual corresponding workers are paid less than temporary workers in any given month. The payroll tables only allow a gross estimate of whether corresponding or temporary workers were paid more, on average, in a given month. Because wages would only increase for those U.S. workers currently making less than the prevailing wage, this information is necessary to determine the effect the rule would have on workers in corresponding employment. Finally, DOL has no data regarding the number of employees who would fall under the two exclusions in the definition of corresponding employment.

DOL, therefore, cannot confidently rely on the payroll tables alone and has no other statistically valid data to quantify the total number of corresponding workers or the number that would be eligible for a wage increase to match the H-2B workers. Nevertheless, DOL believes that the payroll tables show that the impact of the corresponding employment provision would be relatively limited, both as to the number of corresponding workers who would be paid more and as to the amount their wages would increase.

Based on all the information available to us, including the payroll tables and DOL's enforcement experience, DOL attempted to quantify the impact of the corresponding employment provision. DOL notes that the 2008 rule already protected U.S. workers hired in response to the required recruitment, including those U.S. workers who were laid off within 120 days of the date of need and offered reemployment. Therefore, this interim final rule will have no impact on their wages. This interim final rule simply extends the same protection to other employees performing substantially the same work

included in the job order or substantially the same work that is actually performed by the H-2B workers, with the exception of the aforementioned incumbent employees. DOL believes that a reasonable estimate is that H-2B workers make up 75 to 90 percent of the workers in the particular job and location covered by a job order; DOL assumes, therefore, that 10 to 25 percent of the workers will be U.S. workers newly covered by the interim final rule's coverage of corresponding workers. This assumption does not discount for the fact, as noted above, that some of these U.S. workers are already covered by the prevailing wage requirement or could be covered by one of the two exclusions from the definition of corresponding employment. Carrying forward with its estimate that there are a total of 115,500 H-2B workers employed at any given time, DOL thus estimates that there will be between 12,833 (if 90 percent are H-2B workers) and 38,500 (if 75 percent are H-2B workers) U.S. workers newly covered by the corresponding employment provision.

d. Wages used in the analysis

In this analysis, DOL uses the most recent OES wage data available from BLS, and its most recent estimate of the ratio of fringe benefit costs to wages, 44.1 percent.[35] To represent the hourly compensation rate for an administrative assistant/executive secretary, DOL uses the median hourly wage ($23.70) for SOC 43-6011 (Executive Secretaries and Executive Administrative Assistants).[36] The hourly compensation rate for a human resources manager is the median hourly wage of $48.46 for SOC 11-3121 (Human

[35] U.S. Bureau of Labor Statistics (BLS). 2015. Employer Costs for Employee Compensation, December 2014, news release text. March 11, 2015. Available at http://www.bls.gov/news.release/ecec.nr0.htm (accessed on March 12, 2015).

[36] U.S. Bureau of Labor Statistics (BLS). 2014a. Occupational Employment and Wages, May 2013, 43-6011 Executive Secretaries and Executive Administrative Assistants. April 1, 2014. Available at http://www.bls.gov/oes/current/oes436011.htm (accessed on March 12, 2015).

Resources Managers).[37] Both wage rates are multiplied by 1.441 to account for private-sector employee benefits.

For registry development and maintenance activities, DOL uses fully loaded rates based on an Independent Government Cost Estimate (IGCE) produced by OFLC in 2010,[38] which are inclusive of direct labor and overhead costs for each labor category.[39] DOL inflates these fully loaded wage rates to 2014 values using the CPI-U, published by the U.S. Bureau of Labor Statistics.[40]

The 2014 wages used in the analysis are summarized in Table 3.

Table 3. Wages Used in the Analysis

Occupation	Hourly Wage	Loaded Wage [a]	CPI-U Adjusted Wage [b]
Administrative Assistant	$24	$34	N/A
HR Manager	$48	$70	N/A
Program Manager	N/A	$138	$150
Computer Systems Analyst II	N/A	$92	$100
Computer Systems Analyst III	N/A	$110	$119
Computer Programmer III	N/A	$90	$98
Computer Programmer IV	N/A	$108	$117
Computer Programmer Manager	N/A	$124	$135
Data Architect	N/A	$105	$114
Web Designer	N/A	$125	$136
Database Analyst	N/A	$78	$85

[37] U.S. Bureau of Labor Statistics (BLS). 2014b. Occupational Employment and Wages, May 2013, 11-3121 Human Resources Managers. April 1, 2014. Available at http://www.bls.gov/oes/current/oes113121.htm (accessed on March 12, 2015).

[38] OFLC. 2010. Independent Government Cost Estimates.

[39] DOL would not typically use a wage that included overhead costs, but here DOL uses the services of a contractor to develop the registry, and therefore the fully loaded wage is more reflective of costs.

[40] U.S. Bureau of Labor Statistics. 2015. Available at http://data.bls.gov/cgi-bin/surveymost?cu (accessed on March 18, 2015).

Technical Writer II	N/A	$85	$92
Help Desk Support Analyst	N/A	$55	$60
Production Support Manager	N/A	$126	$137

[a] Source: OFLC. 2010. Independent Government Cost Estimate (IGCE). Accounts for 44.1 percent fringe.
[b] Adjusted using CPI-U (2014 annual) and CPI-U (2010 annual), or 236.736/218.056
N/A: Not applicable.
Sources: BLS, 2015; BLS, 2014a; BLS, 2014b.

e. H-2B employment in the Territory of Guam

Subject to the transfer of authority to DOL, this interim final rule applies to H-2B employers in the Territory of Guam only in that it requires them to obtain prevailing wage determinations in accordance with the process defined at 20 CFR 655.10. Because that transfer has not been effectuated, this analysis does not reflect any costs related to employment in Guam.

4. Subject-by-subject analysis

DOL's analysis below considers the expected impacts of the interim final rule provisions against the baseline (i.e., the 2008 rule). The sections detail the costs of provisions that provide additional benefits for H-2B and/or workers in corresponding employment, expand efforts to recruit U.S. workers, enhance transparency and worker protections, and reduce the administrative burden on SWAs.

a. Three-fourths guarantee

In order to ensure that the capped H-2B visas are appropriately made available to employers based on their actual need for workers, and to ensure that U.S. workers can realistically evaluate the job opportunity, DOL asserts that employers should accurately state their beginning and end dates of need and the number of H-2B workers needed. To the extent that employers submit Applications for Temporary Employment Certification

accurately reflecting their needs, the three-fourths guarantee provision should not represent a cost to employers, particularly given the 12-week and 6-week periods over which to calculate the guarantee.

b. Application of H-2B wages to corresponding workers

There are two cohorts of corresponding workers: (1) the U.S. workers hired in the recruitment process and (2) other U.S. workers who work for the employer and who perform the substantially the same work as the H-2B workers, other than those that fall under one of the two exclusions in the definition. The former are part of the baseline for purposes of the wage obligation, as employers have always been required to pay U.S. workers recruited under the H-2B program the same prevailing wage that H-2B workers get. Of the latter group of corresponding workers, some will already be paid a wage equal to or exceeding the H-2B prevailing wage so their wages represent no additional cost to the employer. Those who are currently paid less than the H-2B prevailing wage will have to be paid at a higher rate, with the additional cost to the employer equal to the difference between the former wage and the H-2B wage.

As discussed above, DOL was unable to identify a reliable source of data providing the number of corresponding workers at work sites for which H-2B workers are requested or the hourly wages of those workers. Nevertheless, DOL has attempted to quantify the impacts associated with this provision. All increases in wages paid to corresponding workers under this provision represent a transfer from participating employers to U.S. workers.

In the absence of reliable data, DOL can reasonably assume that H-2B workers make up 75 to 90 percent of the workers in a particular job and location covered by the job

order, with the remaining 10 to 25 percent of workers being corresponding workers newly covered by the rule's wage requirement. When these rates are applied to its estimate of the total number of H-2B workers (115,500) employed at any given time, DOL estimates that the number of corresponding workers newly covered by the corresponding employment provision will be between 12,833 and 38,500. This is an overestimate of the rule's impact since some of the employees included in the 10-25 percent proportion of corresponding workers are those hired in response to required recruitment and are therefore already covered by the existing regulation, and some employees will fall within one of the two exclusions under the definition.

The prevailing wage calculation represents a typical worker's wage for a given type of work. The prevailing wage calculation is based on the current wages received by all workers in the occupation and area of intended employment. Based on OES data,[41] DOL estimated that the weighted mean wage for the top five occupations in the H-2B program[42] reflects approximately the 60th percentile of the wage distribution of those occupations. Therefore, it is reasonable to assume that 40 percent of the corresponding workforce earns a wage that is equal to or greater than the calculated prevailing wage. Conversely, it would be reasonable to assume that 60 percent of the workers in corresponding employment earn less than the prevailing wage and would have their wages increased as a result of the interim final rule. Applying this rate to DOL's estimate of the number of workers covered by the corresponding employment provision would

[41] Bureau of Labor Statistics, Occupational Employment Statistics, May 2014 data, http://www.bls.gov/oes/#data.

[42] Landscaping and Groundskeeping Workers (SOC code: 37-3011); Maids and Housekeeping (SOC code: 37-2012); Amusement and Recreation Attendants (SOC code: 39-3091); Forest and Conservation Workers (SOC code: 45-4011); and Meat, Poultry, and Fish Cutters and Trimmers (SOC code: 51-3022).

mean that the number of newly covered workers who would receive a wage increase is between 7,700 and 23,100.

These newly covered U.S. workers who are currently paid below the new H-2B prevailing wage as established in the final wage rule promulgated simultaneously with this interim final rule (generally the OES mean in the area of intended employment) are likely to receive a wage increase that would be the difference between the new H-2B prevailing wage and their current wage. DOL estimated the weighted wage differences between workers at the 10th percentile and workers at the OES mean ($3.22), between workers at the 25th percentile and workers at the OES mean ($2.39), and between workers at the 50th percentile and workers at the OES mean ($1.03), respectively, for the top five occupations of the H-2B program. Using these weighted average hourly wage differences, DOL assumes that the wage increases for newly covered corresponding workers will be distributed between three hourly wage intervals: 10 percent of newly covered corresponding workers will receive an average hourly wage increase of $3.22; 15 percent will receive an average hourly wage increase of $2.39; and 35 percent will receive an hourly wage increase of $1.03.

Finally, DOL estimates that these workers in corresponding employment will have their wages increased for 1,365 hours of work. This assumes that every H-2B employer is certified for the maximum period of employment of nine months (39 weeks), and that every corresponding worker averages 35 hours of work per week for each of the 39 weeks. This is an upper-bound estimate since it is based on every employer voluntarily providing in excess of the number of hours of work required by the three-fourths guarantee for the maximum number of weeks that can be certified.

Therefore, based on all the assumptions noted above, DOL estimates the total annual transfer incurred due to the increase in wages for newly covered workers in corresponding employment ranges from $18.21 million to $54.62 million. See Table 4.

Table 4. Transfer of Corresponding Worker Wages

Hourly Wage Increase	Percent Corresponding Employees	Corresponding Employees	Total Cost
H-2B Workers Are 90% of Occupation at Firm			
$0.00	40%	5,133	$0
$3.22	10%	1,283	$5,633,075
$2.39	15%	1,925	$6,271,563
$1.03	35%	4,492	$6,303,264
Total	100%	12,833	$18,207,902
H-2B Workers Are 75% of Occupation at Firm			
$0.00	40%	15,400	$0
$3.22	10%	3,850	$16,903,617
$2.39	15%	5,775	$18,814,688
$1.03	35%	13,475	$18,898,641
Total	100%	38,500	$54,616,946

Source: DOL assumptions

Also, based on DOL's review of available information on the characteristics of industries employing H-2B workers, there will be natural limit on the number of corresponding workers whose wages might be affected by the revised rule. DOL found that two of the top five industries that most commonly employ H-2B workers are landscaping services and janitorial services. Establishments in these industries tend to be small: approximately seven percent of janitorial service and three percent of landscaping establishments have more than 50 year-round employees; and 83 percent of janitorial services and 91 percent of landscaping establishments have fewer than 20 year-round

employees.[43] Further, 20 percent of janitorial service firms and 30 percent of firms in landscaping do not operate year-round.[44] Therefore, DOL believes that a majority of H-2B employers are small-sized firms whose workforces are composed predominately of H-2B workers.

Finally, to the extent that firms in landscaping and janitorial services incur increased payroll costs, those increased costs are unlikely to have a significant aggregate impact. A U.S. Bureau of Economic Analysis (BEA) input-output analysis of the economy demonstrates that the demand for "Services to Buildings and Dwellings" (the sector in which janitorial and landscaping services are classified) is highly diffused throughout the economy.[45]

BEA calculates Direct Requirements tables that indicate the dollar amount of input from each industry necessary to produce one dollar of a specified industry's output. These results show that building services account for a relatively negligible proportion of production costs: of 389 sectors, building services account for less than $0.01 for each dollar of output in 379 sectors, and less than $0.005 for each dollar of output in 369 sectors. The largest users of these services tend to be retail trade, government and educational facilities, hotels, entertainment, and similar sectors. In other words, these services do not impact industrial productivity or the production of commodities that will result in large impacts that ripple throughout the economy. To further place this in perspective, Services to Buildings and Dwellings, upon which this characterization is

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[43] United States Census Bureau, 2007 Economic Census, http://www.census.gov/econ/census/data/

[44] United States Census Bureau, 2007 Economic Census, http://www.census.gov/econ/census/data/

[45] U.S. Department of Commerce, Bureau of Economic Analysis, Direct Requirements/After Redefinitions/Producer Value (2007), http://www.bea.gov/industry/io_annual.htm.

based, includes more than just the janitorial and landscaping service industries. The estimated 39,295 H-2B workers hired by these industries account for only 2.2 percent of employment in the Services to Buildings and Dwellings sector, even including impacts through corresponding employee provisions (described above as limited), and are only a small fraction of the already small direct requirements figures for this sector.

Therefore, based on the characteristics of industries that use H-2B workers, only a relatively small fraction of employees and firms in those industries likely will be affected by corresponding worker provisions.

However, because DOL does not have data on the number of corresponding workers or their wages relative to prevailing wages, it cannot project firm-level impacts to those firms that do have permanent corresponding workers. Standard labor economic models suggest that an increase in the cost of employing U.S. workers in corresponding employment would reduce the demand for their labor. Because employers cannot replace U.S. workers laid off 120 days before the date of need or through the period of certification with H-2B workers, DOL concludes that there would be no short-term reduction in the employment of corresponding workers among participating employers. In the long-run, however, these firms might be reluctant to hire additional permanent staff. The extent to which such unemployment effects might result from the prevailing wage provision will be a function of: the number of permanent staff requiring wage increases; the underlying demand for the product or service provided by the firm during off-peak periods; and the firm's ability to substitute for labor to meet that off-peak demand for its products or services. First, the fewer the number of permanent staff receiving wage increases, the smaller the increase in the cost of producing the good or

service. Second, the demand for labor services is a "derived demand." That is, if the product or service provided has few substitutes, purchasers would prefer to pay a higher price rather than do without the product. Third, some goods and services are more difficult to produce than others by substituting equipment or other inputs for labor services. In summary, if increased wages result in a small overall cost increase, demand for the product is inelastic, and there are few suitable substitutes for labor in production, then unemployment effects are likely to be relatively small.

c. Transportation to and from the place of employment for H-2B workers

The interim final rule requires H-2B employers to provide workers—both H-2B workers and those in corresponding employment who are unable to reasonably return to their permanent residences each day—with transportation and daily subsistence to the place of employment from the place from which the worker has come to work for the employer, whether in the United States or abroad, if the worker completes 50 percent of the period of the job order. The employer must also pay for or provide the worker with return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer if the worker completes the period of the job order or is dismissed early. The impacts of requiring H-2B employers to pay for employees' transportation and subsistence represent transfers from H-2B employers to workers because they represent distributional effects, not a change in society's resources.[46]

To estimate the transfer related to transportation, DOL first calculated the average number of certified H-2B positions per year during FY 2013-2014 from the 10 most

[46] For the purpose of this analysis, H-2B workers are considered temporary residents of the United States.

common countries of origin, along with each country's proportion of this total.[47] These figures, presented in Table 5, are used to create weighted averages of travel costs in the analysis below.

Table 5. Number of H-2B Workers by Country of Origin, FY 2013

Country	Number of Workers	Percent of Total
Mexico	88,322	84.1%
Jamaica	5,827	5.6%
Guatemala	2,734	2.6%
United Kingdom	1,414	1.3%
South Africa	1,009	1.0%
Philippines	922	0.9%
El Salvador	478	0.5%
Honduras	409	0.4%
Canada	337	0.3%
Romania	306	0.3%
Total	104,984	100%

Source: Department of Homeland Security, 2015.

DOL calculates transportation costs by adding two components: the estimated cost of a bus or ferry trip from a regional city[48] to the consular city to obtain a visa, and the estimated cost of a trip from the consular city to St. Louis. Workers from Mexico and Canada (85 percent of the total) are assumed to travel by bus; workers from all other countries, by air. Because this interim final rule requires an employer to hire U.S. applicants until 21 days before the date of need, employers will not have to pay a premium for refundable fares. This analysis, therefore, includes only the cost for non-refundable tickets.

[47] U.S. Department of Homeland Security (DHS). 2013. Yearbook of Immigration Statistics. Available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2013/NI/nonimmsuptable2d.xls (accessed on March 18, 2015).

[48] Where possible, DOL used a selection of cities to represent travel from different regions of the country.

The travel cost estimates are presented in Table 6. DOL estimated the round-trip transportation costs by doubling the weighted average one-way cost (for a round-trip travel cost of $836), then multiplying by the annual number of H-2B workers entering the United States (66,000). DOL estimates average annual transfer payments associated with transportation expenditures to be approximately $55.2 million. Employers likely are already paying some of this cost, either voluntarily in order to secure the workers or because of the employer's obligations under the FLSA Under the FLSA, the majority of H-2B employers are required to pay for the proportion of inbound and outbound transportation costs that would otherwise bring a worker's earnings below the minimum wage in the first and last workweeks of employment. However, it is not possible to determine how much of the cost of transportation employers currently are paying. To the extent that this does already occur, this transportation transfer is an upper-bound estimate. DOL also believes it has over-estimated this transfer for the additional reason that inbound transportation is only due for workers who complete 50 percent of the job order and outbound transportation is due only for those who complete the full job order or are dismissed early.

Table 6. Cost of Travel for H-2B Workers

Item	Value
New entrants per year	66,000
Mexico	
One way travel (bus) — Hometown to Monterrey[49]	$52

[49] Omnibus de México. 2015. Venta en Línea. Available at http://www.odm.com.mx/ (accessed on March 12, 2015). Averages cost of a bus ticket to Monterrey from: Tampico (690 pesos), Actopan (875 pesos); and Acámbaro (835 pesos). Converted from pesos to U.S. dollars at the rate of 0.065 pesos per dollar for an average cost of $52.

One way travel (bus) — Monterrey to Juarez[50]	$78
One way travel (bus) — El Paso to St. Louis[51]	$230
Total one way travel	$360
Jamaica	
One way travel (bus) — Hometown to Kingston[52]	$1
One way travel (air) — Kingston to St. Louis[53]	$502
Total one way travel	$503
Guatemala	
One way travel (bus) — Hometown to Guatemala City[54]	$2
One way travel (air) — Guatemala City to St. Louis[55]	$758
Total one way travel	$760
United Kingdom	
One way travel (bus or rail) — Hometown to London[56]	$32
One way travel (air) — London to St. Louis[57]	$2,006
Total one way travel	$1,143
South Africa	

[50] Omnibus de México. 2015. Venta en Línea. Available at http://www.odm.com.mx/ (accessed on March 12, 2015). The cost of a bus ticket from Monterrey to Ciudad Juarez is 1200 pesos, converted from pesos to U.S. dollars at the rate of 0.065 pesos per dollar for a cost of $78.

[51] Greyhound. 2015. Tickets. Available at https://www.greyhound.com/farefinder/ (accessed on March 12, 2015).

[52] Jamaica Guide. 2015. Jamaica Buses. Available at http://caribya.com/jamaica/buses/ (accessed on March 12, 2015).

[53] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 12, 2015).

[54] Virtual Tourist. 2015. Guatemala City Transportation. Available at http://www.virtualtourist.com/travel/Caribbean_and_Central_America/Guatemala/Departamento_de_Guatemala/Guatemala_City-1671108/Transportation-Guatemala_City-TG-C-1.html (accessed on March 12, 2015).

[55] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 12, 2015).

