

Final Rule also amends the basis for revocation proposed at § 655.181(a)(1) of the NPRM.

Several commenters generally objected to the expansion of the Department's power of revocation authority. These commenters opposed the NPRM's elimination of the many restrictions that the 2008 Final Rule puts on the Department's authority to revoke. For example, the standard proposed in the NPRM would allow revocation for any failure to cooperate with a DOL investigation, rather than for only significant failures to cooperate as in the 2008 Final Rule, and the proposed standard would allow revocation for any substantial violation of a material term or condition of the certification without requiring that the violation be willful or that the employer be given an opportunity to cure the violation.

One commenter stated that the proposed changes would allow revocation if an employer submits documents in response to an audit just 1 day late, even if the tardiness is due to an emergency or weather that delays the mail. The same commenter also contended that the proposed changes would allow the CO to revoke for one instance of an H-2A ranch worker acting outside the area of intended employment, even if his actions are to retrieve an animal that has wandered away from the herd in order to comply with a State law that prohibits shepherders from abandoning sheep. Other commenters worried that expansion of the grounds for revocation would allow the Department to revoke certifications of well-intentioned employers making minor errors.

Several employer associations stated that revocation is an extremely harsh penalty. Because a revocation can have such a damaging effect on the employer's business, these commenters believe that revocation is appropriate only for employers who willfully commit substantial violations. They argued that the restrictions built in to the 2008 Final Rule's revocation standards ensure that the Department does not apply such a severe penalty erroneously. Some of these associations argued that revocation was too harsh a penalty for anything other than fraud or willful misrepresentation and that the Department's other enforcement methods (including audits, debarment, and civil money penalties) were sufficient to address most violations.

One employer association argued that the Department does not have the statutory authority to revoke certification on the expanded grounds proposed in the NPRM. The same

commenter acknowledged that some revocation authority may be inferred when fraud has occurred, but the statute does not give authority to revoke because DOL has decided to revisit the merits of the Application. The commenter stated that Congress was specific about the power to revoke previously approved labor certifications: it gave DOL the power to notify DHS when revocation should be imposed, but gave no authority for DOL to revoke a previously approved petition. The commenter stated that the statute does not give the Department the broad powers of authority asserted in the NPRM, such as revoking because an H-2A worker performed an incidental activity that is not specifically listed in the job order.

The same commenter argued that the Department has no legal authority to revoke labor certifications according to the standards proposed in the NPRM, because those standards are destructive to the H-2A program. The commenter contends that this would constitute an illegal taking under the Fifth Amendment.

Some employer associations objected to the proposal because the Department did not support the necessity of expanding the revocation power with any data. These commenters stated that the revocation standards in the 2008 Final Rule are sufficient to enable the Department to address substantial violations, and that the Department has not presented data to justify departing from the 2008 Final Rule's recent rejection of expanding the revocation authority. Several employers argued generally that the heightened enforcement powers contained in the 2008 Final Rule were an appropriate trade-off to the Department's switch to an attestation-based model. These commenters believe that it is only fair for the Department to relax the enforcement standards if we are going to return to a certification model.

Worker advocacy organizations were generally in favor of the NPRM's expansion of the grounds for revocation, calling it an important improvement to the H-2A regulations. One organization proposed that the Department add that failure to cooperate in an investigation performed by State or other officials enforcing employment or housing laws would be grounds for revocation. One Member of Congress generally urged more enforcement. The Department believes its revocation authority extends only to substantial violations of the H-2A program requirements.

Congress explicitly endorsed the Department's revocation authority as a means of validating the integrity of the

program. The INA, codified at 8 U.S.C. 1188(e)(1), specifically refers to a revocation of certification when discussing determinations made by the Secretary. The section does not indicate any limitations on the bases for which the Secretary may determine that the certification should be revoked. Therefore, we interpret the statute as acknowledging that the Secretary has the authority to revoke a labor certification and as providing no limitations on that authority.

The Department understands the concerns of the commenters and we are aware of the severe effects revocation may have on an employer, especially a small employer. The Department believes its revocation authority extends only to substantial violations of the H-2A program requirements. However, the Final Rule retains the text of the NPRM, with some modifications. The removal of the 2008 Final Rule's restrictions on our ability to revoke certifications will ensure that we are able to act appropriately against employers whose grievous actions undermine the integrity of the H-2A program and must be remedied immediately, mid-certification. The Department intends to use its authority to revoke only when an employer's actions warrant such severe consequences. We do not intend to revoke certification if an employer commits minor mistakes or in circumstances that are beyond an employer's control. The changes are meant to ensure that when revocation is appropriate, we have the ability to act.

The Department views our revocation authority as a tool generally to be used to address an employer's flagrant violations. Therefore, we have changed the first ground for revocation to clarify that the Department may revoke if the temporary labor certification was unjustified due to fraud or misrepresentation in the application process.

We view revocation as a remedy to be used in situations that require immediate action. Several commenters expressed their concern that the Department would revoke certification mid-season because we discovered that the employer had committed a substantial violation during a previous certification. This would not fit our conception of our revocation authority, and we regret that the NPRM caused some employer associations to believe we would engage in such revocations for past wrongs. The Department may revoke an employer's certification to remedy actions described in § 655.181(a)(1-4) taken during that same potentially revocable certification. Debarment is the appropriate remedy for

substantial violations committed during a certification that has already ended; the Department's opportunity to revoke the certification has expired.

The Department has many years of experience enforcing the H-2A program. Over those many years, the constraints imposed by prior regulatory language have made it difficult for us to take action in response to flagrant violations. As explained above, we do not intend to revoke certification for any and every violation. We believe that revocation is an essential tool for protecting the integrity of the H-2A program and for addressing violations that must be remedied immediately. The expansion of the revocation power is simply meant to ensure that we are able to use this valuable tool when appropriate.

The commenter's argument that revocation constitutes a taking is premised on the view that the Department is going to use its expanded revocation power to destroy the H-2A program. The Department has no intention of destroying the H-2A program. On the contrary, as we have explained, the Final Rule's changes to the revocation authority are meant to ensure that the Department can use the revocation power to protect the integrity of the H-2A program.

A few commenters stated that the proposed revocation standards are vague and ambiguous. Some commenters also criticized the proposed regulations because they mention but do not define "material term," "failure to cooperate," or "failed to comply."

We disagree that the standards are vague. The Final Rule states that an employer's substantial violation of a material term of the labor certification is grounds for revocation. We believe that the list of violations in § 655.182(d) paired with the list of factors used to determine whether those violations are substantial, listed in § 655.182(e), communicate to employers the conduct that is unacceptable in the H-2A program. These two subsections are referenced in the text of the regulation stating grounds for revocation under § 655.181(a)(2). The words "material term or condition" of a labor certification were added by the 2008 Final Rule to communicate that revocation is not to be used for just any violation of any term of the certification.

The standards "failure to cooperate with a DOL investigation" and "failure to comply" are self-evident. We reiterate that we do not intend to use our revocation authority to remedy minor errors or violations.

A few employer associations commented on the proposed changes to the revocation procedure. One claimed

that the elimination of the Notice of Intent to Revoke, replaced with a Notice to Revoke that will be given immediate effect if the employer does not respond within 14 days, would not constitute a fair right of appeal. However, the Notice of Intent to Revoke given under the 2008 Final Rule also took immediate effect after 14 days if the employer did not respond by sending rebuttal evidence. The 14-day time period sufficiently balances the employer's right to appeal against the reality that circumstances warranting revocation require immediate action. The Department would not issue a Notice of Revocation if the reason for doing so did not seriously jeopardize the integrity of the H-2A labor certification process. Accordingly, it is imperative for the Department to be able to act quickly, especially if the safety of the workers is at stake.

Some employer associations commented on the proposed revision to the revocation procedure of the NPRM. Section 655.181(b)(1) states that after reviewing any rebuttal evidence submitted by an employer, if the CO determines that certification should be revoked, the CO will inform the employer. This is a change from the language in the 2008 Final Rule which stated that if, after reviewing the employer's timely filed rebuttal evidence, the CO finds that the employer more likely than not meets one or more of the bases for revocation, then the CO will inform the employer. Some employer associations noted the proposed removal of the words more likely than not and characterized this as diminishing DOL's burden of proof in support of revocation.

The Final Rule does not contain the words "more likely than not". The Department does not intend this to be a substantive change from the 2008 Final Rule; the language was changed merely for clarity. The Department notes that it has no burden of proof at this stage of the revocation procedure, and that the only purpose of reviewing rebuttal evidence is to determine whether the circumstances reasonably appear to warrant revocation. We would not issue a Notice of Revocation if we did not believe that the reason for doing so seriously jeopardized the integrity of the H-2A labor certification process.

One commenter stated that the NPRM eliminated the requirement that the CO consult with the OFLC Administrator when determining whether to revoke certification. What the commenter intended is unclear. The only time the 2008 Final Rule refers to the CO consulting with the OFLC Administrator is at the very beginning of the section

describing revocation. This language was not changed in the NPRM. In the Final Rule, we clarify that the OFLC Administrator exercises revocation authority, rather than the CO.

A worker advocacy organization proposed that the Department change the revocation procedure to state that the Department shall commence an investigation to determine whether to revoke certification if information is provided to the OFLC by WHD, a SWA, an employee, or any other person alleging that an H-2A employer or an H-2ALC has engaged in activity constituting the basis for revocation. The organization also proposed that any person who provided information that resulted in a revocation be provided copies of the notices issued in the proceeding. The Final Rule does not mandate that the Department commence an investigation in response to every allegation, nor does it mandate that the Department share the results of a revocation investigation with every person who provided useful information over the course of an investigation. Such a system would be unwieldy and an inefficient use of resources.

37. Section 655.182 Debarment

The NPRM proposed to expand the Department's debarment authority. It also proposed that the WHD have concurrent authority with the OFLC, and it proposed changes to the debarment procedure so that the two offices' procedures would be parallel. The Final Rule adopts these provisions with minor changes.

a. Expansion of the Debarment Authority

Many employer associations asserted that the proposed rule's expansion of the Department's debarment authority would discourage participation in the H-2A program and lead to the program's eventual demise. Some commenters stated that the expansion of the debarment grounds in the 2008 Final Rule was sufficient to address any enforcement problems the Department may have had in the past. These commenters advocated that the Department maintain the debarment authority as provided in the 2008 Final Rule. One stated that we should return to the debarment provisions of the 1987 Rule. On the other hand, farm worker advocacy organizations and a Member of Congress generally supported the proposed expansion of the debarment grounds.

We have considered these comments and we believe that the resulting debarment provision enables us to use our authority to uphold the integrity of

the H-2A labor certification program without unfairly punishing employers who use the program or discouraging their future use of the program. The allegations that the Department is trying to destroy the H-2A program are unfounded. This Final Rule is intended to improve the H-2A program, by taking the best aspects of the 2008 Final Rule and of previous rules to create a program that both protects workers and enables agricultural employers to access an available labor supply.

b. Elimination of the Pattern or Practice Requirement

Several farm worker advocacy organizations and a Member of Congress commented that they supported the proposal that the Department may debar if a party commits one or more acts of commission or omission that constitute a substantial violation, rather than requiring a pattern or practice of such actions, as in both the 1987 Rule and the 2008 Final Rule.

Many employer associations commented that they disagreed with the proposed deletion of the pattern or practice requirement. Many of these commenters are concerned that the change would make it too easy for the Department to engage in debarment proceedings and that the Department is looking to debar employers for innocent mistakes or oversight—that the Department may seek to punish a well-intentioned, honest employer who commits minor mistakes or errors while attempting to follow the rules of the program. These commenters characterize the H-2A program as extremely complex, and one where unintentional mistakes are easily made. Some stated that debarment should be reserved for the truly bad actors in the program. The commenters also stated that the Department provided no data to support the elimination of the pattern or practice requirement.

The Department has considered these comments, and we have decided to retain the NPRM's language deleting the pattern or practice requirement in the Final Rule. We believe that by defining a substantial violation as one or more acts of commission or omission, we will be able to more effectively use our debarment authority to enforce compliance with the rules of the H-2A program. In the past, the requirement that the Department show a pattern or practice of violations has obstructed us from using our debarment authority. As one farm worker advocate recounted, these include instances of flagrant violations, such as an employer who physically assaulted a worker whom he believed had filed an OSHA complaint

concerning working conditions on the farm. The commenter stated that even though the employer was found guilty of the charge in criminal court, he continued to be certified and that since the employer had limited the physical assault to a single worker, there was no pattern of substantial violations. By eliminating the requirement that we show a pattern or practice of violations, the Final Rule will enable the Department to remove an employer like this from the H-2A program. This will allow us to better fulfill our statutory duty to protect the integrity of the H-2A program and to debar employers who commit substantial violations.