[56] Megabus. 2011. Megabus UK home page. Available at http://uk.megabus.com/default.aspxhttp\:uk.megabus.com (accessed on July 10, 2011) and Raileasy. 2011. Raileasy home page. Available at https://www.raileasy.co.uk/ (accessed on July 10, 2011); average of the cost of a bus ticket from three cities in England to London (GBP 15) and a train from Northern Ireland to London (GBP 50); Converted at the rate of 1.36 GBP per USD for an average of $32.

[57] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 12, 2015).

One way travel (bus) — Hometown to Johannesburg[58]	$57
One way travel (air) — Johannesburg to St. Louis[59]	$1,323
Total one way travel	$1,380
Philippines	
One way travel (ferry) — Hometown to Manila[60]	$40
One way travel (air) — Manila to St. Louis[61]	$1,735
Total one way travel	$1,775
El Salvador	
One way travel (bus) — Hometown to San Salvador[62]	$1
One way travel (air) — San Salvador to St. Louis[63]	$472
Total one way travel	$473
Honduras	
One way travel (bus) — Hometown to Tegucigalpa[64]	$23
One way travel (air) — Tegucigalpa to St. Louis[65]	$748
Total one way travel	$771
Canada	
One way travel (air) — Hometown to Ottawa[66]	$175

[58] Computicket. 2015. Computicket home page. Available at http://www.computicket.com/web/bus_tickets/ (accessed on March 12, 2015). The maximum bus fare from one of the farthest cities (Cape Town) to Johannesburg is 715 Rand, which is approximately $57 (= 715 Rand × 0.08).

[59] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 12, 2015).

[60] Lonely Planet. 2015. Ferry travel in the Philippines. Available at http://www.lonelyplanet .com/philippines/transport/getting-around (accessed on March 12, 2015).

[61] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 12, 2015).

[62] Rome2Rio. 2015. Home page. Available at https://www.rome2rio.com/s/Santa-Ana-El-Salvador/San-Salvador (accessed on March 18, 2015).

[63] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 18, 2015).

[64] Rome2Rio. 2015. Home page. Available at http://www.rome2rio.com/s/Tegucigalpa/San-Pedro-Sula (accessed on March 18, 2015).

[65] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 18, 2015).

[66] Air Canada. 2011. Air Canada home page. Available at http://www.aircanada.com (accessed on July 10, 2011).

One way travel (bus) — Ottawa to St. Louis[67]	$189
Total one way travel	$353
Romania	
One way travel (bus) — Hometown to Bucharest[68]	$28
One way travel (air) — Bucharest to St. Louis[69]	$1,396
Total one way travel	$1,424
All	
One way travel — Weighted average	$418
Roundtrip travel — Weighted average	$836
Total Travel Costs — H-2B Workers	$55,190,325

d. Transportation to and from the place of employment for corresponding workers

The interim final rule also requires the employer provide inbound and outbound transportation to and from the place of employment for corresponding workers who are unable to return daily to their permanent residences. DOL estimates an approximate unit cost for each traveling corresponding worker by taking the average of the cost of a bus ticket to St. Louis from Fort Wayne, IN ($86), Pittsburgh, PA ($135), Omaha, NE ($88), Nashville, TN ($81), and Palmdale, CA ($230).[70] Averaging the cost of travel from these

[67] Greyhound. 2015. Tickets. Available at https://www.greyhound.com/farefinder/ (accessed on March 12, 2015).

[68] Lonely Planet. 2015. Getting around Romania. Available at http://www.lonelyplanet.com/romania/transport/getting-around/bus/ (accessed on March 12, 2015). According to Lonely Planet, "Figure on about 3 to 4 lei for every 20km travelled." The travel distance from one of the farthest cities (Baia Mare) to Bucharest is approximately 600 km , so the maximum cost would be 120 lei (= 4 lei × 600km/20km), which is approximately $28 (= 120 lei × 0.236).

[69] Orbitz. 2015. Home page. Available at http://www.orbitz.com/ (accessed on March 12, 2015).

[70] Greyhound. 2015. Tickets. Available at https://www.greyhound.com/farefinder/ (accessed on March 12, 2015).

five cities results in an average one way cost of $124, and a round-trip cost of $248 (see Table 7).

Table 7. Unit Costs of Corresponding Worker Travel

One way travel to St. Louis, MO	Cost
Fort Wayne, IN	$86
Pittsburgh, PA	$135
Omaha, NE	$88
Nashville, TN	$81
Palmdale, CA	$230
One way travel - Average	$124
Round-trip travel	$248

Source: Greyhound, 2015.

Because DOL has no basis for estimating the number of workers in corresponding employment who will travel to the job from such a distance that they are unable to return daily to their permanent residence, or to estimate what percentage of them will remain on the job through at least half or all of the job order period, DOL is unable to further estimate the total transfer involved.

e. Subsistence payments

DOL estimated the transfer related to subsistence payments by multiplying the annual cap set for the number of H-2B workers generally entering the United States (66,000) by the subsistence per diem ($11.86), and the round-trip travel time for the top 10 H-2B countries (4 days - 3 days to account for travel from the worker's home town to the consular city to obtain a visa and from the consular city to the place of employment, and 1 day to account for the workers' transportation back to their home town). Multiplying by 66,000 new entrants per year and the subsistence per diem of $11.86 results in average annual transfers associated with the subsistence per diem of approximately $3.1 million

(see Table 8). Again, this is an upper-bound estimate because the inbound subsistence reimbursement only is due for workers who complete 50 percent of the period of the job order and outbound subsistence is due only for those who complete the full job order period or are dismissed early.

Table 8. Transfer of Subsistence Payments

Cost Component	Value
New entrants per year	66,000
Subsistence Per Diem	$11.86
One way travel days – Inbound	3
One way travel days – Outbound	1
Round-trip travel days	4
Total annual subsistence transfer for H-2B workers	$3,131,040

This provision applies not only to H-2B workers, but also to workers in corresponding employment on H-2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. Assuming that each worker can reach the place of employment within 1 day and thus would be reimbursed for a total of 2 round-trip travel days at a rate of $11.86 per day, each corresponding worker would receive $23.72 in subsistence payments. DOL was unable to identify adequate data to estimate the number of corresponding workers who are unable to return to their residence daily or, as a consequence, the percent of corresponding workers requiring payment of subsistence costs; thus, the total cost of this transfer could not be estimated.

f. Lodging for H-2B workers

Any expenses incurred between a worker's hometown and the consular city are within the scope of inbound transportation and subsistence costs, which also includes lodging costs while H-2B workers travel from their hometown to the consular city to wait to obtain a visa and from there to the place of employment. DOL estimates that H-2B workers will spend an average of two nights in an inexpensive hostel-style accommodation and the costs of those stays in consular cities of the 10 most common countries of origin are as follows: Monterrey (Mexico), $13.81; Kingston (Jamaica), $22.72; Guatemala City (Guatemala), $13.25; London (United Kingdom), $38.66; Pretoria (South Africa), $17.55; Manila (Philippines), $11.25; San Salvador (El Salvador), $10.00; Tegucigalpa (Honduras), $15.78; Ottawa (Canada), $25.06; and Bucharest (Romania), $10.38.[71] Using the number of certified H-2B workers from the top 10 countries of origin, DOL calculates a weighted average of $14.13 for one night's stay, and $28.27 for two nights' stay. Multiplying by the 66,000 new entrants per year suggests total transfers associated with travel lodging of $1.9 million per year (see Table 9). This cost would not apply to U.S. workers.

Table 9. Cost of Lodging for H-2B Workers

Cost Component	Value
New entrants per year	66,000
Nights in hostel	2
City	**Lodging Cost**
Monterrey (Mexico)	$13.18
Kingston (Jamaica)*	$22.72
Guatemala City (Guatemala)	$13.25
London (United Kingdom)	$38.66

[71] HostelWorld.com. Available at http://www.hostelworld.com/ (accessed on March 13, 2015).

Pretoria (South Africa)	$17.55
Manila (Philippines)	$11.15
San Salvador (El Salvador)	$10.00
Tegucigalpa (Honduras)	$15.78
Ottawa (Canada)	$25.06
Bucharest (Romania)	$10.38
Weighted Average - One Night	$14.13
Weighted Average - Two Nights	$28.27
Total Cost of Lodging	$1,865,637

Source: Assumed foreign workers stayed in dormitory style accommodations at these hostels unless otherwise noted. *Foreign workers will stay at private accommodations at this hostel since dormitory style facilities were not provided.

g. Visa and consular fees

Under the 2008 rule, visa-related fees—including fees required by the Department of State for scheduling and/or conducting an interview at the Consulate —may be paid by the temporary worker. This interim final rule, however, requires employers to pay visa fees and associated consular expenses. Requiring employers to bear the full cost of their decision to hire foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on U.S. workers. As explained in the Preamble, government-mandated fees such as these are integral to the employer's choice to use the H-2B program to bring temporary foreign workers into the United States.

The reimbursement by employers of visa application fees and fees for scheduling and/or conducting an interview at the consular post is a transfer from employers to H-2B workers. DOL estimates the total cost of these expenses by adding the cost of an H-2B visa and any applicable appointment and reciprocity fees. The H-2B visa fee is $160 in all of the 10 most common countries of origin. We have not attributed a cost with respect to Canada because Canadian citizens traveling to the United States for temporary

employment generally do not need a visa,[72] resulting in a weighted average visa fee of $159. The same countries charge the following appointment fees: Mexico ($0),[73] Jamaica ($10),[74] Guatemala ($12),[75] the U.K. ($0),[76] South Africa ($0),[77] Philippines ($10),[78] El Salvador ($0), Honduras ($0), Canada ($0)[79], and Romania ($11),[80] for a weighted average appointment fee of $1.02. Additionally, South Africa charges a reciprocity fee of $85, resulting in a weighted average of $0.84.[81] Multiplying the weighted average visa cost, appointment fee, and reciprocity fee by the 66,000 H-2B workers entering the United States annually results in an annual average transfer of visa-related fees from H-2B employers to H-2B workers of $10.6 million (see Table 10). Again, this is an upper-bound estimate because many H-2B employers already are paying these fees in order to ensure compliance with the FLSA's minimum wage requirements.

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[72] U.S. Department of State. 2015. Citizens of Canada and Bermuda - http://travel.state.gov/content/visas/english/visit/canada-bermuda.html (accessed on March 13, 2015).

[73] Consulate General of the United States - Monterrey - Mexico. 2015. Temporary worker. Available at http://monterrey.usconsulate.gov/work_visa.html (accessed on March 13, 2015).

[74] The U.S. Visa Information Service in Jamaica. 2011. How the Online System Works. Available at http://www.usvisa-jamaica.com/jam/ (accessed on July 22, 2011).

[75] Embassy of the United States - Guatemala. 2011. Application Process. Available at http://guatemala.usembassy.gov/niv_how_to_apply.html#appointment (accessed on July 22, 2011).

[76] Embassy of the United States - London - U.K. 2011. MRV Application Fee. Available at http://london.usembassy.gov/fee.html (accessed on July 22, 2011).

[77] The U.S. Visa Information Service in South Africa. 2011. Fee Payment Options. Available at http://usvisa-info.com/en-ZA/selfservice/us_fee_payment_options (accessed on July 22, 2011).

[78] Embassy of the United States - Manila - Philippines. 2011. Visa Point™ - The Online Visa Information and Appointment System. Available at http://manila.usembassy.gov/wwwhvpnt.html (accessed on July 22, 2011).

[79] U.S. Department of State. 2011a. Citizens of Canada, Bermuda and Mexico- When is a Visa Required? Available at http://travel.state.gov/visa/temp/without/without_1260.html (accessed on July 22, 2011).

[80] Embassy of the United States - Bucharest - Romania. 2011. Non Immigrant Visas. Available at http://romania.usembassy.gov/visas/visa_application_process.html (accessed on July 22, 2011).

[81] U.S. Department of State. 2015. Reciprocity by Country. Available at http://travel.state.gov/content/visas/english/fees/reciprocity-by-country.html (accessed on March 13, 2015).

Table 10. Cost of Visa and Consular Fees

Cost Component	Value
New Entrants per Year	66,000
Visa Application Fee	
Mexico	$160
Jamaica	$160
Guatemala	$160
United Kingdom	$160
South Africa	$160
Philippines	$160
El Salvador	$160
Honduras	$160
Canada	$0
Romania	$160
Weighted Average Visa Fee	$159
H-2B Visa - Total Costs	$10,525,028
Appointment Fee	
Mexico	$0.00
Jamaica	$10.00
Guatemala	$12.00
United Kingdom	$0.00
South Africa	$0.00
Philippines	$10.00
El Salvador	$0.00
Honduras	$0.00
Canada	$0.00
Romania	$11.00
Weighted Average Appointment Fee	$1.02
Appointment Fee - Total Costs	$67,236
Reciprocity Fee	
Mexico	$0.00
Jamaica	$0.00
Guatemala	$0.00
United Kingdom	$0.00
South Africa	$85.00
Philippines	$0.00
El Salvador	$0.00
Honduras	$0.00
Canada	$0.00
Romania	$0.00

Weighted Average Reciprocity Fee	$0.84
Reciprocity Fee - Total Costs	$55,627
Total Costs	
Total Visa and Consular Fees	$10,647,891

Sources: Given in text

h. Enhanced U.S. worker referral period

The interim final rule ensures that U.S. workers are provided with better access to H-2B job opportunities by requiring employers to continue to hire any qualified and available U.S. worker referred to them from the SWA until 21 days before the date of need, representing an increase in the recruitment period compared to the baseline. The rule also introduces expanded recruitment provisions, including requiring employers to notify their current workforce of the job opportunity and contact their former U.S. employees from the previous year. The enhanced recruitment period and activities improve the information exchange between employers, SWAs, the public, and workers about job availability, increasing the likelihood that U.S. workers will be hired for those jobs.

The benefits to U.S. workers also apply to sections “i” through “j” below, which discuss additional provisions aimed at further improving the recruitment of U.S. workers.

The extension of the referral period in this interim final rule will likely result in more U.S. workers applying for these jobs, requiring more SWA staff time to process additional referrals. DOL does not have estimates of the additional number of U.S. applicants, and thus is unable to estimate the costs to SWAs associated with this provision.

DOL believes that hiring a U.S. worker will cost employers less than hiring an H-2B worker, as transportation and subsistence expenses will likely be reduced, if not avoided entirely. The cost of visa fees will be entirely avoided if U.S. workers are hired. Because DOL has not identified appropriate data to estimate any increase in the number of U.S. workers that might be hired as a result of the interim final rule's enhanced recruitment, it is unable to estimate total cost savings. Likewise, the enhanced recruitment period along with more extensive recruitment activities and a number of program changes that should make these job opportunities more desirable should generate an increased number of local referrals for whom no transportation or subsistence costs will be incurred. Since the number of such workers cannot be estimated with precision, these cost saving are not factored into this analysis; however, DOL is confident the actual overall costs to employers for transportation and subsistence will be lower than the estimates provided here.

i. Additional recruitment directed by the CO

Under the interim final rule, an employer may be directed by the CO to conduct additional recruitment if the CO has determined that there may be qualified U.S. workers available, particularly when the job opportunity is located in an area of substantial unemployment. This provision applies to all employer applicants regardless of whether they ultimately employ H-2B workers. Therefore, DOL estimates costs using the estimated number of unique employer applicants for FY 2013-2014 (4,657). DOL conservatively estimates that 50 percent of these employer applicants (2,329) will be directed by the CO to conduct additional recruitment.

To estimate the cost of a newspaper advertisement, DOL calculates the cost of placing a classified advertisement in the following newspapers: The Virginian Pilot ($574.00)[82], The Austin Chronicle ($76.60),[83] The Gainesville Sun ($569.24),[84] Plaquemines (LA) Gazette ($70.00),[85] Aspen Times ($513.00),[86] and Branson Tri-Lakes News ($104.00),[87] for an average cost of $318. Employers may use other means of recruiting, such as listings on Monster.com ($375)[88] and Career Builder ($419).[89] Because so many newspapers include posting of the advertisement on their websites and/or Career Builder in the cost of the print advertisement, DOL bases the estimate on the cost of newspaper recruiting. Multiplying the number of unique employer applicants who will be directed to conduct additional recruitment (2,329) by the average cost of a newspaper advertisement ($318) results in a total cost for newspaper ads of $0.7 million.

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[82] The Virginian Pilot, available at http://selfserve.pilotezads.com/vp-adportal/classified/index.html. Selected the Platinum package for 14 days (accessed on March 12, 2015).

[83] The Austin Chronicle. 2015. Place an Ad. Selected the Gold Plan. Available at http://austinchronicle.adperfect.com/?catid=33631&chanid=C0A801411d5931FD07Ggh2E376AE&clsid=621631 (accessed on March 12, 2015).

[84] The Gainesville Sun, available at http://gainesvillesun.adperfect.com/. Selected Employment Print and Online option (Thursday through Sunday). The latter option was for two weeks.

[85] The Plaquemines Gazette, available at http://plaqueminesgazette.com/?page_id=118. For this newspaper selected $5 per day ad for 14 days.

[86] Contacted the classified ad staff for the Aspen Times. They do not give quotes over the phone because it depends on the number of lines, length of time published, and other variables. The staff member stated employment classifieds could run at least $300 up to $1,000. The rate of $513 was used for this publication.

[87] Contacted the classified ad staff on March 12, 2015. The paper is only published on Wednesday and Saturdays of each week. For a 30-word ad, for one week is $32 and for two weeks is $64. For one month, it is $104.

[88] Monster.com. 2015. Job Postings Inventory. Available at http://hiring.monster.com/indexProspect.Redux.aspx (accessed on March 12, 2015).

[89] CareerBuilder. 2015. Job Posting. Available at https://www.careerbuilder.com/JobPoster/ECommerce/CartOrderSummary.aspx?cblid=epjobbtn&sc_cmp2=JP_HP_PostJobButton&sslRedirectCnt=1 (accessed on March 12, 2015).

DOL estimates that no more than 10 percent of employer applicants (i.e., 20 percent of those directed to conduct additional recruiting) will need to translate the advertisement in order to recruit workers whose primary language is not English. DOL calculated translation costs for translating a one-page document from English to any language to be $21.95.[90] Multiplying the number of employers performing translation (466) by the translation cost results in total translation costs of $0.01 million.

To account for labor costs in posting additional ads, DOL multiplies the estimated number of unique employer applicants required to conduct additional recruiting (2,329) by the estimated time required to post the advertisement (0.08 hours, or 5 minutes) and the loaded hourly compensation rate of an administrative assistant/executive secretary ($34.15). The result, $0.01 million, is added to the average annual cost of CO-directed recruiting activities for a total of approximately $0.8 million (see Table 11).

Table 11. Cost of Additional Recruiting

Cost Component	Value
Number of unique H-2B employer applicants	4,657
Percent directed to conduct additional recruiting	50%
Employer applicants conducting additional recruiting	2,329
Newspaper advertisement - Unit cost	$318
Total Cost of Newspaper Ad	$740,463
Percent of employer applicants needing to perform translation	10%
Employers performing translation	466

[90] ServiceScape. 2015. How it Works - Cost Calculator. Available at http://www.servicescape.com/help.asp (accessed on March 12, 2015).

English to any language (two day delivery)	$22
Total Cost of Translation	$10,222
Time to post advertisement (hours)	0.08
Administrative Assistant hourly wage w/ fringe	$34.15
Total Cost of Labor to Post Newspaper Ad	$6,362
Total Cost	
Total Cost of Additional Recruiting	$757,047

Sources: BLS, 2011a; BLS, 2011b; U.S. Census, 2008; ServiceScape 2015; Consulted the following publications for their rates on employment classifieds: Branson Tri-Lake News; Aspen Times; The Austin Chronicle; The Gainesville Sun; Plaquemines Gazette; The Virginian Pilot.

It is possible that employers will incur costs from interviewing applicants who are referred to H-2B employers by the additional recruiting activities. However, DOL is unable to quantify the impact.

j. Electronic job registry

Under the interim final rule, DOL will post and maintain employers' H-2B job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The electronic job registry will serve as a public repository of H-2B job orders for the duration of the referral period. The job orders will be posted in the registry by the CO upon the acceptance of each submitted Application for Temporary Employment Certification. The posting of the job orders will not require any additional effort on the part of H-2B employers or SWAs.

i. Benefits

The electronic job registry will improve the visibility of H-2B jobs to U.S. workers. In conjunction with the longer referral period under the interim final rule, the electronic job

registry will expand the availability of information about these jobs to U.S. workers, and therefore improve their employment opportunities. In addition, the establishment of an electronic job registry will provide greater transparency of DOL's administration of the H-2B program to the public, members of Congress, and other stakeholders. Transferring these job orders into electronic records for the electronic job registry will result in a more complete, real-time record of job opportunities for which H-2B workers are sought. Employers seeking temporary workers, in turn, will likely experience an increase in job applications from U.S. workers, and thus may not incur the additional expenses of hiring H-2B workers. DOL, however, is not able to estimate the increase in job applications resulting from the electronic job registry, and thus is unable to quantify this benefit.

ii. Costs

The establishment of an electronic job registry in this interim final rule represents increased maintenance costs to DOL. DOL estimates that first-year costs will be 25 percent of the first-year costs under the H-2A program (25 percent of $561,365, or $140,341) and that subsequent year costs will be 10 percent of the costs under the H-2A program (10 percent of $464,341, or $46,434). Using the loaded hourly rate for all relevant labor categories ($1,342) suggests that 105 labor hours will be required in the first year, and 35 labor hours will be required in subsequent years (see Table 12).

Table 12. Cost of Electronic Job Registry

Cost Component	Value
Sum of All Labor Category Loaded Wages	$1,342
Registry development and maintenance hours - Year 1	105
Registry maintenance hours - Year 2-10	35

Cost to DOL to Develop and Maintain Job Registry - Year 1	$140,341
Cost to DOL to Maintain Job Registry - Year 2-10	$46,434

k. Disclosure of job order

The interim final rule requires an employer to provide a copy of the job order to H-2B workers outside the United States no later than the time at which the worker applies for the visa, and to workers in corresponding employment no later than the day that work starts. For H-2B workers changing employment from one certified H-2B employer to another, the copy must be provided no later than the time the subsequent H-2B employer makes an offer of employment. The job order must be translated to a language understood by the worker.

DOL estimates two cost components for the disclosure of job orders: the cost of reproducing the document containing the terms and conditions of employment, and the cost of translation.

The cost of reproducing job orders does not apply to employers of reforestation workers because the Migrant and Seasonal Agricultural Worker Protection Act already requires these employers to make this disclosure in a language common to the worker. According to H-2B program data for FY 2013-2014, 89.1 percent of H-2B workers work in an industry other than reforestation, suggesting that the job order will need to be reproduced for 102,911 (89.1 percent of 115,500) H-2B workers. DOL estimates the cost of reproducing the terms and conditions document by multiplying the number of affected H-2B workers (102,911) by the number of pages to be photocopied (3) and by the cost per photocopy ($0.09). DOL estimates average annual costs of reproducing the

document containing the terms and conditions of employment to be approximately $0.03 million (see Table 13).

DOL estimates that 91.6 percent of H-2B workers from the top 10 countries of origin do not speak English,[91] so approximately 3,621 H-2B employers will need to translate their job orders. DOL assumes that an employer hires all of its H-2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is necessary per employer needing translation. The estimate of the cost of translating a 3-page document into English from languages spoken in the top 10 countries of origin is $56.85.[92] Multiplying the number of H-2B employers who will need to translate the job order (3,621) by the cost of translation ($56.85) suggests that translation costs will total $0.2 million (see Table 13).

Summing the costs of reproducing and translating the job order results in total costs related to disclosure of the job order of $0.2 million (see Table 13).

Table 13. Cost of Disclosure of Job Order

Cost Component	Value
Reproducing Job Order	
H-2B workers	115,500
Percent workers not in reforestation	89.1%
Affected workers	102,911
Pages to be photocopied	3
Cost per page	$0.09
Cost per job order	$0.27

[91] U.S. Department of Homeland Security (DHS). 2013. Yearbook of Immigration Statistics. Available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2013/NI/nonimmsuptable2d.xls (accessed on March 18, 2015).

[92] ServiceScape. 2015. How it Works - Cost Calculator. Available at http://www.servicescape.com/help.asp (accessed on March 12, 2015).

Total Cost of Reproducing Document	$27,786
Translating Job Order	
Number of unique certified H-2B employers	3,955
Percent workers needing translation	91.6%
Employers performing translation	3,621
English to any language - 3 page document, 2 day delivery	$56.85
Total Translation Cost	$205,868
Total Cost	
Total Cost of Disclosure of Job Order	$233,654

Sources: DHS, 2009; ServiceScape, 2015.

l. Use of post-filing recruitment model

The 2008 rule used an attestation-based model: employers conducted the required recruitment before submitting an Application for Temporary Employment Certification and, based on the results of that effort, applied for certification from DOL for a number of foreign workers to fill the remaining openings. Employers simply attested that they had undertaken the necessary activities and made the required assurances to workers. DOL has determined that this attestation-based model did not provide sufficient protection to workers. The recruitment process under this interim final rule occurs after the Application for Temporary Certification is filed so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of the interim final rule is to change the timing of recruitment rather than to change the substantive requirements.

Using a post-filing recruitment model in which employers demonstrate compliance with program obligations before certification will improve worker protections and reduce various costs for several different stakeholders. Greater compliance will provide

improved administration of the program, conserving government resources at both the State and Federal levels. In addition, employers will be subject to fewer requests for additional information and denials of Applications, decreasing the time and expense of responding to these DOL actions. Finally, it will result in the intangible benefit of increased H-2B visa availability to those employers who have conducted bona fide recruitment around an actual date of need. DOL, however, is not able to estimate the economic impacts of these several effects and is therefore unable to quantify the related benefits.

Requiring post-filing recruitment will impose minimal costs on employers because they will not be required to produce new documents, but only to supplement their recruitment report with additional information (including the additional recruitment conducted, means of posting the job opportunity, contact with former U.S. workers, and contact with labor organizations where the occupation is customarily unionized).

DOL estimated two costs for post-filing recruitment: the material cost of reproducing and mailing the documents, and the associated labor cost. DOL estimated material costs equal to $2,492, calculated by multiplying the number of unique certified H-2B employers (3,955) by the estimated additional number of pages that must be submitted (3) and the additional postage required to ship those pages ($0.21). DOL estimated labor cost of $10,806 by multiplying the number of unique certified H-2B employers (3,955) by the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) and the hourly labor compensation of an administrative assistant/executive secretary ($34.15). Summing these two components results in incremental costs of $0.01 million per year associated with post-filing recruitment (see Table 14).

Table 14. Cost of Post-Filing Recruitment

Cost Component	Value
Postage Costs	
Number of unique certified H-2B employers	3,955
Additional pages to submit	3
Additional postage	$0.21
Total Postage Costs	$2,492
Labor Costs to Photocopy and Mail Documents	
Number of unique certified H-2B employers	3,955
Labor time to photocopy and mail documents (hours)	0.08
Administrative Assistant hourly wage with fringe	$34.15
Total Labor Costs to Photocopy and Mail Documents	$10,806
Total Cost	
Total Costs of Post-Filing Recruitment	$13,297

Sources: In January 2014, first class mail increased temporarily to 49 cents for one ounce while two ounces would be 70 cents. So the extra postage is 70 cents-49 cents, or 21 cents. See the latest first class mail prices at http://pe.usps.com/cpim/ftp/manuals/dmm300/Notice123.pdf on page 1 (accessed on March 12, 2015).

n. Document retention

Under the interim final rule, H-2B employers must retain documentation in addition to that required by the 2008 rule. DOL assumes that each H-2B employer will purchase a filing cabinet at a cost of $67.99[93] in which to store the additional documents starting in the first year of the rule. To obtain the cost of storing documents, DOL multiplies the number of unique certified H-2B employers (3,955) by the cost per file cabinet for a total one-time cost of $0.3 million (see Table 15). This cost is likely an overestimate since the

[93] Price at Office Depot. Vertical file cabinets. Available at http://www.officedepot.com/a/browse/vertical-metal-file-cabinets/N=5+501585&cbxRefine=311457&recordsPerPageNumber=24&No=0/ (accessed on March 12, 2015).

2008 rule also required document retention and many employers who already use the H-2B program will already have bought a file cabinet to store the documents they were required to retain under that rule.

Table 15. Cost of Document Retention

Cost Component	Value
Number of unique certified H-2B employers	3,955
Filing cabinet	$67.99
Total Document Retention Costs	$268,900

Source: Office Depot, 2015.

m. SWA administrative burden

Under this interim final rule, SWAs will see both additions to and reductions from the baseline workload. Additional responsibilities that the SWAs will take on include contacting labor organizations to inform them about a job opportunity when the occupation or industry is customarily unionized, and accepting and processing a likely larger number of U.S. applicants during the extended recruitment period. DOL, however, does not have reliable data to measure these increased activities and is therefore unable to provide an estimate of the increased workload.

In contrast, SWAs will not be responsible for conducting employment eligibility verification activities. These activities included completion of Form I-9 and vetting of application documents by SWA personnel.

Under the 2008 rule, SWAs were required to complete Form I-9 for applicants who are referred through the SWA to non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this interim final

rule, SWAs will not be required to complete this process, resulting in cost savings. Due to a lack of data on the number of SWA referrals, DOL is not able to quantify this cost reduction.

n. Read and understand the rule

During the first year that the interim final rule will be in effect, H-2B employer applicants will need to learn about the new processes and requirements. DOL estimates the cost to read and understand the rule by multiplying the average number of unique H-2B employer applicants in FY 2013-2014 (4,657) by the time required to read the new rule and associated educational and outreach materials (3 hours), and the loaded hourly wage of a human resources manager ($69.83). In the first year of the rule, this amounts to labor costs of approximately $1.0 million (see Table 16).

Table 16. Cost to Read and Understand Rule

Cost Component	Value
Number of unique H-2B employer applicants	4,657
Time to read rule and materials (hours)	3
HR Manager hourly wage	$69.83
Total Cost to Read and Understand Rule	$975,607

Sources: The median hourly wage rate was obtained Occupational and Employment Statistics, 2013, Bureau of Labor Statistics, accessed from: http://www.bls.gov/oes/current/oes_nat.htm#13-0000.

o. Job posting requirement

The interim final rule requires employers applying for H-2B certification to post a notice of the job opportunity in two conspicuous locations at the place of anticipated employment (when there is no union representative) for at least 15 consecutive days. This provision entails additional reproduction costs. To obtain the total cost incurred due to the job posting requirement, DOL multiplied the average number of unique H-2B

employer applicants FY 2013-2014 (4,657) by the cost per photocopy ($0.09) and the number of postings per place of employment (2), which amounts to $838 per year (see Table 17).

Table 17. Cost of Job Posting Requirement

Cost Component	Value
Number of unique H-2B employer applicants	4,657
Job postings per work site	2
Cost per photocopy	$0.09
Total Cost to Post Job Opportunity	$838

p. Workers' rights poster

In addition, the interim final rule requires employers to post and maintain in a conspicuous location at the place of employment a poster provided by DOL which sets out the rights and protections for workers. The poster must be in English and, to the extent necessary and as provided by DOL, foreign language(s) common to a significant portion of the workers if they are not fluent in English. To estimate the cost of producing workers' rights posters, DOL multiplied the estimated number of unique certified H-2B employers (3,955) by the cost of downloading and printing the poster ($0.09). In total, the cost of producing workers' rights posters is $356 per year (see Table 18). If an employer needs to download and print additional versions of the poster in languages other than English, this would result in increased costs.

Table 18. Cost of Workers' Right Poster

Cost Component	Value
Number of unique certified H-2B employers	3,955
Cost per poster	$0.09
Total Cost of Workers' Rights Poster	$356

5. Summary of Cost-Benefit Analysis

Table 19 presents a summary of the costs associated with this interim final rule. Because of data limitations on the number of corresponding workers and U.S. workers expected to fill positions currently held by H-2B workers, DOL was not able to monetize any costs of the rule that would arise as a result of deadweight losses associated with higher employment costs under the interim final rule. However, because the size of the H-2B program is limited, DOL expects that any deadweight loss would be small. The monetized costs displayed are the annual summations of the calculations described above. The total undiscounted costs of the rule in Years 1-10 are expected to total approximately $11.85 million.

Table 19. Total Costs and Transfers – Undiscounted

Cost Component	Year 1 Costs	Year 2-10 Costs	Year 1-10 Costs
Transfers			
Corresponding Workers' Wages – 90 Percent	$18,207,902	$18,207,902	$182,079,024
Corresponding Workers' Wages – 75 percent	$54,616,946	$54,616,946	$546,169,461
Transportation	$55,190,325	$55,190,325	$551,903,254
Subsistence	$3,131,040	$3,131,040	$31,310,400
Lodging	$1,865,637	$1,865,637	$18,656,366
Visa and Border Crossing Fees	$10,647,891	$10,647,891	$106,478,908
Total Transfers- Low	$87,241,061	$87,241,061	$890,427,952.48
Total Transfers – High	$125,451,839	$125,451,839	$1,254,518,389.50
Annual Costs to Employers			
Additional Recruiting	$757,047	$757,047	$7,570,469
Disclosure of Job Order	$233,654	$233,654	$2,336,540
Elimination of Attestation-Based Model	$13,297	$13,297	$132,972
Post Job Opportunity	$838	$838	$8,383
Workers' Rights Poster	$356	$356	$3,560
Total Annual Costs to Employers	$1,005,192	$1,005,192	$10,051,923
First Year Costs to Employers			

Read and Understand Rule	$975,607	$0	$975,607
Document Retention	$268,900	$0	$268,900
Total First Year Costs to Employers	$1,244,507	$0	$1,244,507
Costs to Government			
Electronic Job Registry	$140,341	$46,434	$558,248
Enhanced U.S. Worker Referral Period	Not Estimated	Not Estimated	Not Estimated
Total Costs to Government	$140,341	$46,434	$558,248
Total Costs			
Total Costs and Transfers – Low	$91,432,836	$90,094,422	$902,282,631
Total Costs and Transfers – High	$127,841,880	$126,503,465	$1,266,373,068
Total Transfers – Low	$89,042,795	$89,042,795	$890,427,952
Total Transfers – High	$125,451,839	$125,451,839	$1,254,518,390
Total Costs	$2,390,041	$1,051,626	$11,854,679

Note: Totals may not sum due to rounding

Summing the present value of the costs in Years 1-10 results in total discounted costs over 10 years of $9.24 million to $10.58 million (with 7 percent and 3 percent discounting, respectively) (see Table 20). The total transfers over 10 years range from $669.18 million to $942.80 million and from $792.92 million to $1,112.81 million with 7 percent and 3 percent discounting, respectively. The annual average cost is $0.92 million with 7 percent discounting and $1.06 million with 3 percent discounting. The annual average transfers range from $66.92 million to $94.28 million with 7 percent discounting and from $79.29 to $111.28 million with 3 percent discounting.

Table 20. Total Costs and Transfers – Sum of Present Values

Cost Component	Year 1-10 Costs
Present Value – 7% Discounting	
Total Costs & Transfers – Low	$678,418,918
Total Costs & Transfers – High	$952,041,337

Total Transfers – Low	$669,177,286
Total Transfers – High	$942,799,706
Total Costs	$9,241,631
Present Value – 3% Discounting	
Total Costs & Transfers – Low	$792,917,817
Total Costs & Transfers – High	$1,112,811,640
Total Transfers – Low	$782,339,698
Total Transfers – High	$1,102,233,521
Total Costs	$10,578,119

Note: Totals may not sum due to rounding

Because DOL was not able to monetize any benefits for this interim final rule due to the lack of adequate data, the monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate.

DOL was unable to identify data to provide monetary estimates of several important benefits to society, including increased employment opportunities for U.S. workers and enhancement of worker protections for U.S. and H-2B workers. These important benefits (and cost reductions) result from the following provisions of this interim final rule: the enhanced U.S. worker referral period, additional recruiting directed by the CO, the electronic job registry, transportation to and from the place of employment, payment of visa and consular fees, the job posting requirement, and enhanced integrity and enforcement provisions. Because the enhanced referral period extends the time during which jobs are available to U.S. workers, it increases the likelihood that U.S. workers are hired for those jobs. In addition, the electronic job registry will improve the visibility of H-2B jobs to U.S. workers and enhance their employment opportunities. In addition, the establishment of an electronic job registry will provide greater transparency with respect

to DOL's administration of the H-2B program to the public, members of Congress, and other stakeholders.

The changes and increased protections for workers will result in an improved ability on the part of workers and their families to meet their costs of living and spend money in their local communities. These protections may also decrease turnover among U.S. workers and thereby decrease the costs of recruitment and retention to employers. Reduced worker turnover is associated with lower costs to employers arising from recruiting and training replacement workers. Because seeking and training new workers is costly, reduced turnover leads to savings for employers. Research indicates that decreased turnover costs partially offset increased labor costs.[94] In addition, greater worker protections may increase a worker's productivity by incentivizing the worker to work harder. Thus, the additional costs may be partially offset by higher productivity. A strand of economic research, commonly referred to as "efficiency wages," indicates that employees may interpret the greater protections as a signal of the employer's good will and reciprocate by working harder, or they put in more effort in order to reduce the risk of losing the job because it is now seen as more valuable.[95] All of these benefits, however, are difficult to quantify due to data limitations.

Several unquantifiable benefits result in the form of cost savings. As more U.S. workers are hired as a result of this interim final rule, employers will avoid visa and consular fees for positions that might have otherwise been filled with H-2B workers; it is

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[94] Reich, Michael, Peter Hall and Ken Jacobs, "Living Wages and Economic Performance: The San Francisco Airport Model," Institute of Industrial Relations, University of California, Berkeley, March 2003. Fairris, David, David Runsten, Carolina Briones, and Jessica Goodheart, "Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses," LAANE, 2005.

[95] Akerlof, G.A. (1982), "Labor Contracts as Partial Gift Exchange," The Quarterly Journal of Economics, 97(4), 543-569; Shapiro, C. and Stiglitz, J.E. (1984), "Equilibrium Unemployment as a Worker Discipline Device," The American Economic Review, 74(3), 433-444.

also likely that transportation costs will be lower. Under the 2008 rule, SWAs were required to complete Form I-9 for non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this interim final rule, SWAs will not be required to complete this process, resulting in cost savings to SWAs. DOL was not able to quantify these cost savings due to a lack of data regarding the number of I-9 verifications SWAs have been performing for H-2B referrals.

After considering both the quantitative and qualitative impacts of this interim final rule, DOL has concluded that the societal benefits of the rule justify the societal costs.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements the APA, 5 U.S.C. 553(b), and that are likely to have a significant economic impact on a substantial number of small entities. Under the APA, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B). This interim final rule is exempt from the requirements of the APA because DOL and DHS have made a good cause finding, supra, that a general notice of proposed rulemaking is impracticable and contrary to the public interest under 5 U.S.C. 553(b)(B). Therefore, the requirements of the RFA applicable to notices of proposed rulemaking, 5 U.S.C. 603, do not apply to this interim final rule. Accordingly, the Departments are not required to either certify that the interim final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis. Nevertheless, for informational purposes DOL and DHS

refer the public to the initial and final regulatory flexibility analyses that DOL completed in the 2012 rulemaking process. See 76 FR 15166; 77 FR 10132. DOL and DHS refer to the public to the rulemaking docket on regulations.gov in connection with that rule (RIN 1205-AB58) to obtain further information about DOL's regulatory flexibility analyses under the 2012 rule.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. The interim final rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a Federal intergovernmental mandate or a Federal private sector mandate. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector that is not voluntary. A decision by a private entity to obtain an H-2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

SWAs are mandated to perform certain activities for the Federal Government under the H-2B program, and receive grants to support the performance of these activities. Under the 2008 rule, the SWA role was changed to accommodate the attestation-based process. The current regulation requires SWAs to accept and place job orders into intra- and interstate clearance, review referrals, and verify employment eligibility of the applicants who apply to the SWA to be referred to the job opportunity. Under the interim final rule the SWA will continue to play a significant and active role. The Departments continue to require that employers submit their job orders to the SWA having jurisdiction over the

area of intended employment as is the case in the current regulation, with the added requirement that the SWA review the job order prior to posting it. The interim final rule further requires that the employer provide a copy of the Application for Temporary Employment Certification to the SWA; however, this is simply a copy for disclosure purposes and would require no additional information collection or review activities by the SWA. DOL will also continue to require SWAs to place job orders into clearance, as well as provide employers with referrals received in connection with the job opportunity. Additionally, the interim final rule requires SWAs to contact labor organizations where union representation is customary in the occupation and area of intended employment. DOL recognizes that SWAs may experience a slight increase in their workload in terms of review, referrals, and employer guidance. However, DOL is eliminating the employment verification responsibilities the SWA has under the current regulations. The elimination of workload created by the employment verification requirement will allow the SWAs to apply those resources to the additional recruitment requirements under this rule.

SWA activities under the H-2B program are currently funded by DOL through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 et seq., and directly through appropriated funds for administration of DOL's foreign labor certification program.

D. Executive Order 13132 – Federalism

We have reviewed this interim final rule in accordance with E.O. 13132 on federalism and have determined that it does not have federalism implications. The interim final rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of

government as described by E.O. 13132. Therefore, we have determined that this interim final rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

E. Executive Order 13175 – Indian Tribal Governments

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

F. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681) requires us to assess the impact of this interim final rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale. We have assessed this interim final rule and determined that it will not have a negative effect on families.