The Department appreciates the concern of employer associations that by eliminating the pattern or practice requirement, the Department will be able to use its debarment authority more easily. The Department does not intend to debar employers who make minor, unintentional mistakes in complying with the program. The factors listed in § 655.182(e) of the NPRM have also been retained in the Final Rule. These factors are intended to give employers guidance as to what factors the Department will consider in determining whether a violation constitutes a substantial violation to warrant debarment. The elimination of the pattern or practice requirement was intended to ensure that the Department is able to use debarment in circumstances that warrant the penalty, not to punish well-intentioned employers that inadvertently commit minor errors.

c. Specific Proposed Grounds for Debarment

i. Elimination of the Requirement That a Substantial Violation Be Willful

Several employer associations objected that the NPRM eliminated the many qualifiers in the 2008 Final Rule which required that actions be willful or significant to be considered substantial violations. These comments protested that the change would enable the Department to debar employers who commit minor, unintentional mistakes when using the H-2A program. One commenter argued that the term substantial was too broadly defined, given no real qualitative measurement other than the proposed factors. That commenter stated that this contrasted with the 2008 Final Rule, which provided a detailed list of acts and omissions that meet the definition of a substantial violation.

The Final Rule retains the language of the NPRM. As explained above, the Department does not intend to debar well-intentioned employers that commit

inadvertent or minor mistakes. The Final Rule includes the list of acts or omissions that meet the definition of a substantial violation as proposed. The Department believes this description of the factors the OFLC Administrator may consider when determining whether debarment is appropriate in a particular circumstance will provide clearer guidance and make the Department's determinations more transparent to the regulated community. Additionally, the term willful restricted the Department's ability to use its debarment authority when appropriate, due to the strict legal definitions given the term in other unrelated areas of the law. The language of the Final Rule is intended to ensure that the Department is able to use its debarment authority when appropriate.

ii. The Elimination of the Definition of Incidental Activities and Its Effect on Debarment

Both the 2008 Final Rule and the NPRM permit debarment of employers who use H-2A workers for activities outside the job order. The 2008 Final Rule, however, contains a qualifier providing that such deviations will not result in debarment where they involve an activity or activities minor and incidental to the activity/activities listed in the job order. The NPRM did not contain this qualification and a number of commenters were concerned that this signaled intent on the part of the Department to debar employers who were only guilty of minor or good faith deviations from the job order. This was not the Department's objective, although the Department does not condone the use of H-2A workers for activities not authorized by the statute.

Several farm worker advocacy organizations and a Member of Congress expressed support of the NPRM's expansion of the grounds for debarment to include employment of an H-2A worker outside the area of intended employment. This remains grounds for debarment in the Final Rule.

The removal of the minor and incidental language from the definition of agricultural labor and services is discussed above in the definitions section.

iii. Debarment for Improper Displacement of U.S. Workers and Workers in Corresponding Employment

The NPRM proposed to add the improper layoff or displacement of U.S. workers or workers in corresponding employment as an additional ground for debarment. Some farm worker advocacy organizations and a Member of Congress commented that they support the proposed expansion of the grounds for

debarment to include the improper displacement of U.S. workers.

Several employer associations objected to the added ground for debarment. These commenters were concerned that the breadth of the concepts of displacement and corresponding employment would allow a significant expansion of the debarment authority.

The Final Rule includes this added ground for debarment. An employer's improper displacement or layoff of U.S. workers frustrates the very purpose of many of the protections for American workers imposed by the INA itself—the primary goal of the H-2A program is to allow agricultural employers access to the labor force they need while protecting the employment opportunities for U.S. workers. Improper displacement of U.S. workers clearly subverts a fundamental purpose of the H-2A program. Additionally, the Department does not believe that improper displacement needs to be more clearly defined—improper displacement is any displacement caused by an employer's failure to comply with the H-2A rules.

iv. Added Grounds of Debarment for Violations of the Anti-Fee Shifting Provisions and the Anti-Discrimination Provisions

Several commenters objected to the proposed additional grounds that would allow debarment of employers that violate the anti-fee shifting provisions or anti-discrimination provisions of the proposed rule. The commenters generally objected that these added grounds were an unwarranted expansion of the Department's debarment authority.

The Final Rule retains the proposed added grounds for debarment. Strict enforcement of the anti-fee shifting provisions and anti-discrimination provisions is essential to providing needed protections to H-2A workers and to workers in corresponding employment. Additionally, strict enforcement of the anti-discrimination provisions is essential to maintaining program integrity and compliance, because intimidation of farm workers who file complaints or otherwise participate in the enforcement process impairs the Department's ability to effectively enforce the requirements of the H-2A program.

v. Failure To Pay Certification Fees in a Timely Manner

The NPRM proposed to define a substantial violation to include an employer's failure to pay a necessary fee in a timely manner. The Final Rule

adopts this proposed change but clarifies that the "necessary fee" to which the NPRM refers is the certification fee, described in § 655.163. One commenter contended that this ground for debarment is overly harsh. The commenter stated that because the proposed rule has eliminated the requirement of showing a pattern or practice of violations, this means that the Department may debar an employer if a fee payment arrives one day late in the mail. The commenter points out that most employers who use the H-2A system live in rural areas where mail delivery is not efficient, and the employers often live a far distance from a post office. He points out that many agricultural employers are small, family-run businesses that may not have enough time to spare a person to go to the post office in times of bad weather. Finally, the commenter argues that this proposed provision departs from other immigration programs run by the Department, where one late payment could never cause the harsh result that the employer could not participate in the program for years to come.

The Department is very aware of the severe consequences that debarment has for an employer's business, especially for a small business. Again, the Department's objective in expanding the definition of "substantial violation" is not to debar employers for minor errors or circumstances beyond the employer's control. We expanded the definition to ensure that we will be able to institute debarment proceedings when circumstances warrant it, and to ensure that we are not obstructed by our own regulatory language. The Department must take very seriously the failure to pay the required certification fees in a timely manner simply because we do not believe that it is an effective use of our limited resources to track down employers who fail to pay fees. By defining the late payment of certification fees as a substantial violation in the Final Rule, we intend to impress upon employers that the timely payment of such fees is their responsibility which we expect them to fulfill if they choose to participate in the H-2A program.

vi. Failure To Pay Wages

The NPRM did not propose changes to this requirement. One farm worker advocacy organization commented that the Final Rule should include an explicit statement that multiple reports of unpaid wages will result in debarment. The same commenter stated that there should also be a streamlined system for filing wage complaints and immediate investigations upon

receiving the complaints. We believe that the explicit statement is unnecessary; the Final Rule includes as grounds for debarment the failure to pay or provide the required wages to H-2A workers or workers in corresponding employment. That provision would allow the Department to debar an employer if the employer is found to have failed to pay the required wages, especially if it failed to do so multiple times. As for the streamlined system, we believe that this is available through the Job Service Complaint System.

d. Grounds for Debarring Joint Employer Associations

Several employer associations commented on the NPRM's expansion of the standard for debarment of members of joint employer associations to any member that has reason to know of the association's debarable violation. These commenters stated that the standard is too expansive and unduly harsh, and that the 2008 Final Rule's participation or knowledge standard should be retained. Some commenters also objected that the Department had not provided any data supporting the need for this change.