G. Executive Order 12630 – Government Actions and Interference with Constitutionally Protected Property Rights

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

H. Executive Order 12988 – Civil Justice

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

I. Plain Language

We drafted this interim final rule in plain language.

J. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.) information collection requirements, which must be implemented as a result of this regulation, a clearance package containing proposed changes to the already previously collection was submitted to OMB under the emergency provisions of the PRA, 5 CFR 1320.13, in order to have the information collection take effect on the same date as all other parts of the interim final rule. OMB approved the information collection for 6 months, during which time DOL will publish Notices in the Federal Register that invite public comment on the collection requirements, in anticipation of extending the ICR.

The Departments note that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a), 1320.6, and 1320.11(k)(1).

The forms used to comply with this interim final rule include those that have been required in the H-2B program over the last few years of program operation, except that Form ETA-9142, Appendix B has been modified to reflect the assurances and obligations of the H-2B employer as required under the compliance-based system of this interim final rule. Also, a new form was created for registering as an H-2B employer - the Form ETA-9155, H-2B Registration. DOL continues to include the Seafood Industry Attestation, but has made slight changes to it for clarity and accuracy. Changes to the program as reflected in the new regulations and which have PRA implications, have increased the hourly and cost burdens for employers. Those burdens and costs are outlined below. The Form ETA-9142B with Appendix B has a public reporting burden estimated to average 1 hour per response or application filed. Additionally, the Form ETA-9155 has a public reporting burden estimated to average 1 hour per response or application filed. For an additional explanation of how the Departments calculated the burden hours and related costs, the PRA package for this information collection may be obtained from the RegInfo.gov Web site at *http:// www.reginfo.gov/public/do/PRAMain* or by contacting the DOL at: Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210 or by phone request to 202-693-3700 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Overview of Information Collection

Type of Review: Emergency

Agency: Employment and Training Administration

Title: H-2B Application for Temporary Employment Certification; H-2B Registration; and Seafood Industry Attestation

OMB Number: 1205-0509

Agency Number(s): Forms ETA-9142B (including Appendix B) and ETA-9155

Annual Frequency: On occasion.

Affected Public: Individuals or Households, Private Sector - businesses or other for profits, Government, State, Local and Tribal Governments.

Total Respondents: 7,355

Total Responses: 184,442

Estimated Total Burden Hours: 47,992

Total Burden Cost (capital/startup): 0

Total Burden Cost (operating/maintaining): $351,800

The information collection aspects of this rulemaking are taking effect immediately, but DOL will be following the normal approval process for the extension of this collection within the next 6 months.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant

workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

29 CFR Part 503

Administrative practice and procedure, Employment, Foreign Workers, Housing, Housing standards, Immigration, Labor, Nonimmigrant workers, Penalties, Transportation, Wages.

Department of Homeland Security

8 CFR Chapter I

Accordingly, for the reasons stated in the joint preamble, part 214 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

2. Section 214.1 is amended by revising paragraph (k) to read as follows:

§214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(k) <u>Denial of petitions under section 214(c) of the Act based on a finding by the Department of Labor</u>. Upon debarment by the Department of Labor pursuant to 20 CFR part 655, USCIS may deny any petition filed by that petitioner for nonimmigrant status under section 101(a)(15)(H) (except for status under sections

101(a)(15)(H)(i)(b1)), (L), (O), and (P)(i) of the Act) for a period of at least 1 year but not more than 5 years. The length of the period shall be based on the severity of the violation or violations. The decision to deny petitions, the time period for the bar to petitions, and the reasons for the time period will be explained in a written notice to the petitioner.

3. Section 214.2 is amended by revising paragraph (h)(9)(iii)(B) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(9) * * *

(iii) * * *

(B) H-2B petition. The approval of the petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act shall be valid for the period of the approved temporary labor certification.

* * * * *

Department of Labor

Accordingly, for the reasons stated in the joint preamble, 20 CFR part 655 is amended and 29 CFR part 503 is added as follows:

Title 20 -- EMPLOYEES' BENEFITS

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

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101 649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

Subpart A issued under 8 CFR 214.2(h).

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

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

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

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

5. Revise subpart A to read as follows:

Subpart A--Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers)

Sec.
655.1 Scope and purpose of this subpart.
655.2 Authority of the agencies, offices, and divisions in the Department of Labor.
655.3 Territory of Guam.
655.4 Transition procedures.
655.5 Definition of terms.
655.6 Temporary need.
655.7 Persons and entities authorized to file.
655.8 Requirements for agents.
655.9 Disclosure of foreign worker recruitment.

PREFILING PROCEDURES

655.10 Determination of prevailing wage for temporary labor certification purposes.
655.11 Registration of H-2B employers.
655.12 Use of registration of H-2B employers.
655.13 Review of PWDs.
655.14 [Reserved]

APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION FILING PROCEDURES

655.15 Application filing requirements.
655.16 Filing of the job order at the SWA.
655.17 Emergency situations.
655.18 Job order assurances and contents.
655.19 Job contractor filing requirements.

ASSURANCES AND OBLIGATIONS

655.20 Assurances and obligations of H-2B employers.
655.21-655.29 [Reserved]

PROCESSING OF AN APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION

655.30 Processing of an application and job order.
655.31 Notice of deficiency.
655.32 Submission of a modified application or job order.
655.33 Notice of acceptance.
655.34 Electronic job registry.
655.35 Amendments to an application or job order.

655.36-655.39 [Reserved]

POST-ACCEPTANCE REQUIREMENTS

655.40 Employer-conducted recruitment.
655.41 Advertising requirements.
655.42 Newspaper advertisements.
655.43 Contact with former U.S. employees.
655.44 [Reserved]
655.45 Contact with bargaining representative, posting and other contact requirements.
655.46 Additional employer-conducted recruitment.
655.47 Referrals of U.S. workers.
655.48 Recruitment report.
655.49 [Reserved]

LABOR CERTIFICATION DETERMINATIONS

655.50 Determinations.
655.51 Criteria for certification.
655.52 Approved certification.
655.53 Denied certification.
655.54 Partial certification.
655.55 Validity of temporary labor certification.
655.56 Document retention requirements of H-2B employers.
655.57 Request for determination based on nonavailability of U.S. workers.
655.58-655.59 [Reserved]

POST CERTIFICATION ACTIVITIES

655.60 Extensions.
655.61 Administrative review.
655.62 Withdrawal of an Application for Temporary Employment Certification.
655.63 Public disclosure.
655.64-655.69 [Reserved]

INTEGRITY MEASURES

655.70 Audits.
655.71 CO-ordered assisted recruitment.
655.72 Revocation.
655.73 Debarment.
655.74-655.76 [Reserved]
655.80-655.99 [Reserved]

§ 655.1 Scope and purpose of this subpart.

Section 214(c)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1184(c)(1), requires the Secretary of Homeland Security to consult with appropriate agencies before authorizing the classification of aliens as H-2B workers. Department of Homeland Security (DHS) regulations at 8 CFR 214.2(h)(6)(iii)(D) designate the Secretary of Labor as an appropriate authority with whom DHS consults regarding the H-2B program, and specifies that the Secretary of Labor, in carrying out this consultative function, shall issue regulations regarding the issuance of temporary labor certifications. DHS regulations at 8 CFR 214.2(h)(6)(iv) further provide that an employer's petition to employ H-2B nonimmigrant workers for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor (Secretary).

(a) Purpose. The temporary labor certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that

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

(b) Scope. This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the H-2B nonimmigrant classification, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b), section 101(a)(15)(H)(ii)(b) of the INA. It also establishes obligations with respect to the terms and conditions of the temporary labor certification with which H-2B employers must

comply, as well as their obligations to H-2B workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the temporary labor certification.

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

(a) Authority and role of the Office of Foreign Labor Certification (OFLC). The Secretary has delegated authority to make determinations under this subpart, pursuant to 8 CFR 214.2(h)(6)(iii)(D) and (h)(6)(iv), to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to OFLC. Determinations on an Application for Temporary Employment Certification in the H-2B program are made by the Administrator, OFLC who, in turn, may delegate this responsibility to designated staff members, e.g., a Certifying Officer (CO).

(b) Authority of the Wage and Hour Division (WHD). Pursuant to its authority under section 214(c)(14)(B) of the INA, 8 U.S.C. 1184(c)(l4)(B), DHS has delegated to the Secretary certain investigatory and enforcement functions with respect to terms and conditions of employment in the H-2B program. The Secretary has, in turn, delegated that authority to WHD. The regulations governing WHD investigation and enforcement functions, including those related to the enforcement of temporary labor certifications, issued under this subpart, may be found in 29 CFR part 503.

(c) Concurrent authority. OFLC and WHD have concurrent authority to impose a debarment remedy under § 655.73 or under 29 CFR 503.24.

§ 655.3 Territory of Guam.

This subpart does not apply to temporary employment in the Territory of Guam, except that an employer who applies for a temporary labor certification for a job opportunity on Guam will need to obtain a prevailing wage from the U.S. Department of Labor (DOL) in accordance with § 655.10, subject to the transfer of authority to set the prevailing wage for a job opportunity on Guam to DOL in title 8 of the Code of Federal Regulations. DOL does not certify to DHS the temporary employment of H-2B nonimmigrant foreign workers, or enforce compliance with the provisions of the H-2B visa program, in the Territory of Guam.

§ 655.4 Transition procedures.

(a) The NPWC shall continue to process an Application for Prevailing Wage Determination submitted prior to [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], in accordance with the prevailing wage methodology at 20 CFR part 655, subpart A, revised as of April 1, 2009, except for § 655.10(b)(2), see 20 CFR part 655, subpart A, revised as of April 1, 2014. Employers with a pending Application for Prevailing Wage Determination who seek a prevailing wage based on an alternate wage source must submit a new Application for Prevailing Wage Determination.

(b) The NPWC shall process an Application for a Prevailing Wage Determination submitted on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], in accordance with the wage methodology established in § 655.10 of the final prevailing wage rule.

(c) The NPC shall continue to process an Application for Temporary Employment Certification submitted prior to [INSERT DATE OF PUBLICATION IN THE

FEDERAL REGISTER], in accordance with 20 CFR part 655, subpart A, revised as of April 1, 2009.

(d) The NPC shall process an Application for Temporary Employment Certification submitted on or after [INSERT DATE PUBLICATION IN THE FEDERAL REGISTER], and that has a start date of need prior to October 1, 2015, as follows:

(1) Employers will be permitted to file an Application for Temporary Employment Certification job order with the NPC using the emergency situations provision at § 655.17. The Application for Temporary Employment Certification must include a signed and dated copy of the new Appendix B associated with the ETA Form 9142B containing the requisite program assurances and obligations under this rule. In the case of a job contractor filing as a joint employer with its employer-client, the NPC must receive a separate attachment containing the employer-client's business and contact information (i.e., sections C and D of the ETA Form 9142B) as well as a separate signed and dated copy of the Appendix B for its employer-client, as required by § 655.19.

(2) The NPC will waive the regulatory filing timeframe under § 655.15 and process the Application for Temporary Employment Certification and job order in a manner consistent with the handling of applications under § 655.17 for emergency situations, including the recruitment of U.S. workers on an expedited basis, and make a determination as required by § 655.50. The recruitment of U.S. workers on an expedited basis will consist of placing a new job order with the SWA serving the area of intended employment that contains the job assurances and contents set forth in § 655.18 for a period of not less than 10 calendar days. In addition, employers who have not placed any newspaper advertisements under the rule published at 20 CFR part 655, subpart A,

revised as of April 1, 2009. must place one newspaper advertisement, which may be published on any day of the week, meeting the advertising requirements of § 655.41, during the period of time the SWA is actively circulating the job order for intrastate clearance.

(3) If the Chicago NPC grants a temporary labor certification, the employer will receive an original certified ETA Form 9142B and a Final Determination letter. Upon receipt of the original certified ETA Form 9142B, the employer or its agent or attorney, if applicable, must complete the footer on the original Appendix B of the Application for Temporary Employment Certification, retain the original Appendix B, and submit a signed copy of Appendix B, together with the original certified ETA Form 9142B directly to USCIS. Under the document retention requirements in § 655.56, the employer must retain a copy of the temporary labor certification and the original signed Appendix B.

(4) An employer who did not submit an Application for a Prevailing Wage Determination prior to [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], but who has a start date of need prior to October 1, 2015 may submit a completed Application for a Prevailing Wage Determination to the NPC with its emergency Application for Temporary Employment Certification requesting a prevailing wage determination for the job opportunity. Upon receipt, the NPC will transmit, on behalf of the employer, a copy of the Application for a Prevailing Wage Determination to the NPWC for processing and issuance of a prevailing wage determination using the wage methodology established in § 655.10.

(e) The NPC shall process an Application for Temporary Employment Certification submitted on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and that has a start date of need after October 1, 2015, in accordance with all application filing requirements under this rule, and the employer must obtain a valid prevailing wage determination under the wage methodology established in § 655.10 prior to filing the job order with the SWA under § 655.16.

(f) Employers with a prevailing wage determination issued by the NPWC, or who have a pending or granted Application for Temporary Employment Certification on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], may seek a supplemental prevailing wage determination (SPWD) in order to obtain a prevailing wage based on an alternate wage source under this rule.

(1) The SPWD will apply during the validity period of the certification, except that such SPWD will be applicable only to those H-2B workers who are not yet employed in the certified position on the date of the issuance of the SPWD. The SPWD will not be applicable to H-2B workers who are already employed in the certified position at the time of the issuance of the SPWD, and it will not apply to U.S. workers recruited and hired under the original job order. For seafood employers whose workers' entry into the U.S. may be staggered under § 655.15(f), an SPWD issued under this provision will apply only to those H-2B workers who have not yet entered the U.S. and are therefore not yet employed in the certified position at the time of the issuance of the SPWD.

(2) In order to receive an SPWD under this provision, the employer must submit a new ETA Form 9141 to the NPWC that contains in Section E.a.5 Job Duties the original PWD tracking number (starting with P-400), the H-2B temporary employment

certification application number (starting with H-400), and the words "Request for a Supplemental Prevailing Wage Determination." Electronic submission through the iCERT Visa Portal System is preferred. Upon receipt of the request, the NPWC will issue to the employer, or if applicable, the employer's attorney or agent, an SPWD in an expedited manner and provide a copy to the Chicago NPC.

§ 655.5 Definition of terms.

For purposes of this subpart:

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

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

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

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

Agent means:

(1) A legal entity or person who:

(i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes;

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

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department of Labor, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Agricultural labor or services means those duties and occupations defined in subpart B of this part.

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

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved ETA Form 9142B and the appropriate appendices, a valid wage determination, as required by § 655.10, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary labor certification determination from DOL.

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 that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the

identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Area of substantial unemployment means a contiguous area with a population of at least 10,000 in which there is an average unemployment rate equal to or exceeding 6.5 percent for the 12 months preceding the determination of such areas made by the ETA.

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 U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department of Labor, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of ALJs assigned to the Department of Labor and designated by the Chief ALJ to be members of BALCA.

Certifying Officer (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H-2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under this subpart.

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

Corresponding employment means:

(1) The employment of workers who are not H-2B workers by an employer that has a certified H-2B Application for Temporary Employment Certification when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, except that workers in the following two categories are not included in corresponding employment:

(i) Incumbent employees continuously employed by the H-2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H-2B workers during the 52 weeks prior to the period of employment certified on the Application for Temporary Employment Certification and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer's payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or

(ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H-2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause.

(2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H-2B workers as listed on the Application for Temporary Employment Certification.

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

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms employee and worker are used interchangeably in this subpart.

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

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

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

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

Employer-client means an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Employment and Training Administration (ETA) means the agency within the Department of Labor that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an Application for Temporary Employment Certification and related functions.

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

Full-time means 35 or more hours of work per week.

H-2B Petition means the DHS Form I-129 Petition for a Nonimmigrant Worker, with H Supplement or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2B nonimmigrant workers

H-2B Registration means the OMB-approved ETA Form 9155, submitted by an employer to register its intent to hire H-2B workers and to file an Application for Temporary Employment Certification.

H-2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b).

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

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

Job opportunity means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 29 CFR part 503 and this subpart that is posted between and among the State Workforce Agencies (SWAs) on their job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker,

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

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

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

National Prevailing Wage Center (NPWC) means that office within OFLC from which employers, agents, or attorneys who wish to file an Application for Temporary Employment Certification receive a prevailing wage determination (PWD).

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

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an Application for Temporary Employment Certification or other applications. For purposes of this subpart, the NPC receiving a request for an H-2B Registration and an Application for Temporary Employment Certification is the Chicago NPC whose address is published in the Federal Register.

NPC Director means the OFLC official to whom the Administrator, OFLC has delegated authority for purposes of certain Chicago NPC operations and functions.

Non-agricultural labor and services means any labor or services not considered to be agricultural labor or services as defined in subpart B of this part. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Occupational employment statistics (OES) survey means the program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual wage estimates for occupations at the State and MSA levels.

Offered wage means the wage offered by an employer in an H-2B job order. The offered wage must equal or exceed the highest of the prevailing wage or Federal, State or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities, including determinations related to an employer's request for H-2B Registration, Application for Prevailing Wage Determination, or Application for Temporary Employment Certification.

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in § 655.10, that is the subject of the Application for Temporary Employment Certification. The PWD is made on ETA Form 9141, Application for Prevailing Wage Determination.

Professional athlete means an individual who is employed as an athlete by:

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

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

Seafood is defined as fresh or saltwater finfish, crustaceans, other forms of aquatic animal life, including, but not limited to, alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals, and all mollusks.

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

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

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

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

Successor in interest means:

(1) Where an employer has violated 29 CFR part 503, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest

to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

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

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

(viii) Similarity of products and services; and

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

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

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

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

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

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

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, section 207 of the INA, is granted asylum under 8 U.S.C. 1158, section 208 of the INA, or is an alien otherwise authorized under the immigration laws to be employed in the U.S.; or

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

Wage and Hour Division (WHD) means the agency within the Department of Labor with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c), section 214(c) of the INA.

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

§ 655.6 Temporary need.

(a) An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations. Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an H-2B Registration or an Application for Temporary Employment Certification where the employer has a need lasting more than 9 months.

(c) A job contractor will only be permitted to seek certification if it can demonstrate through documentation its own temporary need, not that of its employer-client(s). A job contractor will only be permitted to file applications based on a seasonal need or a one-time occurrence.

(d) Nothing in this paragraph (d) is intended to limit the authority of the Secretary of Homeland Security, in the course of adjudicating an H-2B petition, to make the final determination as to whether a prospective H-2B employer's need is temporary in nature.

§ 655.7 Persons and entities authorized to file.

(a) Persons authorized to file. In addition to the employer applicant, a request for an H-2B Registration or an Application for Temporary Employment Certification may be filed by an attorney or agent, as defined in § 655.5.

(b) Employer's signature required. Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the H-2B Registration and Application for Temporary Employment Certification and all documentation submitted to the Department of Labor.

§ 655.8 Requirements for agents.

An agent filing an Application for Temporary Employment Certification on behalf of an employer must provide:

(a) A copy of the agent agreement or other document demonstrating the agent's authority to represent the employer; and

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration, if the agent is required under MSPA, at 29 U.S.C. 1801 et seq., to have such a certificate, identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.9 Disclosure of foreign worker recruitment.

(a) The employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this Application for Temporary Employment Certification. These agreements must contain the contractual prohibition against charging fees as set forth in § 655.20(p).

(b) The employer, and its attorney or agent, as applicable, must also provide the identity and location of all persons and entities hired by or working for the recruiter or agent referenced in paragraph (a) of this section, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H-2B job opportunities offered by the employer.

(c) The Department of Labor will maintain a publicly available list of agents and recruiters who are party to the agreements referenced in paragraph (a) of this section, as

well as the persons and entities referenced in paragraph (b) of this section and the locations in which they are operating.

PREFILING PROCEDURES

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

(a) Offered wage. The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H-2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

(b) [Reserved]

(c) Request for PWD. (1) An employer must request and receive a PWD from the NPWC before filing the job order with the SWA.

(2) The PWD must be valid on the date the job order is posted.

(d) Multiple worksites. If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the opportunity within the area of intended employment, the prevailing wage is the highest applicable wage among all the worksites.

(e) NPWC action. The NPWC will provide the PWD, indicate the source, and return the Application for Prevailing Wage Determination (ETA Form 9141) with its endorsement to the employer.

(f) [Reserved]

(g) Review of employer-provided surveys. (1) If the NPWC finds an employer-provided survey not to be acceptable, the NPWC shall inform the employer in writing of the reasons the survey was not accepted.

(2) The employer, after receiving notification that the survey it provided for consideration is not acceptable, may request review under § 655.13.

(h) Validity period. The NPWC must specify the validity period of the prevailing wage, which in no event may be more than 365 days and no less than 90 days from the date that the determination is issued.

(i) Professional athletes. In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage.

(j) Retention of documentation. The employer must retain the PWD for 3 years from the date of issuance or the date of a final determination on the Application for Temporary Employment Certification, whichever is later, and submit it to a CO if requested by a Notice of Deficiency, described in § 655.31, or audit, as described in § 655.70, or to a WHD representative during a WHD investigation.

(k) Guam. The requirements of this section apply to any request filed for an H-2B job opportunity on Guam, subject to the transfer of authority to set the prevailing wage for a job opportunity on Guam to DOL in Title 8 of the Code of Federal Regulations.

§ 655.11 Registration of H-2B employers.

All employers, including job contractors, that desire to hire H-2B workers must establish their need for services or labor is temporary by filing an H-2B Registration with the Chicago NPC.

(a) Registration filing. An employer must file an H-2B Registration. The H-2B Registration must be accompanied by documentation evidencing:

(1) The number of positions that will be sought in the first year of registration;

(2) The time period of need for the workers requested;

(3) That the nature of the employer's need for the services or labor to be performed is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by DHS regulations and § 655.6 (or in the case of job contractors, a seasonal need or one-time occurrence); and

(4) For job contractors, the job contractor's own seasonal need or one-time occurrence, such as through the provision of payroll records.

(b) Original signature. The H-2B Registration must bear the original signature of the employer (and that of the employer's attorney or agent if applicable). If and when the H-2B Registration is permitted to be filed electronically, the employer will satisfy this requirement by signing the H-2B Registration as directed by the CO.

(c) Timeliness of registration filing. A completed request for an H-2B Registration must be received by no less than 120 calendar days and no more than 150 calendar days

before the employer's date of need, except where the employer submits the H-2B Registration in support of an emergency filing under § 655.17.

(d) Temporary need. (1) The employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary, consistent with DHS regulations. A job contractor must also demonstrate through documentation its own seasonal need or one-time occurrence.

(2) The employer's need will be assessed in accordance with the definitions provided by the Secretary of Homeland Security and as further defined in § 655.6.

(e) NPC review. The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based on the following factors:

(1) The job classification and duties qualify as non-agricultural;

(2) The employer's need for the services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;

(3) The number of worker positions and period of need are justified; and

(4) The request represents a bona fide job opportunity.

(f) Mailing and postmark requirements. Any notice or request pertaining to an H-2B Registration sent by the CO to an employer requiring a response will be mailed to the address provided on the H-2B Registration using methods to assure next day delivery, including electronic mail. The employer's response to the notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent

by the due date specified by the CO or by the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(g) Request for information (RFI). If the CO determines the H-2B Registration cannot be approved, the CO will issue an RFI. The RFI will be issued within 7 business days of the CO's receipt of the H-2B Registration. The RFI will:

(1) State the reason(s) why the H-2B Registration cannot be approved and what supplemental information or documentation is needed to correct the deficiencies;

(2) Specify a date, no later than 7 business days from the date the RFI is issued, by which the supplemental information or documentation must be sent by the employer;

(3) State that, upon receipt of a response to the RFI, the CO will review the H-2B Registration as well as any supplemental information and documentation and issue a Notice of Decision on the H-2B Registration. The CO may, at his or her discretion, issue one or more additional RFIs before issuing a Notice of Decision on the H-2B Registration; and

(4) State that failure to comply with an RFI, including not responding in a timely manner or not providing all required documentation within the specified timeframe, will result in a denial of the H-2B Registration.

(h) Notice of Decision. The CO will notify the employer in writing of the final decision on the H-2B Registration.

(1) Approved H-2B Registration. If the H-2B Registration is approved, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will notify the employer that it is eligible to seek H-2B workers in the occupational classification for the anticipated number of

positions and period of need stated on the approved H-2B Registration. The CO may approve the H-2B Registration for a period of up to 3 consecutive years.

(2) Denied H-2B Registration. If the H-2B Registration is denied, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will:

(i) State the reason(s) why the H-2B Registration is denied;

(ii) Offer the employer an opportunity to request administrative review under § 655.61 within 10 business days from the date the Notice of Decision is issued and state that if the employer does not request administrative review within that period the denial is final.

(i) Retention of documents. All employers filing an H-2B Registration are required to retain any documents and records not otherwise submitted proving compliance with this subpart. Such records and documents must be retained for a period of 3 years from the date of certification of the last Application for Temporary Employment Certification supported by the H-2B Registration, if approved, or 3 years from the date the decision is issued if the H-2B Registration is denied or 3 years from the day the Department of Labor receives written notification from the employer withdrawing its pending H-2B Registration.

(j) Transition period. In order to allow OFLC to make the necessary changes to its program operations to accommodate the new registration process, OFLC will announce in the Federal Register a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications.

§ 655.12 Use of registration of H-2B employers.

(a) Upon approval of the H-2B Registration, the employer is authorized for the specified period of up to 3 consecutive years from the date the H-2B Registration is approved to file an Application for Temporary Employment Certification, unless:

(1) The number of workers to be employed has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers) from the initial year;

(2) The dates of need for the job opportunity have changed by more than a total of 30 calendar days from the initial year for the entire period of need;

(3) The nature of the job classification and/or duties has materially changed; or

(4) The temporary nature of the employer's need for services or labor to be performed has materially changed.

(b) If any of the changes in paragraphs (a)(1) through (4) of this section apply, the employer must file a new H-2B Registration in accordance with § 655.11.

(c) The H-2B Registration may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 655.13 Review of PWDs.

(a) Request for review of PWDs. Any employer desiring review of a PWD must make a written request for such review to the NPWC Director within 7 business days from the date the PWD is issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) NPWC review. Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review shall issue a Final Determination letter; that letter may:

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

(2) Modify the PWD.

(c) Request for review by BALCA. Any employer desiring review of the NPWC Director's decision on a PWD must make a written request for review of the determination by BALCA within 10 business days from the date the Final Determination letter is issued.

(1) The request for BALCA review must be in writing and addressed to the NPWC Director who made the final determinations. Upon receipt of a request for BALCA review, the NPWC will prepare an appeal file and submit it to BALCA.

(2) The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD was based.

(3) BALCA will handle appeals in accordance with § 655.61.

§655.14 [Reserved]

APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION FILING PROCEDURES

§ 655.15 Application filing requirements.

All registered employers that desire to hire H-2B workers must file an Application for Temporary Employment Certification with the NPC designated by the Administrator, OFLC. Except for employers that qualify for emergency procedures at § 655.17, employers that fail to register under the procedures in § 655.11 and/or that fail to submit a PWD obtained under § 655.10 will not be eligible to file an Application for Temporary Employment Certification and their applications will be returned without review.

(a) What to file. A registered employer seeking H-2B workers must file a completed Application for Temporary Employment Certification (ETA Form 9142B and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in § 655.16, and copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunities and all information required, as specified in §§ 655.8 and 655.9.

(b) Timeliness. A completed Application for Temporary Employment Certification must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.

(c) Location and method of filing. The employer must submit the Application for Temporary Employment Certification and all required supporting documentation to the NPC either electronically or by mail.

(d) Original signature. The Application for Temporary Employment Certification must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is so represented). If the Application for Temporary Employment Certification is filed electronically, the employer must satisfy this

requirement by signing the Application for Temporary Employment Certification as directed by the CO.

(e) Requests for multiple positions. Certification of more than one position may be requested on the Application for Temporary Employment Certification as long as all H-2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(f) Separate applications. Except as otherwise permitted by this paragraph (f), only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. Except where otherwise permitted under § 655.4, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H-2B program.

(1) Subject to paragraph (f)(2) of this section, if a petition for H–2B nonimmigrants filed by an employer in the seafood industry is granted, the employer may bring the nonimmigrants described in the petition into the United States at any time during the 120-day period beginning on the start date for which the employer is seeking the services of the nonimmigrants without filing another petition.

(2) An employer in the seafood industry may not bring H–2B nonimmigrants into the United States after the date that is 90 days after the start date for which the employer is seeking the services of the nonimmigrants unless the employer conducts new recruitment, that begins at least 45 days after, and ends before the 90th day after, the certified start date of need as follows:

(i) Completes a new assessment of the local labor market by—

(A) Listing the job orders in local newspapers on 2 separate Sundays; and

(B) Placing new job orders for the job opportunity with the State Workforce Agency serving the area of intended employment and posting the job opportunity at the place of employment for at least 10 days; and

(C) Offering the job to an equally or better qualified United States worker who—

(1) Applies for the job; and

(2) Will be available at the time and place of need.

(3) In order to comply with this provision, employers in the seafood industry must –

(1) Sign and date an attestation form stating the employer's compliance with this subparagraph. The attestation form is available at http://www.foreignlaborcert.doleta.gov/form.cfm;

(2) Provide each H-2B nonimmigrant worker seeking admission to the United States a copy of the signed and dated attestation, with instructions that the worker must present the documentation upon request to the Department of State's consular officers when they apply for a visa and/or the Department of Homeland Security's U.S Customs and Border Protection officers when seeking admission to the United States. Without this attestation, an H-2B nonimmigrant may be denied a visa or admission to the United States if seeking to enter at any time other than the start date stated in the petition. (The attestation is not necessary when filing an amended petition based on a worker who is being substituted in accordance with DHS regulations.) The attestation presented by an H-2B nonimmigrant worker must be the official attestation downloaded from OFLC's website and may not be altered or revised in any manner; and

(3) Retain the additional recruitment documentation, together with their prefiling recruitment documentation, for a period of 3 years from the date of certification, consistent with the document retention requirements under §655.56. Seafood industry employers who conduct the required additional recruitment should not submit proof of the additional recruitment to the Office of Foreign Labor Certification.

(g) One-time occurrence. Where a one-time occurrence lasts longer than 1 year, the CO will instruct the employer on any additional recruitment requirements with respect to the continuing validity of the labor market test or offered wage obligation.

(h) Information dissemination. Information received in the course of processing a request for an H-2B Registration, an Application for Temporary Employment Certification or program integrity measures such as audits may be forwarded from OFLC to WHD, or any other Federal agency as appropriate, for investigative and/or enforcement purposes.

§ 655.16 Filing of the job order at the SWA.

(a) Submission of the job order. (1) The employer must submit the job order to the SWA serving the area of intended employment at the same time it submits the Application for Temporary Employment Certification and a copy of the job order to the NPC in accordance with § 655.15. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit the job order to any one of the SWAs having jurisdiction over the anticipated worksites, but must identify the receiving SWA on the copy of the job order submitted to the NPC with its Application for Temporary Employment Certification. The employer must inform the

SWA that the job order is being placed in connection with a concurrently submitted Application for Temporary Employment Certification for H-2B workers.

(2) In addition to complying with State-specific requirements governing job orders, the job order submitted to the SWA must satisfy the requirements set forth in § 655.18.

(b) SWA review of the job order. The SWA must review the job order and ensure that it complies with criteria set forth in § 655.18. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO at the NPC of the noted deficiencies within 6 business days of receipt of the job order.

(c) Intrastate and interstate clearance. Upon receipt of the Notice of Acceptance, as described in § 655.33, the SWA must promptly place the job order in intrastate clearance, and in interstate clearance by providing a copy of the job order to other states as directed by the CO.

(d) Duration of job order posting and SWA referral of U.S. workers. Upon receipt of the Notice of Acceptance, any SWA in receipt of the employer's job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.40(c), and must refer to the employer in a manner consistent with § 655.47 all qualified U.S. workers who apply for the job opportunity or on whose behalf a job application is made.

(e) Amendments to a job order. The employer may amend the job order at any time before the CO makes a final determination, in accordance with procedures set forth in § 655.35.

§ 655.17 Emergency situations.

(a) Waiver of time period. The CO may waive the time period(s) for filing an H-2B Registration and/or an Application for Temporary Employment Certification for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.

(b) Employer requirements. The employer requesting a waiver of the required time period(s) must submit to the NPC a request for a waiver of the time period requirement, a completed Application for Temporary Employment Certification and the proposed job order identifying the SWA serving the area of intended employment, and must otherwise meet the requirements of § 655.15. If the employer did not previously apply for an H-2B Registration, the employer must also submit a completed H-2B Registration with all supporting documentation, as required by § 655.11. If the employer did not previously apply for a PWD, the employer must also submit a completed PWD request. The employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues. A denial of a previously submitted H-2B Registration in accordance with the procedures set forth in § 655.11 does not constitute good and substantial cause necessitating a waiver under this section.

(c) Processing of emergency applications. The CO will process the emergency H-2B Registration and/or Application for Temporary Employment Certification and job order

in a manner consistent with the provisions of this subpart and make a determination on the Application for Temporary Employment Certification in accordance with § 655.50. If the CO grants the waiver request, the CO will forward a Notice of Acceptance and the approved job order to the SWA serving the area of intended employment identified by the employer in the job order. If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53.

§ 655.18 Job order assurances and contents.

(a) General. Each job order placed in connection with an Application for Temporary Employment Certification must at a minimum include the information contained in paragraph (b) of this section. In addition, by submitting the Application for Temporary Employment Certification, an employer agrees to comply with the following assurances with respect to each job order:

(1) Prohibition against preferential treatment. The employer's job order 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-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B

workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(2) Bona fide job requirements. Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

(b) Contents. In addition to complying with the assurances in paragraph (a) of this section, the employer's job order must meet the following requirements:

(1) State the employer's name and contact information;

(2) Indicate that the job opportunity is a temporary, full-time position, including the total number of job openings the employer intends to fill;

(3) Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

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

(5) Specify the wage that the employer is offering, intends to offer, or will provide to H-2B workers, or, in the event that there are multiple wage offers, the range of wage offers, and ensure that the wage offer equals or exceeds the highest of the prevailing wage or the Federal, State, or local minimum wage;

(6) If applicable, specify that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(7) If applicable, state that on-the-job training will be provided to the worker;

(8) State that the employer will use a single workweek as its standard for computing wages due;

(9) Specify the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent;

(10) If the employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided;

(11) State that the employer will make all deductions from the worker's paycheck required by law. Specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;

(12) Detail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order, consistent with § 655.20(j)(1)(i);

(13) State that the employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from

which the worker, disregarding intervening employment, departed to work for the employer, if the worker completes the certified period of employment or is dismissed from employment for any reason by the employer before the end of the period, consistent with § 655.20(j)(1)(ii);

(14) If applicable, state that the employer will provide daily transportation to and from the worksite;

(15) State that the employer will reimburse the H-2B worker in the first workweek for all visa, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H-2B worker (but need not include passport expenses or other charges primarily for the benefit of the worker);

(16) State that the employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.20(k);

(17) State the applicability of the three-fourths guarantee, offering the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period, if the period of employment covered by the job order is 120 or more days, or each 6-week period, if the period of employment covered by the job order is less than 120 days, in accordance with § 655.20(f); and

(18) Instruct applicants to inquire about the job opportunity or send applications, indications of availability, and/or resumes directly to the nearest office of the SWA in the State in which the advertisement appeared and include the SWA contact information.

§ 655.19 Job contractor filing requirements.

(a) Provided that a job contractor and any employer-client are joint employers, a job contractor may submit an Application for Temporary Employment Certification on behalf of itself and that employer-client.

(b) A job contractor must have separate contracts with each different employer-client. Each contract or agreement may support only one Application for Temporary Employment Certification for each employer-client job opportunity within a single area of intended employment.

(c) Either the job contractor or its employer-client may submit an ETA Form 9141, Application for Prevailing Wage Determination, describing the job opportunity to the NPWC. However, each of the joint employers is separately responsible for ensuring that the wage offer listed on the Application for Temporary Employment Certification, ETA Form 9142B, and related recruitment at least equals the prevailing wage rate determined by the NPWC and that all other wage obligations are met.

(d)(1) A job contractor that is filing as a joint employer with its employer-client must submit to the NPC a completed Application for Temporary Employment Certification, ETA Form 9142, that clearly identifies the joint employers (the job contractor and its employer-client) and the employment relationship (including the actual worksite), in accordance with the instructions provided by the Department of Labor. The Application for Temporary Employment Certification must bear the original signature of the job contractor and the employer-client and be accompanied by the contract or agreement establishing the employers' relationship related to the workers sought.

(2) By signing the Application for Temporary Employment Certification**,** each employer independently attests to the conditions of employment required of an employer

participating in the H-2B program and assumes full responsibility for the accuracy of the representations made in the application and for all of the responsibilities of an employer in the H-2B program.

(e)(1) Either the job contractor or its employer-client may place the required job order and conduct recruitment as described in § 655.16 and §§ 655.42 through 655.46. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the NPC with the Application for Temporary Employment Certification, ETA Form 9142B.

(2) The job order and all recruitment conducted by joint employers must satisfy the content requirements identified in §§ 655.18 and 655.41. Additionally, in order to fully apprise applicants of the job opportunity and avoid potential confusion inherent in a job opportunity involving two employers, joint employer recruitment must clearly identify both employers (the job contractor and its employer-client) by name and must clearly identify the worksite location(s) where workers will perform labor or services.

(3)(i) Provided that all of the employer-clients' job opportunities are in the same occupation and area of intended employment and have the same requirements and terms and conditions of employment, including dates of employment, a job contractor may combine more than one of its joint employer employer-clients' job opportunities in a single advertisement. Each advertisement must fully apprise potential workers of the job opportunity available with each employer-client and otherwise satisfy the advertising content requirements required for all H-2B-related advertisements, as identified in § 655.41. Such a shared advertisement must clearly identify the job contractor by name,

the joint employment relationship, and the number of workers sought for each job opportunity, identified by employer-client name and location (e.g. 5 openings with Employer-Client 1 (worksite location), 3 openings with Employer-Client 2 (worksite location)).

(ii) In addition, the advertisement must contain the following statement: "Applicants may apply for any or all of the jobs listed. When applying, please identify the job(s) (by company and work location) you are applying to for the entire period of employment specified." If an applicant fails to identify one or more specific work location(s), that applicant is presumed to have applied to all work locations listed in the advertisement.

(f) If an application for joint employers is approved, the NPC will issue one certification and send it to the job contractor. In order to ensure notice to both employers, a courtesy copy of the certification cover letter will be sent to the employer-client.

(g) When submitting a certified Application for Temporary Employment Certification to USCIS, the job contractor should submit the complete ETA Form 9142B containing the original signatures of both the job contractor and employer-client.

ASSURANCES AND OBLIGATIONS

§ 655.20 Assurances and obligations of H-2B employers.

An employer employing H-2B workers and/or workers in corresponding employment under an Application for Temporary Employment Certification has agreed as part of the Application for Temporary Employment Certification that it will abide by the following conditions with respect to its H-2B workers and any workers in corresponding employment:

(a) Rate of pay. (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the Application for Temporary Employment Certification granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and the employer must demonstrate that they are normal and usual for non-H-2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece rate is no less than the normal rate paid by non-H-2B employers to workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) Wages free and clear. The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." The principles applied in determining whether deductions are reasonable and payments are received free and clear and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) Deductions. The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay; any such deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are

contrary to law or from which the employer, agent or recruiter including any agents or employees of these entities, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the Application for Temporary Employment Certification.

(d) Job opportunity is full-time. The job opportunity is a full-time temporary position, consistent with § 655.5, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) Job qualifications and requirements. Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must not be less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

(f) Three-fourths guarantee. (1) 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 in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any. See the exception in paragraph (y) of this section.

(2) For purposes of this paragraph (f) a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date 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 job order and all extensions thereof are in effect.

(4) The 12-week periods (6-week periods if the period of employment covered by the job order is less than 120 days) to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 12-week period (or 6-week period, as appropriate) also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 12 weeks and 6 days (or 6 weeks and 6 days, as

appropriate)). The final 12-week period (or 6-week period, as appropriate) includes any time remaining after the last full 12-week period (or 6-week period) ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 32-week period (a period greater than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 315 hours in the first 12-week period (12 weeks × 35 hours/week = 420 hours × 75 percent = 315), at least 315 hours in the second 12-week period, and at least 210 hours (8 weeks x 35 hours/week = 280 hours x 75 percent = 210) in the final partial period. If the job order is for a 16-week period (less than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 157.5 hours (6 weeks × 35 hours/week = 210 hours × 75 percent = 157.5) in the first 6-week period, at least 157.5 hours in the second 6-week period, and at least 105 hours (4 weeks × 35 hours/week = 140 hours × 75 percent = 105) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee.