The Final Rule retains the language proposed in the NPRM. The Department's change to the debarment standard for members of joint employer associations is consistent with the statutory language in 8 U.S.C. 1188(d)(3)(B)(1), which states that an individual producer-member of a joint employer association will not be debarred if the association commits a substantial violation unless the member participated in, had knowledge of, or reason to know of the violation.

e. Debarment of Agents/Attorneys

The NPRM proposed to authorize the Department to debar agents and attorneys. One commenter stated that the INA only gives the Department authority to debar employers, and therefore the Department has no authority to debar agents or attorneys. As explained in the 2008 Final Rule's preamble, we believe that acts committed by agents and attorneys of employers may constitute substantial violations and, accordingly, that agents and attorneys of employers should be debarable parties.

The commenter's argument that the statute does not give the Department the power to debar agents or attorneys seems to be premised on the argument that by naming one thing in the statute, Congress meant to exclude all others, a legal maxim of statutory construction referred to as *expressio unius est exclusio alterius*. However, this maxim

is limited in application. In order for it to apply, the necessary implication is that Congress considered the unnamed possibility (such as debarring agents or attorneys) and meant to exclude it, as opposed to excluding the term inadvertently or simply deciding not to address it. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citing *United Dominion Industries, Inc. v. United States*, 532 U.S. 822, 836 (2001)). The application of the maxim can also be limited where the exclusion would result in inconsistency or injustice or would undermine the general purpose of the statute. See *Ford v. United States*, 273 U.S. 593, 612 (1927), and *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983).

The INA makes no reference to the role of agents or attorneys in its labor certification provisions. The involvement of two parties in the H-2A certification process is strictly a construct of the regulations. Therefore, it would be difficult to believe that Congress actually considered acts committed by agents and attorneys, much less deliberately excluded them when it drafted the debarment provision. Additionally, if the Department were not able to debar agents or attorneys, the integrity and effectiveness of the H-2A program potentially would be at risk, which would seem to undermine the Department's ability to carry out its responsibilities under the statute. Criminal cases under other immigration programs are strong evidence that agents and attorneys can commit flagrant violations of the INA, sometimes without the knowledge of their clients.

Additionally, the Department has inherent authority to regulate the conduct of attorneys and agents who practice before it. The Department has invoked this authority to debar agents and attorneys under the PERM and H-1B immigration programs. As discussed in the preamble to the PERM fraud rule, there is extensive case law establishing that Federal agencies have the authority to determine who can practice and participate in administrative proceedings before them. The general authority of an agency to prescribe its own rules of procedure is sufficient authority for an agency to determine who may practice and participate in administrative proceedings before it, even in the absence of an express statutory provision authorizing that agency to prescribe the qualifications of those individuals or entities. *Koden v. United States Department of Justice*, 546 F.2d 228, 232-233 (7th Cir. 1977) (citing *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926)). See also

Schwebel v. Orrick, 153 F. Supp. 701, 704 (D.D.C. 1957) (The Securities and Exchange Commission has implied authority under its general statutory power to make rules and regulations necessary for the execution of its functions to establish qualifications for the attorneys practicing before it and to take disciplinary action against attorneys found guilty of unethical or improper professional conduct). In addition, an agency with the power to determine who may practice before it also has the authority to debar or discipline such individuals for unprofessional conduct. See *Koden*, 546 F.2d at 233. Further, as the Department has the authority to prescribe regulations for the performance of its business (as is the case with all executive departments under 5 U.S.C. 301), it likewise has the authority to determine who may practice or participate in administrative proceedings before it and may debar or discipline those individuals engaging in unprofessional conduct. The Department has exercised such authority in the past in prescribing the qualifications and procedures for denying the appearance of attorneys and other representatives before the Department's Office of Administrative Law Judges under 29 CFR 18.34(g). See also *Smiley v. Director, Office of Workers' Compensation Programs*, 984 F.2d 278, 283 (9th Cir. 1993). Accordingly, the Department has the authority to debar agents and attorneys. We have decided to assert this authority to maintain the integrity of the H-2A program and to be consistent with other immigration programs.

The same commenter argued that the Department's assertion of its authority to debar attorneys will have severe implications on attorney-client privilege, impairing an attorney's ability to give advice about these regulations to his or her clients, lest a client's question cause the attorney to know or have reason to know about a client's substantial violation. The Department acknowledges this concern. However, as explained in the preamble to the 2008 Final Rule, the Department does not intend to make attorneys (or agents) strictly liable for debarable offenses committed by their employer clients. The Department does not intend to debar attorneys who obtain privileged information during the course of representation regarding their client's violations. We asserted authority to debar attorneys, like the authority to debar agents, to ensure that we are able to address substantial violations committed by the attorneys or agents

themselves, or committed in concert with the employers. The Department is not seeking to debar attorneys who, while working to assist their clients in complying with the H-2A program, make an error. Nor are we seeking to debar attorneys whose clients disregard their legal advice and commit substantial violations; the appropriate party to be debarred in that situation would be the employer-client. However, the Department is asserting its authority to debar attorneys who work in collusion with their employer-clients to commit substantial violations. Therefore, in response to the comments, we have modified the Final Rule to allow for the debarment of attorneys only if the OFLC Administrator finds that the attorney has participated in a substantial violation.

f. Statute of Limitations for Initiating Debarment Proceedings

The NPRM did not propose any changes to the statute of limitations for debarment proceedings. One commenter suggested that the Department change the time limitation to issue a Notice of Debarment. The commenter suggested that rather than stating the notice must be issued no later than 2 years after the occurrence of the violation, the regulations should require a Notice of Debarment be issued no later than 2 years from the time the debarring authority learns of the debarable activities.

However, the restriction to 2 years is mandated by the INA. Accordingly it is maintained in the Final Rule.

g. Debarment Procedure

i. Concurrent Authority With WHD

The NPRM proposed and the Final Rule provides WHD the authority to debar employers, agents, and attorneys who commit substantial violations, in addition to OFLC's authority to debar. A number of commenters supported this change from the 2008 Final Rule, because they believe that it will strengthen and improve the efficiency of enforcement of the H-2A regulations. Conversely, many employer associations opposed concurrent debarment authority, predicting inconsistencies in the two agencies' interpretation of the regulations. These comments are discussed in the sections that discuss the debarment authority of the WHD.