(7) 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. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 12-week period (6-week period if the

period of employment covered by the job order is less than 120 days) during the period of the job order the employer affords the U.S. or H-2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in an 12-week period (or 6-week period, as appropriate) if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 12-week period (or 6-week period, as appropriate) of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) Impossibility of fulfillment. If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God, or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as

described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H-2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2B employer, whichever the worker prefers.

(h) Frequency of pay. The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) Earnings statements. (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: records showing the nature, amount and location(s) of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the

amount of and reasons for any and all deductions taken from or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

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

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

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

(vii) The beginning and ending dates of the pay period; and

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

(j) Transportation and visa fees. (1)(i) Transportation to the place of employment. The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the job order (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the

transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in § 655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: the costs of transportation and subsistence incurred by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the FLSA applies independently of the H-2B requirements and imposes obligations on employers regarding payment of wages.

(ii) Transportation from the place of employment. If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent

employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State, and local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) Disclosure. All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H-2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

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

(l) Disclosure of job order. The employer must provide to an H-2B worker outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent approved modifications. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B employer, the copy must be

provided no later than the time an offer of employment is made by the subsequent H-2B employer. The disclosure of all documents required by this paragraph (l) must be provided in a language understood by the worker, as necessary or reasonable.

(m) Notice of worker rights. The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department of Labor that sets out the rights and protections for H-2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department of Labor, in any language common to a significant portion of the workers if they are not fluent in English.

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

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 29 CFR part 503, or this subpart, or any other regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 29 CFR part 503, or this subpart or any other regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 29 CFR part 503, or this subpart or any other regulation promulgated thereunder;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), section 214(c) of the INA, 29 CFR part 503, or this subpart or any other regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), section 214(c) of the INA, 29 CFR part 503, or this subpart or any other regulation promulgated thereunder.

(o) Comply with the prohibitions against employees paying fees. The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H-2B labor certification or employment, including payment of the employer's attorney or agent fees, application and H-2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved Application for Temporary Employment Certification. For purposes of this paragraph (o), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) Contracts with third parties to comply with prohibitions. The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of H-2B workers to seek or receive payments or other compensation from

prospective workers. The contract must include the following statement: "Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees."

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

(r) Non-discriminatory hiring practices. The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 655.56.

(s) Recruitment requirements. The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in §§ 655.40 through 655.46.

(t) Continuing requirement to hire U.S. workers. The employer has and will continue to cooperate with the SWA by accepting referrals of all qualified U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified U.S. worker who applies to the employer for the job opportunity**,** until 21 days before the date of need.

(u) No strike or lockout. There is no strike or lockout at any of the employer's worksites within the area of intended employment for which the employer is requesting H-2B certification at the time the Application for Temporary Employment Certification is filed.

(v) No recent or future layoffs. The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H-2B workers are laid off before any U.S. worker in corresponding employment.

(w) Contact with former U.S. employees. The employer will contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (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, disclose the terms of the job order, and solicit their return to the job.

(x) Area of intended employment and job opportunity. The employer must not place any H-2B workers employed under the approved Application for Temporary Employment Certification outside the area of intended employment or in a job opportunity not listed on the approved Application for Temporary Employment Certification unless the employer has obtained a new approved Application for Temporary Employment Certification.

(y) Abandonment/termination of employment. Upon the separation from employment of worker(s) employed under the Application for Temporary Employment Certification or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the Application for Temporary Employment Certification, the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department of Labor or DHS in the Federal Register or the Code of Federal Regulations) of such separation of an H-2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H-2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph (y), the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and

that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 12-week period (or 6-week period, as appropriate) preceding the worker's voluntary abandonment or termination for cause.

(z) Compliance with applicable laws. During the period of employment specified on the Application for Temporary Employment Certification, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. This includes compliance with 18 U.S.C. 1592(a), with respect to prohibitions against employers, the employer's agents or their attorneys knowingly holding, destroying or confiscating workers' passports, visas, or other immigration documents.

(aa) Disclosure of foreign worker recruitment. The employer, and its attorney or agent, as applicable, must comply with § 655.9 by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers, and the identity and location of the persons or entities hired by or working for the agent or recruiter and any of the agents or employees of those persons and entities, to recruit foreign workers. Pursuant to § 655.15(a), the agreements and information must be filed with the Application for Temporary Employment Certification.

(bb) Cooperation with investigators. The employer must cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's authority pursuant to 8 U.S.C. 1184(c)(14)(B), section 214(c)(14)(B) of the INA.

§§ 655.21—655.29 [Reserved]

PROCESSING OF AN APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION

§ 655.30 Processing of an application and job order.

(a) NPC review. The CO will review the Application for Temporary Employment Certification and job order for compliance with all applicable program requirements.

(b) Mailing and postmark requirements. Any notice or request sent by the CO to an employer requiring a response will be mailed to the address provided in the Application for Temporary Employment Certification using methods to assure next day delivery, including electronic mail. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date or the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(c) Information dissemination. OFLC may forward information received in the course of processing an Application for Temporary Employment Certification and program integrity measures to WHD, or any other Federal agency, as appropriate, for investigation and/or enforcement purposes.

§ 655.31 Notice of deficiency.

(a) Notification timeline. If the CO determines the Application for Temporary Employment Certification and/or job order is incomplete, contains errors or inaccuracies,

or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 business days from the CO's receipt of the Application for Temporary Employment Certification. If applicable, the Notice of Deficiency will include job order deficiencies identified by the SWA under § 655.16. The CO will send a copy of the Notice of Deficiency to the SWA serving the area of intended employment identified by the employer on its job order, and if applicable, to the employer's attorney or agent.

(b) Notice content. The Notice of Deficiency will:

(1) State the reason(s) why the Application for Temporary Employment Certification or job order fails to meet the criteria for acceptance and state the modification needed for the CO to issue a Notice of Acceptance;

(2) Offer the employer an opportunity to submit a modified Application for Temporary Employment Certification or job order within 10 business days from the date of the Notice of Deficiency. The Notice will state the modification needed for the CO to issue a Notice of Acceptance;

(3) Offer the employer an opportunity to request administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61. The Notice will inform the employer that it must submit a written request for review to the Chief ALJ of DOL within 10 business days from the date the Notice of Deficiency is issued by facsimile or other means normally assuring next day delivery, and that the employer must 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

(4) State that if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the Application for Temporary Employment Certification. The Notice will inform the employer that the denial of the Application for Temporary Employment Certification is final, and cannot be appealed. The Department of Labor will not further consider that Application for Temporary Employment Certification.

§ 655.32 Submission of a modified application or job order.

(a) Review of a modified Application for Temporary Employment Certification or job order. Upon receipt of a response to a Notice of Deficiency, including any modifications, the CO will review the response. The CO may issue one or more additional Notices of Deficiency before issuing a decision. The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.

(b) Acceptance of a modified Application for Temporary Employment Certification or job order. If the CO accepts the modification(s) to the Application for Temporary Employment Certification and/or job order, the CO will issue a Notice of Acceptance to the employer. The CO will send a copy of the Notice of Acceptance to the SWA instructing it to make any necessary modifications to the not yet posted job order and, if applicable, to the employer's attorney or agent, and follow the procedure set forth in § 655.33.

(c) Denial of a modified Application for Temporary Employment Certification or job order. If the CO finds the response to Notice of Deficiency unacceptable, the CO will deny the Application for Temporary Employment Certification in accordance with the labor certification determination provisions in § 655.51.

(d) Appeal from denial of a modified Application for Temporary Employment Certification or job order. The procedures for appealing a denial of a modified Application for Temporary Employment Certification and/or job order are the same as for appealing the denial of a non-modified Application for Temporary Employment Certification outlined in § 655.61.

(e) Post acceptance modifications. Irrespective of the decision to accept the Application for Temporary Employment Certification, the CO may require modifications to the job order at any time before the final determination to grant or deny the Application for Temporary Employment Certification if the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions as set forth in § 655.18. The employer must make such modification, or certification will be denied under § 655.53. The employer must provide all workers recruited in connection with the job opportunity in the Application for Temporary Employment Certification with a copy of the modified job order no later than the date work commences, as approved by the CO.

§ 655.33 Notice of acceptance.

(a) Notification timeline. If the CO determines the Application for Temporary Employment Certification and job order are complete and meet the requirements of this

subpart, the CO will notify the employer in writing within 7 business days from the date the CO received the Application for Temporary Employment Certification and job order or modification thereof. A copy of the Notice of Acceptance will be sent to the SWA serving the area of intended employment identified by the employer on its job order and, if applicable, to the employer's attorney or agent.

(b) Notice content. The notice will:

(1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.40 through 655.46, including any additional recruitment ordered by the CO under § 655.46;

(2) State that such employer-conducted recruitment is in addition to the job order being circulated by the SWA(s) and that the employer must conduct recruitment within 14 calendar days from the date the Notice of Acceptance is issued, consistent with § 655.40;

(3) Direct the SWA to place the job order into intra- and interstate clearance as set forth in § 655.16 and to commence such clearance by:

(i) Sending a copy of the job order to other States listed as anticipated worksites in the Application for Temporary Employment Certification and job order, if applicable; and

(ii) Sending a copy of the job order to the SWAs for all States designated by the CO for interstate clearance;

(4) Instruct the SWA to keep the approved job order on its active file until the end of the recruitment period as defined in § 655.40(c), and to transmit the same instruction to other SWAs to which it circulates the job order in the course of interstate clearance;

(5) Where the occupation or industry is traditionally or customarily unionized, direct the SWA to circulate a copy of the job order to the following labor organizations:

(i) The central office of the State Federation of Labor in the State(s) in which work will be performed; and

(ii) The office(s) of local union(s) representing employees in the same or substantially equivalent job classification in the area(s) in which work will be performed;

(6) Advise the employer, as appropriate, that it must contact the appropriate designated community-based organization(s) with notice of the job opportunity; and

(7) Require the employer to submit a report of its recruitment efforts as specified in § 655.48.

§ 655.34 Electronic job registry.

(a) Location of and placement in the electronic job registry. Upon acceptance of the Application for Temporary Employment Certification under § 655.33, the CO will place for public examination a copy of the job order posted by the SWA on the Department's electronic job registry, including any amendments or required modifications approved by the CO.

(b) Length of posting on electronic job registry. The Department of Labor will keep the job order posted on the electronic job registry until the end of the recruitment period, as set forth in § 655.40(c).

(c) Conclusion of active posting. Once the recruitment period has concluded the job order will be placed in inactive status on the electronic job registry.

§ 655.35 Amendments to an application or job order.

(a) Increases in number of workers. The employer may request to increase the number of workers noted in the H-2B Registration by no more than 20 percent (50 percent for employers requesting fewer than 10 workers). All requests for increasing the number of workers must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

(b) Minor changes to the period of employment. The employer may request minor changes to the total period of employment listed on its Application for Temporary Employment Certification and job order, for a period of up to 14 days, but the period of employment may not exceed a total of 9 months, except in the event of a one-time occurrence. All requests for minor changes to the total period of employment must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order

(c) Other amendments to the Application for Temporary Employment Certification and job order. The employer may request other amendments to the Application for Temporary Employment Certification and job order. All such requests must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry.

(d) Amendments after certification are not permitted. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

§§ 655.36-655.39 [Reserved]

POST-ACCEPTANCE REQUIREMENTS

§ 655.40 Employer-conducted recruitment.

(a) Employer obligations. Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the Application for Temporary Employment Certification. U.S. Applicants can be rejected only for lawful job-related reasons.

(b) Employer-conducted recruitment period. Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.42 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.

(c) U.S. workers. Employers must continue to accept referrals and applications of all U.S. applicants interested in the position until 21 days before the date of need.

(d) Interviewing U.S. workers. Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H-2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.

(e) Qualified and available U.S. workers. The employer must consider all U.S. applicants for the job opportunity. The employer must accept and hire any applicants who are qualified and who will be available.

(f) Recruitment report. The employer must prepare a recruitment report meeting the requirements of § 655.48.

§ 655.41 Advertising requirements.

(a) All recruitment conducted under §§ 655.42 through 655.46 must contain terms and conditions of employment that are not less favorable than those offered to the H-2B workers and, at a minimum, must comply with the assurances applicable to job orders as set forth in § 655.18(a).

(b) All advertising must contain the following information:

(1) The employer's name and contact information;

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

(3) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) A statement that the job opportunity is a temporary, full-time position including the total number of job openings the employer intends to fill;

(5) If applicable, a statement that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(6) If applicable, a statement indicating that on-the-job training will be provided to the worker;

(7) The wage that the employer is offering, intends to offer or will provide to the H-2B workers or, in the event that there are multiple wage offers, the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage;

(8) If applicable, any board, lodging, or other facilities the employer will offer to workers or intends to assist workers in securing;

(9) All deductions not required by law that the employer will make from the worker's paycheck, including, if applicable, reasonable deduction for board, lodging, and other facilities offered to the workers;

(10) A statement that transportation and subsistence from the place where the worker has come to work for the employer to the place of employment and return transportation and subsistence will be provided, as required by § 655.20(j)(1);

(11) If applicable, a statement that work tools, supplies, and equipment will be provided to the worker without charge;

(12) If applicable, a statement that daily transportation to and from the worksite will be provided by the employer;

(13) A statement summarizing the three-fourths guarantee as required by § 655.20(f); and

(14) A statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the State in which the advertisement appeared, the SWA contact information, and, if applicable, the job order number.

§ 655.42 Newspaper advertisements.

(a) The employer must place an advertisement (which must be in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (b) of this section), in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity.

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

(c) The newspaper advertisements must satisfy the requirements in § 655.41.

(d) The employer must maintain copies of newspaper pages (with date of publication and full copy of the advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication furnished by the newspaper containing the text of the printed advertisements and the dates of publication, consistent with the document retention requirements in § 655.56. If the advertisement was required to be placed in a language other than English, the employer must maintain a translation and retain it in accordance with § 655.56.

§ 655.43 Contact with former U.S. employees.

The employer must contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need, employed by the employer in the occupation at the place of employment during the previous year (except those who were dismissed for cause or who abandoned the worksite), disclose the terms of the job order, and solicit their return to the job. The employer must maintain documentation sufficient to prove such contact in accordance with § 655.56.

§ 655.44 [Reserved]

§ 655.45 Contact with bargaining representative, posting and other contact requirements.

(a) If there is a bargaining representative for any of the employer's employees in the occupation and area of intended employment, the employer must provide written notice

of the job opportunity, by providing a copy of the Application for Temporary Employment Certification and the job order, and maintain documentation that it was sent to the bargaining representative(s). An employer governed by this paragraph (a) must include information in its recruitment report that confirms that the bargaining representative(s) was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

(b) If there is no bargaining representative, the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H-2B workers. Electronic posting, such as displaying the notice prominently on any internal or external website that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must meet the requirements under § 655.41 and be posted for at least 15 consecutive business days. The employer must maintain a copy of the posted notice and identify where and when it was posted in accordance with § 655.56.

(c) If appropriate to the occupation and area of intended employment, as indicated by the CO in the Notice of Acceptance, the employer must provide written notice of the job opportunity to a community-based organization, and maintain documentation that it was sent to any designated community-based organization. An employer governed by this paragraph (c) must include information in its recruitment report that confirms that the

community-based organization was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

§ 655.46 Additional employer-conducted recruitment.

(a) Requirement to conduct additional recruitment. The employer may be instructed by the CO to conduct additional reasonable recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there is a likelihood that U.S. workers who are qualified and will be available for the work, including but not limited to where the job opportunity is located in an Area of Substantial Unemployment.

(b) Nature of the additional employer-conducted recruitment. The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but is not limited to, posting on the employer's Web site or another Web site, contact with additional community-based organizations, additional contact with State One-Stop Career Centers, and other print advertising, such as using a professional, trade or ethnic publication where such a publication is appropriate for the occupation and the workers likely to apply for the job opportunity. When assessing the appropriateness of a particular recruitment method, the CO will consider the cost of the additional recruitment and the likelihood that the additional recruitment method(s) will identify qualified and available U.S. workers.

(c) Proof of the additional employer-conducted recruitment. The CO will specify the documentation or other supporting evidence that must be maintained by the employer as

proof that the additional recruitment requirements were met. Documentation must be maintained as required in § 655.56.

§ 655.47 Referrals of U.S. workers.

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and who are qualified and will be available for employment.

§ 655.48 Recruitment report.

(a) Requirements of the recruitment report. The employer must prepare, sign, and date a recruitment report. Where recruitment was conducted by a job contractor or its employer-client, both joint employers must sign the recruitment report in accordance with §655.19(e). The recruitment report must be submitted by a date specified by the CO in the Notice of Acceptance and contain the following information:

(1) The name of each recruitment activity or source (e.g., job order and the name of the newspaper);

(2) The name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;

(3) Confirmation that former U.S. employees were contacted, if applicable, and by what means;

(4) Confirmation that the bargaining representative was contacted, if applicable, and by what means, or that the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the H-2B workers;

(5) Confirmation that the community-based organization designated by the CO was contacted, if applicable;

(6) If applicable, confirmation that additional recruitment was conducted as directed by the CO; and

(7) If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

(b) Duty to update recruitment report. The employer must continue to update the recruitment report throughout the recruitment period. In a joint employment situation, either the job contractor or the employer-client may update the recruitment report. The updated report must be signed, dated and need not be submitted to the Department of Labor, but must be made available in the event of a post-certification audit or upon request by DOL.

§ 655.49 [Reserved]

LABOR CERTIFICATION DETERMINATIONS

§ 655.50 Determinations.

(a) Certifying Officers (COs). The Administrator, OFLC is the Department's National CO. The Administrator, OFLC and the CO(s), by virtue of delegation from the Administrator, OFLC, have the authority to certify or deny Applications for Temporary Employment Certification under the H-2B nonimmigrant classification. If the Administrator, OFLC directs that certain types of temporary labor certification applications or a specific Application for Temporary Employment Certification under the H-2B nonimmigrant classification be handled by the OFLC's National Office, the Director of the NPC will refer such applications to the Administrator, OFLC.

(b) Determination. Except as otherwise provided in this paragraph (b), the CO will make a determination either to certify or deny the Application for Temporary Employment Certification. The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

§ 655.51 Criteria for certification.

(a) The criteria for certification include whether the employer has a valid H-2B Registration to participate in the H-2B program and has complied with all of the requirements necessary to grant the labor certification.

(b) In making a determination whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made)

directly to the employer, but who was rejected by the employer for other than a lawful job-related reason.

(c) A certification will not be granted to an employer that has failed to comply with one or more sanctions or remedies imposed by final agency actions under the H-2B program.

§ 655.52 Approved certification.

If a temporary labor certification is granted, the CO will send the approved Application for Temporary Employment Certification and a Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if applicable, to the employer's attorney or agent. If the Application for Temporary Employment Certification is electronically filed, the employer must sign the certified Application for Temporary Employment Certification as directed by the CO. The employer must retain a signed copy of the Application for Temporary Employment Certification and the original signed Appendix B of the Application, as required by § 655.56.

§ 655.53 Denied certification.

If a temporary labor certification is denied, the CO will send the Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if applicable , to the employer's attorney or agent. The Final Determination letter will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.61; and

(c) State that if the employer does not request administrative review in accordance with § 655.61, the denial is final and the Department of Labor will not accept any appeal on that Application for Temporary Employment Certification.

§ 655.54 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of H-2B workers or both for certification, based upon information the CO receives during the course of processing the Application for Temporary Employment Certification. The number of workers certified will be reduced by one for each U.S. worker who is qualified and who will be available at the time and place needed to perform the services or labor and who has not been rejected for lawful job-related reasons. If a partial labor certification is issued, the CO will amend the Application for Temporary Employment Certification and then return it to the employer with a Final Determination letter, with a copy to the employer's attorney or agent, if applicable. The Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H-2B workers requested has been reduced, citing the relevant regulatory standards;

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

(c) Offer the employer an opportunity to request administrative review of the partial certification under § 655.61; and

(d) State that if the employer does not request administrative review in accordance with § 655.61, the partial certification is final and the Department of Labor will not accept any appeal on that Application for Temporary Employment Certification.

§ 655.55 Validity of temporary labor certification.

(a) Validity period. A temporary labor certification is valid only for the period as approved on the Application for Temporary Employment Certification. The certification expires on the last day of authorized employment.

(b) Scope of validity. A temporary labor certification is valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved Application for Temporary Employment Certification, including any approved modifications. The temporary labor certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 655.56 Document retention requirements of H-2B employers.

(a) Entities required to retain documents. All employers filing an Application for Temporary Employment Certification requesting H-2B workers are required to retain the documents and records proving compliance with 29 CFR part 503 and this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) Period of required retention. The employer must retain records and documents for 3 years from the date of certification of the Application for Temporary Employment

Certification, or from the date of adjudication if the Application for Temporary Employment Certification is denied, or 3 years from the day the Department of Labor receives the letter of withdrawal provided in accordance with § 655.62. For the purposes of this section, records and documents required to be retained in connection with an H-2B Registration must be retained in connection with all of the Applications for Temporary Employment Certification that are supported by it.

(c) Documents and records to be retained by all employer applicants. All employers filing an H-2B Registration and an Application for Temporary Employment Certification must retain the following documents and records and must provide the documents and records to the Department of Labor and other Federal agencies in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in § 655.16;

(ii) Advertising as specified in §§ 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in § 655.43;

(iv) Contact with bargaining representative(s), or a copy of the posting of the job opportunity, if applicable, as specified in § 655.45(a) or (b); and

(v) Additional employer-conducted recruitment efforts as specified in § 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with § 655.48, such as evidence of nonapplicability of contact with former workers as specified in § 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in § 655.48;

(5) Records of each worker's earnings, hours offered and worked, location(s) of work performed, and other information as specified in § 655.20(i);

(6) If appropriate, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 655.20(j).

(7) Evidence of contact with U.S. workers who applied for the job opportunity in the Application for Temporary Employment Certification, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.20(r);

(8) Evidence of contact with any former U.S. worker in the occupation at the place of employment in the Application for Temporary Employment Certification, including documents demonstrating that the U.S. worker had been offered the job opportunity in the Application for Temporary Employment Certification, as specified in § 655.20(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 655.20(r);

(9) The written contracts with agents or recruiters as specified in §§ 655.8 and 655.9, and the list of the identities and locations of persons hired by or working for the agent or recruiter and these entities' agents or employees, as specified in § 655.9;

(10) Written notice provided to and informing OFLC that an H-2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the Application for Temporary Employment Certification, as specified in § 655.20(y);

(11) The H-2B Registration, job order and a copy of the Application for Temporary Employment Certification and the original signed Appendix B of the Application. If the Application for Temporary Employment Certification and H-2B Registration is electronically filed, a printed copy of each adjudicated Application for Temporary Employment Certification, including any modifications, amendments or extensions must be signed by the employer as directed by the CO and retained;

(12) The H-2B Petition, including all accompanying documents; and

(13) Any collective bargaining agreement(s), individual employment contract(s), or payroll records from the previous year necessary to substantiate any claim that certain incumbent workers are not included in corresponding employment, as specified in § 655.5.

(d) Availability of documents for enforcement purposes. An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 29 CFR part 503 and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

§ 655.57 Request for determination based on nonavailability of U.S. workers.

(a) Standards for requests. If a temporary labor certification has been partially granted or denied, based on the CO's determination that qualified U.S. workers are available, and, on or after 21 calendar days before the date of need, some or all of those qualified U.S. workers are, in fact no longer available, the employer may request a new temporary labor certification determination from the CO. Prior to making a new determination the CO

will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific 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 CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request. An employer may appeal a denial of such a determination in accordance with procedures contained in § 655.61.

(b) Unavailability of U.S. workers. The employer's request for a new determination must be made directly to the CO by electronic mail or other appropriate means and must be accompanied by a signed statement confirming the employer's assertion. In addition, unless the employer has provided to the CO notification of abandonment or termination of employment as required by § 655.20(y), the employer's signed statement must include the name and contact information of each U.S. worker who became unavailable and must supply the reason why the worker has become unavailable.

(c) Notification of determination. If the CO determines that U.S. workers have become unavailable and cannot identify sufficient available U.S. workers who are qualified or who are likely to become available, the CO will grant the employer's request for a new determination. 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 qualified because of lawful job-related reasons.

§§ 655.58—655.59 [Reserved]

POST CERTIFICATION ACTIVITIES

§ 655.60 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances. A request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing. Except in extraordinary circumstances, the CO will not grant an extension where the total work period under that Application for Temporary Employment Certification and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need. The employer may appeal a denial of a request for an extension by following the procedures in § 655.61. The H-2B employer's assurances and obligations under the temporary labor certification will continue to apply during the extended period of employment. The employer must immediately provide to its workers a copy of any approved extension.

§ 655.61 Administrative review.

(a) Request for review. Where authorized in this subpart, employers may request an administrative review before the BALCA of a determination by the CO. In such cases, the request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who issued the determination, within 10 business days from the date of determination;

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

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

(4) Must include a copy of the CO's determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued.

(b) Appeal file. Upon the receipt of a request for review, the CO will, within 7 business days, assemble and submit the Appeal File using means to ensure same day or next day delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) Briefing schedule. Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or next day delivery, a brief in support of the CO's decision.

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

(e) Review. The BALCA must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the CO's determination; or

(2) Reverse or modify the CO's determination; or

(3) Remand to the CO for further action.

(f) Decision. The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

§ 655.62 Withdrawal of an Application for Temporary Employment Certification.

Employers may withdraw an Application for Temporary Employment Certification after it has been accepted and before it is adjudicated. The employer must request such withdrawal in writing.

§ 655.63 Public disclosure.

The Department of Labor will maintain an electronic file accessible to the public with information on all employers applying for temporary nonagricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§ 655.64—655.69 [Reserved]

INTEGRITY MEASURES

§ 655.70 Audits.

The CO may conduct audits of adjudicated temporary employment certification applications.

(a) Discretion. The CO has the sole discretion to choose the applications selected for audit.

(b) Audit letter. Where an application is selected for audit, the CO will send an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. The audit letter will:

(1) Specify the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and

(3) Advise that failure to fully comply with the audit process may result:

(i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.71 in future filings of H-2B temporary employment certification applications for a period of up to 2 years, or

(ii) In a revocation of the certification and/or debarment from the H-2B program and any other foreign labor certification program administered by the Department Labor.

(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. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) Potential referrals. In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS, WHD, or other

appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.71 CO-ordered assisted recruitment.

(a) Requirement of assisted recruitment. If, as a result of audit or otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future Application for Temporary Employment Certification.

(b) Notification of assisted recruitment. The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of an application for temporary employment certification, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.61 apply.

(c) Assisted recruitment. The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.41 through 655.46 and may consist of, but is not limited to, one or more of the following:

(1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the Application for Temporary Employment Certification;

(2) Designating the sources where the employer must recruit for U.S. workers, including newspapers and other publications, and directing the employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisement and/or job order;

(4) Requiring the employer to notify the CO and the SWA in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO, in addition to providing a copy of the job order;

(7) Requiring the employer to provide proof of all SWA referrals made in response to the job order;

(8) Requiring the employer to submit any proof of contact with all referrals and past U.S. workers; and/or

(9) Requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) Failure to comply. If an employer materially fails to comply with requirements ordered by the CO under this section, the certification will be denied and the employer and/or its attorney or agent may be debarred under § 655.73.

§ 655.72 Revocation.

(a) Basis for DOL revocation. The Administrator, OFLC may revoke a temporary labor certification approved under this subpart, if the Administrator, OFLC finds:

(1) The issuance of the temporary labor certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in § 655.73(d);

(2) The employer substantially failed to comply with any of the terms or conditions of the approved temporary labor certification. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.73(d) and (e);

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (under § 655.73), or law enforcement function under 29 CFR part 503 or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary with the respect to the H-2B program.

(b) DOL procedures for revocation--(1) Notice of Revocation. If the Administrator, OFLC makes a determination to revoke an employer's temporary labor certification, the Administrator, OFLC will send to the employer (and its attorney or agent, if applicable) a Notice of Revocation. The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 10 business days from the date the Notice of Revocation is issued, the notice is the final agency action and will take effect immediately at the end of the 10-day period.

(2) Rebuttal. If the employer timely submits rebuttal evidence, the Administrator, OFLC will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal according to the procedures of § 655.61. If the employer does not appeal the final determination, it will become the final agency action.

(3) Appeal. An employer may appeal a Notice of Revocation, or a final determination of the Administrator, OFLC after the review of rebuttal evidence, according to the appeal procedures of § 655.61. The ALJ's decision is the final agency action.

(4) Stay. The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) Decision. If the temporary labor certification is revoked, the Administrator, OFLC will send a copy of the final agency action to DHS and the Department of State.

(c) Employer's obligations in the event of revocation. If an employer's temporary labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other expenses;

(2) The workers' outbound transportation expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

§ 655.73 Debarment.

(a) Debarment of an employer. The Administrator, OFLC may not issue future labor certifications under this subpart to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, OFLC finds that the employer committed the following violations:

(1) Willful misrepresentation of a material fact in its H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition;

(2) Substantial failure to meet any of the terms and conditions of its H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the DOS during the visa application process.

(b) Debarment of an agent or attorney. If the Administrator, OFLC finds, under this section, that an attorney or agent committed a violation as described in paragraphs (a)(1) through (3) of this section or participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) Period of debarment. Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) Determining whether a violation is willful. A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when

the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(e) Determining whether a violation is significant. In determining whether a violation is a significant deviation from the terms and conditions of the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition, the factors that the Administrator, OFLC may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the H-2B program;

(2) The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and

(5) Whether U.S. workers have been harmed by the violation.

(f) Violations. Where the standards set forth in paragraphs (d) and (e) in this section are met, debarrable violations would include but would not be limited to one or more acts of commission or omission which involve:

(1) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2B workers and/or workers in corresponding employment;

(2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under this subpart or 29 CFR part 503;

(6) Failure to comply with the Notice of Deficiency process under this subpart;

(7) Failure to comply with the assisted recruitment process under this subpart;

(8) Impeding an investigation of an employer under 29 CFR part 503 or an audit under this subpart;

(9) Employing an H-2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(10) A violation of the requirements of § 655.20(o) or (p);

(11) A violation of any of the provisions listed in § 655.20(r);

(12) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(13) Fraud involving the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or the H-2B Petition; or

(14) A material misrepresentation of fact during the registration or application process.

(g) Debarment procedure--(1) Notice of Debarment. If the Administrator, OFLC makes a determination to debar an employer, attorney, or agent, the Administrator, OFLC will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an rebuttal evidence or a request for a hearing stays the debarment pending the outcome of the appeal as provided in paragraphs (g)(2) through (6) of this section.

(2) Rebuttal. The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the notice within 30 calendar days of the date the notice is issued. If rebuttal evidence is timely filed, the Administrator, OFLC will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the party should be debarred, the Administrator, OFLC will inform the party of its right to request a debarment hearing according to the procedures in this section. The party must request a hearing within 30 calendar days after the date of the Administrator, OFLC's final determination, or the Administrator OFLC's determination will be the final agency order and the debarment will take effect at the end of the 30-day period.

(3) Hearing. The recipient of a Notice of Debarment seeking to challenge the debarment must request a debarment hearing within 30 calendar days of the date of a

Notice of Debarment or the date of a final determination of the Administrator, OFLC after review of rebuttal evidence submitted under paragraph (g)(2) of this section. To obtain a debarment hearing, the recipient must, within 30 days of the date of the Notice or the final determination, file a written request with the Chief ALJ, United States Department of Labor, 800 K Street, NW, Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy on the Administrator, OFLC. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is timely filed. Within 10 business days of receipt of the request for a hearing, the Administrator, OFLC will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) Decision. After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided to the parties to the debarment hearing by means normally assuring next day delivery. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) Review by the ARB. (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB

will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete hearing record to the ARB.

(iii) Where the ARB has determined to review the decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which the presentation must be submitted.

(6) ARB Decision. The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

(h) Concurrent debarment jurisdiction. OFLC and the WHD have concurrent jurisdiction to debar under this section or under 29 CFR 503.24. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(i) Debarment from other foreign labor programs. Upon debarment under this subpart or 29 CFR 503.24, the debarred party will be disqualified from filing any labor

certification applications or labor condition applications with the Department of Labor by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§§ 655.74—655.76 [Reserved]

§§ 655.80—655.99 [Reserved]

TITLE 29—LABOR

6. Revise part 503 to read as follows:

PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY NONIMMIGRANT NON-AGRICULTURAL WORKERS DESCRIBED IN THE IMMIGRATION AND NATIONALITY ACT

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Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c); 8 CFR 214.2(h).

Subpart A - General Provisions

§ 503.0 Introduction.

The regulations in this part cover the enforcement of all statutory and regulatory obligations, including requirements under 8 U.S.C. 1184(c), section 214(c) of the INA and 20 CFR part 655, subpart A, applicable to the employment of H-2B workers in nonimmigrant status under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(ii)(b), section 101(a)(15)(H)(ii)(b) of the INA, and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by the regulations in this part or 20 CFR part 655, subpart A.

§ 503.1 Scope and purpose.

(a) Consultation standard. Section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), requires the Secretary of Homeland Security to consult with appropriate agencies before authorizing the classification of aliens as H-2B workers. Department of Homeland Security (DHS) regulations at 8 CFR 214.2(h)(6)(iii)(D) recognize the Secretary of Labor as the appropriate authority with whom DHS consults regarding the H-2B program, and recognize the Secretary of Labor's authority in carrying out the Secretary of Labor's

consultative function to issue regulations regarding the issuance of temporary labor certifications. DHS regulations at 8 CFR 214.2(h)(6)(iv) provide that an employer's petition to employ nonimmigrant workers on H-2B visas for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor. The temporary labor certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers; and

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

(b) Role of the Employment and Training Administration (ETA). The issuance and denial of labor certifications for purposes of satisfying the consultation requirement in 8 U.S.C. 1184(c), INA section 214(c), has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (DOL), which in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an H-2B employer related to the temporary labor certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment, and assuring program integrity. The regulations pertaining to the issuance, denial, and revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, subpart A.

(c) Role of the Wage and Hour Division (WHD). Effective January 18, 2009, DHS has delegated to the Secretary under 8 U.S.C. 1184(c)(14)(B), section 214(c)(14)(B) of

the INA, certain investigatory and law enforcement functions to carry out the provisions under 8 U.S.C. 1184(c), INA section 214(c). The Secretary has delegated these functions to the WHD. In general, matters concerning the rights of H-2B workers and workers in corresponding employment under this part and the employer's obligations are enforced by the WHD, including whether employment was offered to U.S. workers as required under 20 CFR part 655, subpart A, or whether U.S. workers were laid off or displaced in violation of program requirements. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certifications, and to seek remedies for violations, including recovery of unpaid wages and reinstatement of improperly laid off or displaced U.S. workers.

(d) Effect of regulations. The enforcement functions carried out by the WHD under 8 U.S.C. 1184(c), INA section 214(c), 20 CFR part 655, subpart A, and the regulations in this part apply to the employment of any H-2B worker and any worker in corresponding employment as the result of an Application for Temporary Employment Certification filed with the Department of Labor on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

§ 503.2 Territory of Guam.

This part does not apply to temporary employment in the Territory of Guam. The Department of Labor does not certify to DHS the temporary employment of nonimmigrant foreign workers or enforce compliance with the provisions of the H-2B visa program in the Territory of Guam.

§ 503.3 Coordination among Governmental agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding noncompliance with H-2B statutory or regulatory labor standards will be immediately forwarded to the appropriate WHD office for suitable action under the regulations in this part.

(b) Information received in the course of processing registrations and applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H-2B program, may be forwarded to other agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is sought will be cited in a single debarment proceeding. OFLC and the WHD will coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

§ 503.4 Definition of terms.

For purposes of this part:

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

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

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

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

Agent means:

(1) A legal entity or person who:

(i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes;

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

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department of Labor, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Agricultural labor or services means those duties and occupations defined in 20 CFR part 655, subpart B.

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

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved ETA Form 9142B and the appropriate

appendices, a valid wage determination, as required by 20 CFR 655.10, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary labor certification determination from DOL.

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 that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Attorney 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 U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department of Labor, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Certifying Officer (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H-2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the

Administrator, OFLC to make the determinations required under 20 CFR part 655, subpart A.

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

Corresponding employment means:

(1) The employment of workers who are not H-2B workers by an employer that has a certified H-2B Application for Temporary Employment Certification when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, except that workers in the following two categories are not included in corresponding employment:

(i) Incumbent employees continuously employed by the H-2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H-2B workers during the 52 weeks prior to the period of employment certified on the Application for Temporary Employment Certification and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer's payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or

(ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H-2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause.

(2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H-2B workers as listed on the Application for Temporary Employment Certification.

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

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms employee and worker are used interchangeably in this part.

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

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

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

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

Employment and Training Administration (ETA) means the agency within the Department of Labor that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an Application for Temporary Employment Certification and related functions.

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

Full-time means 35 or more hours of work per week.

H-2B Petition means the DHS Form I-129 Petition for a Nonimmigrant Worker, with H Supplement, or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2B nonimmigrant workers.

H-2B Registration means the OMB-approved ETA Form 9155, submitted by an employer to register its intent to hire H-2B workers and to file an Application for Temporary Employment Certification.

H-2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b).

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

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

Job opportunity means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 29 CFR part 655, subpart A and this subpart that is posted between and among the SWAs on their job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

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

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

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an Application for Temporary Employment Certification or other applications.

Non-agricultural labor and services means any labor or services not considered to be agricultural labor or services as defined in 20 CFR part 655, subpart B. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Offered wage means the wage offered by an employer in an H-2B job order. The offered wage must equal or exceed the highest of the prevailing wage or Federal, State or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities, including determinations related to an employer's request for H-2B Registration, Application for Prevailing Wage Determination, or Application for Temporary Employment Certification.

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in 20 CFR 655.10, that is the subject of the Application for Temporary Employment Certification.

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

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

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

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

Successor in interest means:

(1) Where an employer has violated 20 CFR part 655, subpart A, or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

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

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

(viii) Similarity of products and services; and

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

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

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

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

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

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

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, section 207 of the INA, is granted asylum under 8 U.S.C. 1158, section 208 of the INA, or is an alien otherwise authorized under the immigration laws to be employed in the U.S.; or

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

Wage and Hour Division (WHD) means the agency within the Department of Labor with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c), section 214(c) of the INA.

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

§ 503.5 Temporary need.

(a) An employer seeking certification under 20 CFR part 655, subpart A, must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

§ 503.6 Waiver of rights prohibited.

A person may not seek to have an H-2B worker, a worker in corresponding employment, or any other person, including but not limited to a U.S. worker improperly rejected for employment or improperly laid off or displaced, waive or modify any rights conferred under 8 U.S.C. 1184(c), INA section 214(c), 20 CFR part 655, subpart A, or the regulations in this part. Any agreement by an employee purporting to waive or modify any rights given to said person under these provisions will be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary will be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

§ 503.7 Investigation authority of Secretary.

(a) Authority of the Administrator, WHD. The Secretary of Homeland Security has delegated to the Secretary, under 8 U.S.C. 1184(c)(14)(B), INA section 214(c)(14)(B), authority to perform investigative and enforcement functions. Within the Department of Labor, the Administrator, WHD will perform all such functions.

(b) Conduct of investigations. The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1184(c), INA section 214(c), 20

CFR part 655, subpart A, or the regulations in this part, either under a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, worksite, vehicles, structure, facility, place and records (and make transcriptions, photographs, scans, videos, photocopies, or use any other means to record the content of the records or preserve images of places or objects), question any person, or gather any information, in whatever form, as may be appropriate.

(c) Confidential investigation. The WHD will 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 obligations imposed by 8 U.S.C. 1184(c), INA section 214(c), 20 CFR part 655, subpart A, or the regulations in this part to the Secretary by advising any local office of the SWA, ETA, WHD or any other authorized representative of the Secretary. The office or person receiving such a report will refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 503.8 Accuracy of information, statements, data.

Information, statements, and data submitted in compliance with 8 U.S.C. 1184(c), INA section 214(c), or the regulations in this part are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S., knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes

any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, will be fined not more than $250,000 or imprisoned not more than 5 years, or both.

Subpart B – Enforcement

§ 503.15 Enforcement.

The investigation, inspection, and law enforcement functions that carry out the provisions of 8 U.S.C. 1184(c), INA section 214(c), 20 CFR part 655, subpart A, or the regulations in this part pertain to the employment of any H-2B worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced.

§ 503.16 Assurances and obligations of H-2B employers.

An employer employing H-2B workers and/or workers in corresponding employment under an Application for Temporary Employment Certification has agreed as part of the Application for Temporary Employment Certification that it will abide by the following conditions with respect to its H-2B workers and any workers in corresponding employment:

(a) Rate of pay. (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the Application for Temporary Employment Certification granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and the employer must demonstrate that they are normal and usual for non-H-2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece rate is no less than the normal rate paid by non-H-2B employers to workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) Wages free and clear. The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." The principles applied in determining whether deductions are reasonable and payments are received free and clear and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) Deductions. The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay; any such deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter, including any agents or employees of these entities, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the Application for Temporary Employment Certification.