The Final Rule states that the OFLC and the WHD will coordinate their activities so that only one debarment proceeding is imposed for the same substantial violation. The Department notes that the two agencies have been concurrently involved in debarment

proceedings from the beginning of the H-2A program, with WHD performing the investigations and OFLC conducting the actual debarment proceedings on WHD's recommendations. This experience the two agencies have in coordinating their actions will help minimize any inconsistencies that may exist between the agencies' interpretations of the program requirements. Furthermore, the two agencies' debarment proceedings are the same, which is intended to eliminate any inconsistencies between the agencies' interpretations. Three grounds for debarment are listed in § 655.182(d)(2-4) that are not present in the regulations governing WHD's involvement in the H-2A program, because these grounds concern the processing of an employer's Application for H-2A labor certification, which is solely within the jurisdiction of the OFLC. The Department believes that conferring concurrent debarment authority on both agencies will improve the quality of H-2A enforcement and increase efficiency.

ii. Changes to the Debarment Procedure of OFLC

The NPRM proposed to extend concurrent debarment authority to the WHD, and made changes to the OFLC debarment procedure so that it would parallel the debarment procedure of the WHD. This included eliminating the step wherein the OFLC sends the employer a Notice of Intent to Debar, and eliminating the employer's opportunity to submit rebuttal evidence to the OFLC Administrator upon receiving that Notice of Intent. Instead, the proposed rule gave the employer an immediate right to a hearing before the ALJ, and then the right to request review before the Administrative Review Board (ARB). The Final Rule adopts many of the proposed changes, but it amends the proposed elimination of an employer's chance to submit rebuttal evidenced. The Final Rule also clarifies that the OFLC Administrator rather than the CO will exercise debarment authority, and the Final Rule makes minor changes relating to service so as not to preclude, for example, electronic service. Additionally, the Final Rule makes a minor change to the provision in § 655.182(f)(3) of the NPRM that stated the ALJ's decision after a debarment hearing will be provided to the employer, OFLC Administrator, DHS, and DOS by means normally assuring next-day delivery. The Final Rule states that the ALJ's decision will be immediately provided to the parties to the debarment hearing by means normally assuring next-day delivery.

This change was made so the language would include an attorney or agent if that person (rather than the employer) was the party subject to the debarment hearing. Additionally, the reference to DHS and DOS was eliminated here because it is redundant; § 655.182(g) states that final debarment decisions will be forwarded to DHS promptly.

Many employer associations objected to the changes proposed to the OFLC debarment procedures. A number of commenters objected to the elimination of debarred parties' opportunity to submit rebuttal evidence providing them with only one option to respond to a Notice of Debarment, namely to request a hearing before the ALJ. Many commenters stated that this would deny the parties due process.

The Department considered these comments and is restoring the right to submit rebuttal evidence. The Final Rule adopts a hybrid approach. The procedure for a debarment proceeding that is initiated by WHD will still follow the procedure as proposed. A regulatory provision for submission of rebuttal evidence by an employer in a debarment proceeding conducted by the WHD is unnecessary—a WHD debarment proceeding will be predicated on a WHD investigation that involves numerous opportunities for communication between the WHD and the party that is subject to the investigation. However, the procedure for a debarment proceeding initiated by the OFLC will include a provision allowing the party who receives a Notice of Debarment to choose first to submit rebuttal evidence to the OFLC Administrator before requesting a hearing before the ALJ. This procedure for OFLC debarments is better suited to the method of OFLC investigations, which consist mainly of an OFLC audit and written exchanges between the OFLC and the party subject to debarment. This procedure for OFLC debarment is also more closely parallel to the OFLC procedure for revocation. However, the OFLC debarment procedure will still parallel WHD's debarment procedure after the potentially debarred party's opportunity to submit rebuttal evidence, including a party's opportunity to request a hearing before an ALJ and then on appeal to the ARB. This procedure will ensure that employers have ample opportunity to be heard during debarment proceedings initiated by the OFLC while also maintaining the ARB as the single highest authority for all debarments from the H-2A program, whether initiated by the WHD or the OFLC. This will ensure consistency in the

application of debarment standards by both agencies.

Other employer associations commented that there should also be a process by which an H-2A employer can appeal a Notice of Debarment. The intended meaning of this comment is unclear since there is provision for an appeal.

Finally, as in its comments regarding the revocation section, one farm worker advocacy organization proposed that the regulations state that the Department shall commence a debarment investigation if it receives any information provided from a SWA, an employee, or other person alleging activity that may constitute grounds for debarment. The organization also proposed that any person who provided information that resulted in a debarment be provided copies of the notices issued in the proceeding. The Final Rule does not adopt such an inflexible system for the same reasons mentioned under the revocation section—it is inefficient and hinders the Department's discretion in enforcing its regulations.

38. Section 655.183 Less Than Substantial Violations

The NPRM proposed to require an employer to follow special requirements during its recruitment process if the Department believes that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers if the Department determined that the employer was guilty of a less than substantial violation of the terms of its labor certification. It also proposed an appeals process the employer may pursue if it disagrees with the Department's determination. The Final Rule retains this provision as proposed.

A few employer associations opposed this section. Generally, they stated that the provision is ill-defined, costly, and overly harsh. One predicts that due to the Final Rule's expansion of the definition of a substantial violation, virtually every employer who uses the H-2A program will be subject to the special procedures referred to in this section. The commenters also stated that the provision does not confer sufficient due process to contest the imposition of these special procedures, and that the Department fails to cite any evidence showing the need for this provision.

This provision was included in the H-2A regulations from the 1987 Rule until the provision was removed, with no explanation, by the 2008 Final Rule. The Department is restoring the provision to this Final Rule because it

allows added flexibility in enforcing the H-2A regulations. It also gives the Department a mechanism to address employers' less severe violations without pursuing the more serious remedies of revocation or debarment. The Department believes that this added flexibility will suit its enforcement goals while acknowledging employers' concerns about the harshness of revocation or debarment.

39. Section 655.184 Applications Involving Fraud or Willful Misrepresentation

The Department proposed a process for the referral of applications involving potential fraud or misrepresentation to the DHS and the Department's Office of the Inspector General for investigation and action. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM.

40. Section 655.185 Job Service Complaint System; Enforcement of Work Contracts

The NPRM proposed to continue the requirements for the filing of complaints arising under this subpart through the Job Service Complaint System and the referral of complaints alleging discrimination against eligible U.S. workers to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices. These requirements were also included in the 2008 Final Rule. The proposed rule additionally requires the SWA to refer complaints alleging fraud or misrepresentation to the attention of the CO who will commence the audit process to determine whether the allegations are valid and warrant imposing employer sanctions or penalties. The Department is retaining the provision as proposed in the NPRM.