(d) Job opportunity is full-time. The job opportunity is a full-time temporary position, consistent with § 503.4, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) Job qualifications and requirements. Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must not be less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

(f) Three-fourths guarantee. (1) 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 in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any. See the exception in paragraph (y) of this section.

(2) For purposes of this paragraph (f) a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date 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 job order and all extensions thereof are in effect.

(4) The 12-week periods (6-week periods if the period of employment covered by the job order is less than 120 days) to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 12-week period (or 6-week period, as appropriate) also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 12 weeks and 6 days (or 6 weeks and 6 days, as appropriate)). The final 12-week period (or 6-week period, as appropriate) includes any time remaining after the last full 12-week period (or 6-week period) ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 32-week period (a period greater than 120 days), during which the normal workdays and work hours for the workweek are

specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 315 hours in the first 12-week period (12 weeks × 35 hours/week = 420 hours × 75 percent = 315), at least 315 hours in the second 12-week period, and at least 210 hours (8 weeks x 35 hours/week = 280 hours x 75 percent = 210) in the final partial period. If the job order is for a 16-week period (less than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 157.5 hours (6 weeks × 35 hours/week = 210 hours × 75 percent = 157.5) in the first 6-week period, at least 157.5 hours in the second 6-week period, and at least 105 hours (4 weeks × 35 hours/week = 140 hours × 75 percent = 105) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee.

(7) 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. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 12-week period (6-week period if the period of employment covered by the job order is less than 120 days) during the period of the job order the employer affords the U.S. or H-2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely

offered work on three-fourths of the workdays in an 12-week period (or 6-week period, as appropriate) if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 12-week period (or 6-week period, as appropriate) of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) Impossibility of fulfillment. If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God, or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H-2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as

applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2B employer, whichever the worker prefers.

(h) Frequency of pay. The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) Earnings statements. (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: records showing the nature, amount and location(s) of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

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

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

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

(vii) The beginning and ending dates of the pay period; and

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

(j) Transportation and visa fees--(1)(i) Transportation to the place of employment. The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the job order (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of

the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in 20 CFR 655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: the costs of transportation and subsistence incurred by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the Fair Labor Standards Act (FLSA) applies independently of the H-2B requirements and imposes obligations on employers regarding payment of wages.

(ii) Transportation from the place of employment. If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State, and local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) Disclosure. All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H-2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

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

(l) Disclosure of job order. The employer must provide to an H-2B worker outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent approved modifications. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2B employer. The disclosure of all documents required by this paragraph (l) must be provided in a language understood by the worker, as necessary or reasonable.

(m) Notice of worker rights. The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department of Labor that

sets out the rights and protections for H-2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department of Labor, in any language common to a significant portion of the workers if they are not fluent in English.

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

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself or herself or others any right or protection afforded by 8 U.S.C. 1184(c), section 214(c) of the INA, 20 CFR part 655, subpart A, or this part or any other regulation promulgated thereunder.

(o) Comply with the prohibitions against employees paying fees. The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H-2B labor certification or employment, including payment of the employer's attorney or agent fees, application and H-2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved Application for Temporary Employment Certification. For purposes of this paragraph (o), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) Contracts with third parties to comply with prohibitions. The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of H-2B workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: "Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains

employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees."

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

(r) Non-discriminatory hiring practices. The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 503.17.

(s) Recruitment requirements. The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in 20 CFR 655.40 through 655.46.

(t) Continuing requirement to hire U.S. workers. The employer has and will continue to cooperate with the SWA by accepting referrals of all qualified U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide

employment to any qualified U.S. worker who applies to the employer for the job opportunity, until 21 days before the date of need.

(u) No strike or lockout. There is no strike or lockout at any of the employer's worksites within the area of intended employment for which the employer is requesting H-2B certification at the time the Application for Temporary Employment Certification is filed.

(v) No recent or future layoffs. The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H-2B workers are laid off before any U.S. worker in corresponding employment.

(w) Contact with former U.S. employees. The employer will contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (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, disclose the terms of the job order, and solicit their return to the job.

(x) Area of intended employment and job opportunity. The employer must not place any H-2B workers employed under the approved Application for Temporary Employment Certification outside the area of intended employment or in a job opportunity not listed on the approved Application for Temporary Employment

Certification unless the employer has obtained a new approved Application for Temporary Employment Certification.

(y) Abandonment/termination of employment. Upon the separation from employment of worker(s) employed under the Application for Temporary Employment Certification or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the Application for Temporary Employment Certification, the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department of Labor or DHS in the Federal Register or the Code of Federal Regulations) of such separation of an H-2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H-2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph (y), the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 12-week period (or 6-week period, as appropriate) preceding the worker's voluntary abandonment or termination for cause.

(z) Compliance with applicable laws. During the period of employment specified on the Application for Temporary Employment Certification, the employer must comply

with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. This includes compliance with 18 U.S.C. 1592(a), with respect to prohibitions against employers, the employer's agents or their attorneys knowingly holding, destroying or confiscating workers' passports, visas, or other immigration documents.

(aa) Disclosure of foreign worker recruitment. The employer, and its attorney or agent, as applicable, must comply with 20 CFR 655.9 by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers, and the identity and location of the persons or entities hired by or working for the agent or recruiter, and any of the agents or employees of those persons and entities, to recruit foreign workers. Pursuant to 20 CFR 655.15(a), the agreements and information must be filed with the Application for Temporary Employment Certification.

(bb) Cooperation with investigators. The employer must cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's authority pursuant to 8 U.S.C. 1184(c)(14)(B), section 214(c)(14)(B) of the INA.

§ 503.17 Document retention requirements of H-2B employers.

(a) Entities required to retain documents. All employers filing an Application for Temporary Employment Certification requesting H-2B workers are required to retain the documents and records proving compliance with 20 CFR part 655, subpart A and this part, including but not limited to those specified in paragraph (c) of this section.

(b) Period of required retention. The employer must retain records and documents for 3 years from the date of certification of the Application for Temporary Employment Certification or from the date of adjudication if the Application for Temporary Employment Certification is denied or 3 years from the day the Department of Labor receives the letter of withdrawal provided in accordance with 20 CFR 655.62.

(c) Documents and records to be retained by all employer applicants. All employers filing an H-2B Registration and an Application for Temporary Employment Certification must retain the following documents and records and must provide the documents and records in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in 20 CFR 655.16;

(ii) Advertising as specified in 20 CFR 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in 20 CFR 655.43;

(iv) Contact with bargaining representative(s), copy of the posting of the job opportunity, and contact with community-based organizations, if applicable, as specified in 20 CFR 655.45(a), (b) and (c); and

(v) Additional employer-conducted recruitment efforts as specified in 20 CFR 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with 20 CFR 655.48, such as evidence of nonapplicability of contact with former workers as specified in 20 CFR 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in 20 CFR 655.48;

(5) Records of each worker's earnings, hours offered and worked, and other information as specified in § 503.16(i);

(6) If appropriate, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 503.16(j).

(7) Evidence of contact with U.S. workers who applied for the job opportunity in the Application for Temporary Employment Certification, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 503.16(r);

(8) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment in the Application for Temporary Employment Certification, including documents demonstrating that the U.S. worker had been offered the job opportunity in the Application for Temporary Employment Certification, as specified in § 503.16(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 503.16(r);

(9) The written contracts with agents or recruiters, as specified in 20 CFR 655.8 and 655.9, and the list of the identities and locations of persons hired by or working for the agent or recruiter and these entities' agents or employees, as specified in 20 CFR 655.9;

(10) Written notice provided to and informing OFLC that an H-2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the Application for Temporary Employment Certification, as specified in § 503.16(y);

(11) The H-2B Registration, job order, and a copy of the Application for Temporary Employment Certification and the original signed Appendix B of the Application.

(12) The approved H-2B Petition, including all accompanying documents; and

(13) Any collective bargaining agreement(s), individual employment contract(s), or payroll records from the previous year necessary to substantiate any claim that certain incumbent workers are not included in corresponding employment, as specified in § 503.4.

(d) Availability of documents for enforcement purposes. An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 20 CFR part 655, subpart A and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

§ 503.18 Validity of temporary labor certification.

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

(b) Scope of validity. A temporary labor certification is valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved Application for Temporary Employment Certification. The temporary labor certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 503.19 Violations.

(a) Types of violations. Pursuant to the statutory provisions governing enforcement of the H-2B program, 8 U.S.C. 1184(c)(14), a violation exists under this part where the Administrator, WHD determines that there has been a:

(1) Willful misrepresentation of a material fact on the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition;

(2) Substantial failure to meet any of the terms and conditions of the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the Department of State during the H-2B nonimmigrant visa application process.

(b) Determining whether a violation is willful. A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(c) Determining whether a violation is significant. In determining whether a violation is a significant deviation from the terms and conditions of the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment

Certification, or H-2B Petition, the factors that the Administrator, WHD may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the H-2B program;

(2) The number of H-2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and

(5) Whether U.S. workers have been harmed by the violation.

(d) Employer acceptance of obligations. The provisions of this part become applicable upon the date that the employer's Application for Temporary Employment Certification is accepted. The employer's submission of the approved H-2B Registration, Application for Prevailing Wage Determination, the employer's survey attestation (Form ETA-9165), Appendix B of the Application for Temporary Employment Certification, and H-2B Petition constitute the employer's representation that the statements on the forms are accurate and that it knows and accepts the obligations of the program.

§ 503.20 Sanctions and remedies – general.

Whenever the Administrator, WHD determines that there has been a violation(s), as described in § 503.19, such action will be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Institute administrative proceedings, including for: the recovery of unpaid wages (including recovery of prohibited recruitment fees paid or impermissible deductions from

pay, and recovery of wages due for improperly placing workers in areas of employment or in occupations other than those identified on the Application for Temporary Employment Certification and for which a prevailing wage was not obtained); the enforcement of provisions of the job order, 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or the regulations in this part; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced; or debarment for no less than 1 or no more than 5 years.

(b) The remedies referenced in paragraph (a) of this section will be sought either directly from the employer, or from its successor in interest, or from the employer's agent or attorney, as appropriate.

§ 503.21 Concurrent actions within the Department of Labor.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 503.1(b) and in 20 CFR part 655, subpart A. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 503.1(c). The taking of any one of the actions referred to above will not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or the regulations in this part. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.73 or under § 503.24.

§ 503.22 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, will represent the Administrator, WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and the regulations in this part.

§ 503.23 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation that meets the standards described in § 503.19. Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition, constitutes a separate violation. Civil money penalty amounts for such violations are determined as set forth in paragraphs (b) to (e) of this section.

(b) Upon determining that an employer has violated any provisions of § 503.16 related to wages, impermissible deductions or prohibited fees and expenses, the Administrator, WHD may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s), not to exceed $10,000 per violation.

(c) Upon determining that an employer has terminated by layoff or otherwise or has refused to employ any worker in violation of § 503.16(r), (t), or (v), within the periods described in those sections, the Administrator, WHD may assess civil money penalties that are equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed $10,000 per violation. No civil money penalty will be assessed,

however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(d) The Administrator, WHD may assess civil money penalties in an amount not to exceed $10,000 per violation for any other violation that meets the standards described in § 503.19.

(e) In determining the amount of the civil money penalty to be assessed under paragraph (d) of this section, the Administrator, WHD will consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties will be reserved for willful failures to meet any of the conditions of the Application for Temporary Employment Certification and H-2B Petition that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or the regulations in this part;

(2) The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, and the regulations in this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety; and

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

§ 503.24 Debarment.

(a) Debarment of an employer. The Administrator, OFLC may not issue future labor certifications under 20 CFR part 655, subpart A to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, WHD finds that the employer committed a violation that meets the standards of § 503.19. Where these standards are met, debarrable violations would include but not be limited to one or more acts of commission or omission which involve:

(1) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H-2B workers and/or workers in corresponding employment;

(2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under 20 CFR part 655, subpart A or this part;

(6) Impeding an investigation of an employer under this part;

(7) Employing an H-2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(8) A violation of the requirements of § 503.16(o) or (p);

(9) A violation of any of the provisions listed in § 503.16(r);

(10) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(11) Fraud involving the H-2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H-2B Petition; or

(12) A material misrepresentation of fact during the registration or application process.

(b) Debarment of an agent or attorney. If the Administrator, WHD finds, under this section, that an agent or attorney committed a violation as described in paragraph (a) of this section or participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) Period of debarment. Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) Debarment procedure. If the Administrator, WHD makes a determination to debar an employer, attorney, or agent, the Administrator, WHD will send the party a Notice of Debarment. The notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the

party subject to the notice of its right to request a debarment hearing and the timeframe under which such rights must be exercised under § 503.43. If the party does not request a hearing within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 503.43(e).

(e) Concurrent debarment jurisdiction. OFLC and the WHD have concurrent jurisdiction debar under 20 CFR 655.73 or under this part. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(f) Debarment from other labor certification programs. Upon debarment under this part or 20 CFR 655.73, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department of Labor by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§ 503.25 Failure to cooperate with investigators.

(a) No person will interfere or refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's investigative or enforcement authority under 8 U.S.C. 1184(c). Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 114.

(b) Where an employer (or employer's agent or attorney) interferes or does not cooperate with an investigation concerning the employment of an H-2B worker or a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H-2B workers giving rise to the investigation. In addition, WHD may take such action as appropriate where the failure to cooperate meets the standards in § 503.19, including initiating proceedings for the debarment of the employer from future certification for up to 5 years, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action will not bar the taking of any additional action.

§ 503.26 Civil money penalties – payment and collection.

Where a civil money penalty is assessed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty must be received by the Administrator, WHD within 30 calendar days of the date of the final order. The person assessed the penalty will remit the amount ordered to the Administrator, WHD by certified check or by money order, made payable to the Wage and Hour Division, United States Department of Labor. The remittance will be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C – Administrative Proceedings

§ 503.40 Applicability of procedures and rules.

(a) The procedures and rules contained in this subpart prescribe the administrative appeal process that will be applied with respect to a determination to assess civil money penalties, to debar, to enforce provisions of the job order or provisions under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or the regulations in this part, or to the collection of monetary relief due as a result of any violation.

(b) With respect to determinations as listed in paragraph (a) involving provisions under 8 U.S.C. 1184(c), the procedures and rules contained in this subpart will apply regardless of the date of violation.

PROCEDURES RELATED TO HEARING

§ 503.41 Administrator, WHD's determination.

(a) Whenever the Administrator, WHD decides to assess a civil money penalty, to debar, or to impose other appropriate administrative remedies, including for the recovery of monetary relief, the party against which such action is taken will be notified in writing of such determination.

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

§ 503.42 Contents of notice of determination.

The notice of determination required by § 503.41 will:

(a) Set forth the determination of the Administrator, WHD, including:

(1) The amount of any monetary relief due; or

(2) Other appropriate administrative remedies; or

(3) The amount of any civil money penalty assessment; or

(4) Whether debarment is sought and the term; and

(5) The reason or reasons for such determination.

(b) Set forth the right to request a hearing on such determination;

(c) Inform the recipient(s) of the notice that in the absence of a timely request for a hearing, received by the Chief ALJ within 30 calendar days of the date of the determination, the determination of the Administrator, WHD will become final and not appealable;

(d) Set forth the time and method for requesting a hearing, and the related procedures for doing so, as set forth in § 503.43, and give the addresses of the Chief ALJ (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served); and

(e) Where appropriate, inform the recipient(s) of the notice that the Administrator, WHD will notify OFLC and DHS of the occurrence of a violation by the employer.

§ 503.43 Request for hearing.

(a) Any party desiring review of a determination issued under § 503.41, including judicial review, must make a request for such an administrative hearing in writing to the Chief ALJ at the address stated in the notice of determination. In such a proceeding, the

Administrator will be the plaintiff, and the party will be the respondent. If such a request for an administrative hearing is timely filed, the Administrator, WHD's determination will be inoperative unless and until the case is dismissed or the ALJ issues an order affirming the decision.

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

(1) Be dated;

(2) Be typewritten or legibly written;

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

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

(5) Be signed by the party making the request or by the agent or attorney of such party; and

(6) Include the address at which such party or agent or attorney desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief ALJ, at the address stated in the Administrator, WHD's notice of determination, no later than 30 calendar days after the date of the determination. A party which fails to meet this 30-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the ALJ.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service within the time set forth in paragraph (c) of this

section. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the party or its attorney or agent, must be filed within 25 days.

(e) The determination will take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

(f) Copies of the request for a hearing will be sent by the party or attorney or agent to the WHD official who issued the notice of determination on behalf of the Administrator, WHD, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

RULES OF PRACTICE

§ 503.44 General.

(a) Except as specifically provided in the regulations in this part and to the extent they do not conflict with the provisions of this part, 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 will apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for

Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence will guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 503.45 Service of pleadings.

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

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

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

§ 503.46 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1184(c)(14) and the regulations in this part will be commenced upon receipt of a timely request for hearing filed in accordance with § 503.43.

§ 503.47 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1184(c)(14), INA section 214(c)(14) and the regulations in this part will be captioned in the name of the person requesting such hearing, and will be styled as follows:

In the Matter of ____, Respondent.

(b) For the purposes of such administrative proceedings the Administrator, WHD will be identified as plaintiff and the person requesting such hearing will be named as respondent.

§ 503.48 Conduct of proceeding.

(a) Upon receipt of a timely request for a hearing filed under and in accordance with § 503.43, the Chief ALJ will promptly appoint an ALJ to hear the case.

(b) The ALJ will notify all parties of the date, time and place of the hearing. Parties will be given at least 30 calendar days' notice of such hearing.

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

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

§ 503.49 Consent findings and order.

(a) General. At any time after the commencement of a proceeding under this part, but before 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 will be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) Content. Any agreement containing consent findings and an order disposing of a proceeding or any part thereof will also provide:

(1) That the order will 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 will consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Submission. On or before the expiration of the time granted for negotiations, the parties or their attorney or agent may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) Disposition. In the event an agreement containing consent findings and an order is submitted within the time allowed therefore, the ALJ, within 30 days thereafter, will, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

POST-HEARING PROCEDURES

§ 503.50 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator, WHD.

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

(c) In the event that the Administrator, WHD assesses back wages for wage violation(s) of § 503.16 based upon a PWD obtained by the Administrator from OFLC during the investigation and the ALJ determines that the Administrator's request was not warranted, the ALJ will remand the matter to the Administrator for further proceedings

on the Administrator's determination. If there is no such determination and remand by the ALJ, the ALJ will accept as final and accurate the wage determination obtained from OFLC or, in the event the party filed a timely appeal under 20 CFR 655.13 the final wage determination resulting from that process. Under no circumstances will the ALJ determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The decision will be served on all parties.

(e) The decision concerning civil money penalties, debarment, monetary relief, and/or other administrative remedies, when served by the ALJ will constitute the final agency order unless the ARB, as provided for in § 503.51, determines to review the decision.

REVIEW OF ADMINISTRATIVE LAW JUDGE'S DECISION

§ 503.51 Procedures for initiating and undertaking review.

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ will, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition will be served on all parties and on the ALJ.

(b) No particular form is prescribed for any petition for the ARB's review permitted by this part. However, any such petition will:

(1) Be dated;

(2) Be typewritten or legibly written;

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

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

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

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

(7) Include as an attachment the ALJ's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

(c) If the ARB does not issue a notice accepting a petition for review of the decision within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(d) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same will be served upon the ALJ and upon all parties to the proceeding.

§ 503.52 Responsibility of the Office of Administrative Law Judges (OALJ).

Upon receipt of the ARB's notice under § 503.51, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

§ 503.53 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify the parties of:

(a) The issue or issues raised;

(b) The form in which submissions will be made (i.e., briefs, oral argument); and

(c) The time within which such presentation will be submitted.

§ 503.54 Submission of documents to the Administrative Review Board.

All documents submitted to the ARB will be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue NW, Room S-5220, Washington, DC 20210. An original and two copies of all documents must be filed. Documents are not deemed filed with the ARB until actually received by the ARB. All documents, including documents filed by mail, must be received by the ARB either on or before the due date. Copies of all documents filed with the ARB must be served upon all other parties involved in the proceeding.

§ 503.55 Final decision of the Administrative Review Board.

The ARB's final decision will be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

RECORD

§ 503.56 Retention of official record.

The official record of every completed administrative hearing provided by the regulations in this part will be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

SIGNED: at Washington, D.C. this 22nd of April, 2015.

_____

Thomas E. Perez,

Secretary of Labor.

SIGNED: at Washington, D.C. this 22nd of April, 2015.

_____

Jeh Charles Johnson,

Secretary of Homeland Security.

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