One commenter misunderstood the proposed requirement for complaint referral to the CO and stated that the filing with the CO may be challenging for migrant and seasonal workers who rely on the SWA to prepare and file their complaints. Another commenter who opposed this requirement asserted that the CO does not have the ability to determine whether or not a complaint alleging fraud is valid. Two employer organizations also opposed the requirement, contending that the NPRM did not include safeguards to prevent third parties from abusing the system to harass employers. Another commenter proposed that the Department implement user-friendly complaint procedures.

An association of growers proposed that the Department disallow anonymous complaints so that employers can face their accusers. This commenter also requested that the Department limit the application of its integrity measures to only those cases in which it has additional corroborative evidence, beyond the initial Job Service Complaint System complaint. Furthermore, it proposed that the Department require that Job Service Complaint System complaints consist of detailed written statements signed under penalty of perjury.

Another commenter called for improved oversight of complaint processing by the SWAs. This commenter also proposed a change to the regulations to mandate the exchange of certain information (such as outcomes of investigation or administrative proceedings conducted by the SWA or any Federal agency) between the WHD and the OFLC and the Office of Special Counsel for Unfair Immigration-Related Employment Practices at DOJ and the OFLC.

The Job Service Complaint System is part of the State agencies' mandate under the Wagner-Peyser Act. See Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 *et seq.*; 38 U.S.C. chapters 41 and 42; 5 U.S.C. 301 *et seq.*; 20 CFR. 658.410, 658.411 and 658.413 also issued under 44 U.S.C. 3501 *et seq.* These regulations apply to State agencies and require them to establish and administer the Job Service Complaint System in order to accept complaints from migrant and seasonal farm workers. This enables workers who may already have a relationship with the SWA as a result of referral to go back to the SWA for assistance. The NPRM did not propose to amend the regulations governing the operation of the Job Service Complaint System found in 20 CFR part 658, subpart E. Therefore, the Department is unable to respond to the many suggestions discussed above that would require changes to these regulations.

The Department agrees that the SWAs play an essential role in accepting and evaluating complaints from workers. The requirement that the SWAs refer certain complaints to the CO is intended to bolster program integrity by ensuring that the Department most effectively directs its enforcement resources to curb and address program abuses. In response to a commenter's assertion of potential abuse of the Job Service Complaint System by third parties, the Department does not anticipate that the Job Service Complaint System will be used as a widespread tool to harass employers. Furthermore, under the

Final Rule, the COs will receive any complaints alleging fraud or misrepresentation and will use their longstanding and extensive programmatic knowledge and understanding of the user community to distinguish between frivolous complaints and those asserting real and supported claims. No entity will be subject to penalties or sanctions when the CO ascertains that the employer is in compliance. Finally, closer cooperation with its State partners in the area of enforcement will enable the Department to ensure program integrity and increase protections for both U.S. and foreign workers participating in the program.

In response to one commenter's suggestion that the regulations mandate information sharing between different agencies, the Department has determined that the part of that suggestion that is specific to amendments to the Job Service Complaint System falls outside the scope of this rulemaking as the process of the system is regulated by 20 CFR 658. However, this is not to say that information is not shared with our sister agency. As explained further above and below, the Department affirmatively shares information with DHS and other agencies, within defined limits, to enable those agencies to take action.

Therefore, the Department is retaining this provision as proposed.

III. Revisions to 29 CFR Part 501

The Final Rule amends the Department's regulations at 29 CFR part 501, which set forth the responsibilities of the WHD to enforce the legal, contractual and regulatory obligations of employers under the H-2A program so that WHD can carry out its statutory mandate to protect temporary H-2A workers and U.S. workers. These amendments are adopted concurrent with and in order to complement the changes ETA is making in its certification procedures.

Since this Final Rule makes changes to several of the existing regulations in 29 CFR part 501, we have included the entire text of the final regulations and not just the sections which have been amended.

a. Subpart A General Provisions

1. Sections 501.0 and 501.1 Introduction and Purpose and Scope

Consistent with its statutory mandate, the Department proposed to amend its regulations in order to enhance its enforcement program and better protect workers—including U.S. workers, H-2A workers, and/or workers employed in

corresponding employment—from adverse effects and from potential abuse by employers who fail to meet the requirements of the H–2A program or violate its provisions. Modifications were proposed to §§ 501.0 and 501.1 to more clearly outline the differing authority and responsibilities of ETA and WHD, to identify the various groups of workers who are entitled to protections under the program, and to state the effective date of the Final Rule.

The Department is adopting the provisions as proposed, with clarifications and the following change: since the NPRM was issued, the Department has eliminated the Employment Standards Administration (ESA), which was the former umbrella organization of the WHD. Therefore, the Final Rule deletes the reference to ESA in § 501.1(c).

Many commenters representing workers, farm worker advocacy organizations, unions, SWAs, Congress, and individuals generally supported the proposed changes to 29 CFR part 501, and they advocated stronger enforcement of program requirements across the board. Several of these commenters noted the long history of abuses under guest farm worker programs, dating back to the Bracero program of the 1940's. They noted that these workers are particularly vulnerable. Since their work visas are tied to a single employer they are reluctant to complain for fear of losing their jobs and being deported, and they often have limited English skills and limited access to social services or legal representation. These commenters welcomed the reversal of many aspects of the 2008 Final Rule, and they endorsed more active enforcement by WHD.

Most commenters representing employers generally opposed the enhanced enforcement proposals. Many employers complained that the proposal is not balanced, since it reinstates the labor certification requirements of the 1987 Rule yet retains the elevated penalties which were added by the 2008 Final Rule. They argued that the elevated penalties were a trade-off for the streamlined attestation procedures in the 2008 Final Rule, suggesting that one cannot be retained without the other. One commenter asserted that the NPRM retains the most burdensome and, in its view, punitive provisions of the 1987 Rule and 2008 Final Rule, while adding new and onerous requirements. A commenter asserted that the proposed enforcement changes exceed the Department's underlying statutory authority, that the NPRM failed to include any citations or legal

analysis supporting the changes, and that the Department generally ignored its own analysis in the 2008 Final Rule.

The Department disagrees. The proposed changes are clearly authorized by the INA, which authorizes the Secretary to deny certifications and to take such other actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to ensure compliance with the terms and conditions of employment. The Department believes that these enhanced enforcement regulations are necessary to properly carry out its statutory obligations to protect workers.

As explained both in the NPRM and in the foregoing preamble sections, the Department has now determined that the 2008 Final Rule did not effectively carry out the Department's statutory mandate to protect workers and failed to allow for robust and meaningful enforcement of the terms of the approved job orders and other regulatory requirements. While most employers of temporary H–2A workers are law-abiding, some are not. The Department has carefully crafted its enhanced enforcement tools so as to continue allowing law-abiding employers to use the program to recruit U.S. workers and/or guest workers to meet their seasonal employment needs. At the same time, it seeks to target those employers who fail to meet their legal obligations to recruit and hire U.S. workers, and/or to offer required wages and benefits to workers. We believe that the Final Rule achieves the proper balance between meeting the seasonal labor needs of farmers and protecting the rights of farm workers.

2. Section 501.2 Coordination Between Federal Agencies

The Department also proposed to expand § 501.2 to allow broader information sharing and coordination between agencies both within and outside of DOL, and to grant WHD and OFLC express authority to share information for enforcement purposes and, where appropriate, with other agencies such as DHS and DOS which play a role in immigration enforcement. In addition, because the Department proposed that ETA and WHD have concurrent debarment authority, the Department also proposed to limit its enforcement to only one debarment proceeding (by either OFLC or WHD, but not both) resulting from a single set of operative facts, and proposed that OFLC and the WHD would coordinate their activities to accomplish this result. It also proposed that copies of any final

debarment decisions be forwarded by DOL to DHS so that it can take appropriate action.

No comments were received on this proposed section. Therefore, the Department is adopting the provision generally as proposed, with slight wording changes.

3. Section 501.3 Definitions

As in the 2008 Final Rule, the NPRM proposed to incorporate the definitions listed in 20 CFR part 655, subpart B that pertain to 29 CFR part 501. The discussion of changes to the definitions can be found in the preamble for 20 CFR part 655, subpart B above.

4. Section 501.4 Discrimination Prohibited

The Department proposed to move this provision from § 501.3 to § 501.4, and to add a reference to debarment as a potential remedy for employers or others who engage in prohibited discrimination, along with other minor editorial changes. The Final Rule adopts the provisions as proposed without change.

Worker advocacy organizations supported the proposal requiring workers' compensation coverage and the submission of proof of coverage. They also requested that the Final Rule include a provision making discrimination against workers who file a workers' compensation claim a violation of these regulations. This protection is already provided. The regulation at 20 CFR 655.122(e), like the statutory provision it implements, provides a right to workers' compensation coverage under State law or, where the employee is not covered by State law, private insurance. The right to workers' compensation coverage would be meaningless if it did not include the right to file a claim under that coverage without risking retaliation. Accordingly, the right to file a claim is provided under the INA, as well as these regulations. Section 501.4(a)(5) states that discrimination against any person asserting a right or protection afforded by the INA or these regulations is prohibited. Therefore, persons filing workers' compensation claims under a workers' compensation policy mandated by the statute are protected from discrimination. In addition, as a condition of H–2A certification, employers must agree to comply with Federal, State and local laws and regulations during the period of employment. Where State laws prohibit discrimination against employees making workers' compensation claims, a violation of those laws would also be a violation of these regulations.

5. Section 501.5 Waiver of Rights Prohibited

The Department proposed to renumber § 501.5 (Waiver of rights prohibited), which was previously § 501.4, and to expand the provision to cover U.S. workers who were improperly rejected for employment or improperly laid off or displaced. The Final Rule adopts the proposed amendment.

A legal services organization suggested expanding this provision to also prohibit waivers of the FLSA, applicable State employment laws, and State employee housing laws. The Department notes that the FLSA may not be waived and that State laws may or may not be waivable. The regulations require employers to certify their compliance with all applicable State and local laws and regulations, including health and safety laws. Therefore, the Department does not believe that such additional references need to be included in the no-waiver provision.

6. Section 501.6 Investigation Authority of the Secretary

The Department proposed to renumber, substantially shorten and revise this section to clarify and to eliminate duplication. The Department is adopting the provisions as proposed without change.

Employee advocacy groups commented that this provision should be expanded to require WHD to notify workers (in their language), as well as advocates and local agencies whenever WHD conducts an investigation, and that it notify workers and others of the outcome of investigations. As a matter of enforcement policy, WHD already notifies complainants of the status of their complaint(s), and makes every effort to do so in languages understandable to the worker. Notifying all employees, advocates and local agencies in every case is impracticable. However, WHD is committed to doing outreach to advocates, workers, and affected communities, and intends to work more closely with interested parties in appropriate cases.

7. Section 501.7 Cooperation With Federal Officials

The NPRM proposed to require cooperation with any Federal official investigating, inspecting, or enforcing compliance with the statute or regulations. No comments were received addressing this section. Therefore, the Final Rule adopts the provision as proposed.

8. Section 501.8 Accuracy of Information, Statements, Data

The NPRM also proposed to renumber § 501.8, which was previously § 501.7, but did not otherwise change the provision. No comments were received addressing this section. Therefore, the Final Rule adopts the changes as proposed.

9. Section 501.9 Surety Bond

In order to assure compliance with the H-2A labor provisions and to ensure the safety and economic security of covered employees of H-2ALCs under the H-2A program, the NPRM proposed to continue the requirement that H-2ALCs obtain and maintain a surety bond based on the number of workers to be employed under the labor certification, throughout the period it is in effect, including any extensions. The proposed rule also retained the provision that enables the WHD to require, after notice and the opportunity for a hearing, that an H-2ALC obtain a surety bond with a face amount greater than the amounts specified in the proposed regulation. The Department also proposed to enhance the level of protection for workers by introducing new bond amount tiers that are more closely and appropriately tied to the number of job opportunities for which certification is sought. The Final Rule adopts the NPRM with one change and minor clarifying edits. The Final Rule requires H-2ALCs to provide the original surety bond with their application, rather than just a copy.

In the 2008 Final Rule, surety bond amounts were set at \$5,000 for H-2ALCs seeking certification to employ fewer than 25 employees, \$10,000 for those seeking certification to employ 25 to 49 employees, and \$20,000 for H-2ALCs wanting to hire 50 or more employees. However, assuming that an H-2ALC with 50 employees pays approximately the same for a \$20,000 bond as an H-2ALC with 300 employees, the 2008 Final Rule framework disproportionately advantages larger H-2ALCs while providing diminishing levels of protection for the employees of such contractors.

Under the proposed rule, the first two bond amount tiers remained unchanged (\$5,000 for H-2ALCs who apply for certification to employ fewer than 25 employees and \$10,000 for those H-2ALCs who are applying for certification to employ 25 to 49 workers). The NPRM proposed to require H-2ALCs seeking certification to employ from 50 to 74 workers to obtain a bond of \$20,000. In addition, we proposed to require H-2ALCs seeking

certification to employ from 75 to 99 workers to obtain a surety bond of \$50,000, and those seeking certification to employ 100 or more workers to obtain a bond of \$75,000.

In the proposed rule, the Department specifically requested comments addressing the implications for H-2ALCs who may be subject to this requirement. A number of commenters opposed the adoption of the proposed surety bond requirements as being too costly and indicated these increased costs will discourage participation in the H-2A program while not significantly improving worker protections.

A number of commenters supported the surety bond requirements. However, these commenters also expressed the view that the proposed requirements do not go far enough to protect covered farm workers, and they offered suggestions to further strengthen the requirements. These suggestions fall into three general categories: (a) either increase the face amount of the required bond to \$1,000 per worker or index the amount of the bond to a percentage of the value of the offered contract; (b) require that the bond be payable to both the DOL and the affected workers; and (c) in lieu of a surety bond, allow H-2ALCs and the fixed-site employers to enter into a written contract in which the fixed-site employer agrees to be responsible for compliance with respect to the H-2ALC's employees as if the employees were jointly employed by both an H-2ALC and the fixed-site employer.

Only those H-2A program applicants who meet the definition of an H-2ALC will be required to obtain a surety bond. The Department is not aware that any H-2ALC has been unable to obtain a surety bond as required under the 2008 Final Rule because it was too costly. The Department's enforcement experience has found that agricultural labor contractors are more often in violation of applicable labor standards than fixed-site employers. They are also less likely to meet their obligations to their workers than fixed-site employers. Regarding the comment that the Department does not have the authority to institute a surety bond requirement, the Department notes that 8 U.S.C. 1188 gives the Secretary the authority to take such actions as may be necessary to assure employer compliance with the terms and conditions of employment. Requiring a bond of H-2ALCs is within the scope of that authority to better ensure compliance with H-2A obligations and to protect the safety and security of covered workers employed by H-2ALCs. The Department believes

that the increased bond amounts are appropriate and will better allow the Department to ensure that adequate funds are available to remedy violations that result in lost wages for workers.

The Department has also determined to retain the surety bond levels as proposed in the NPRM. With regard to the suggestions that the bond amount be set at \$1,000 per worker, we do not believe this to be necessary as the proposal gives the WHD Administrator the authority to adjust the amounts on an individual basis, as may be warranted in the future. For the alternative suggestion that the amount be indexed to a percentage of the value of the offered contract, it is unclear how bond underwriters would be able to accomplish this.

Other commenters suggested a further amendment to the language to make the bonds payable to both the Administrator of the Wage and Hour Division and to affected employees of the H-2ALCs. The suggestions did not state how to implement such a change since the bond needs to be secured and provided as part of the Application approval process. Moreover, the Department believes that it is most appropriate for the Administrator to be the party named in the bond because the Administrator is responsible for the enforcement of the terms and conditions of the labor certification and will act on behalf of all employees if a violation is found. Therefore, the Department has determined to retain the requirement that the bond be payable to the Administrator of the Wage and Hour Division as proposed.

Certain commenters suggested that the Department adopt, as an alternative to the requirement to obtain a bond, a provision that allows an H-2ALC to forgo obtaining a bond if the fixed-site employer to whom an H-2ALC furnishes workers contractually obligates itself (in writing) to be jointly responsible as a joint employer with an H-2ALC for compliance with all of the provisions of the job offer/contract. To adopt such a provision would necessitate that an H-2ALC enter into a separate contractual agreement with each and every fixed-site employer to whom he or she intends to furnish workers throughout the period for which certification is sought; it is unclear if this is feasible and, further, it would require that each such contractual agreement be scrutinized for legal sufficiency prior to certification, which would impact the finite resources available for processing applications. Therefore, the Department has not adopted this suggestion.

No comments were received on the proposal to change the requirement that H-2ALCs provide written notice to the WHD Administrator of cancellation or termination of the surety bonds from a 30-day to a 45-day notice period, and that the bond must remain in effect for at least 2 years after the expiration of the labor certification (unless the WHD has commenced an enforcement proceeding, in which case the bond must remain in effect until the conclusion of the proceeding and any appeals). Therefore, the Department adopts the proposal in the NPRM.

Finally, the proposed rule required that documentation from the issuer must be provided with the Application identifying the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated in this section), date of its issuance and expiration and any identifying designation used by the surety for the bond. In the Final Rule, the Department is requiring that the original of the bond be submitted with the Application. The Department believes this change will not present any additional costs for applicants since such applicants are already required to provide fundamental information from the bond which most applicants accomplish by providing a copy of the bond. The requirement to provide the original bond is intended to ensure that the Department has legal recourse to make a claim to the surety against the bond following a final order finding violations.

10. Section 501.15 Enforcement

The Department proposed no changes and received no comment on this section. The Department is adopting these provisions as proposed without change.

11. Section 501.16 Sanctions and Remedies—General

The Department proposed to provide WHD with express authority to pursue reinstatement and make whole relief in addition to back wages in cases of discrimination, or in cases in which U.S. workers have been improperly rejected, laid off, or displaced. As explained in the proposal, this was intended to clarify WHD's authority to pursue recovery of improper deductions, such as recruiter fees or other costs improperly deducted or paid in violation of the required assurances under the Application, which forbid such deductions and payments. The Final Rule adopts the provisions as proposed.

Many commenters representing farm workers, farm worker advocacy

organizations, unions, SWA, Congress, and individuals generally endorsed the enhanced enforcement provisions. Employee advocacy groups commented that this provision should be expanded to require WHD to notify workers (in their language) and invite them to participate whenever it files an administrative proceeding, and serve them with notices of all hearings, settlements, decisions and orders in each case; they also suggested improving outreach and follow-up communications with State and County staff after complaints are filed.

Many other commenters representing employers, recruiters and employer associations complained that the proposed enhanced penalties and remedies would punish innocent employers and deter them from using the program. Specific comments are addressed below.

Several commenters representing employers expressed concerns about the breadth and potential severity of the proposed new remedies, in particular make whole relief, which they feared could potentially include compensatory damages for non-economic injuries such as pain and suffering, or other civil damages of the type available in Federal or State courts. Another commenter questioned how WHD would exercise its new authority, asserting that the provisions were vague and would leave employers vulnerable to endless litigation and harassment based on the flimsiest of allegations.

These concerns are unfounded. The Department intended make whole relief to be limited to its traditional meaning, such as, reinstatement, hiring, reimbursement of monies illegally demanded or withheld, or the provision of specific relief such as the cash value of insurance benefits, housing, transportation or subsistence payments which the employer was required to, but failed to provide, in addition to the recovery of back wages where appropriate. Nothing in the regulations allows for the recovery of pain and suffering or other civil or punitive damages on behalf of workers in addition to actual damages and equitable relief. Moreover, the Department has been enforcing H-2A regulations for many years. It intends to continue to use its traditional enforcement discretion to review cases based on their facts, and to select for prosecution only those which an investigation has shown the case to be well-founded.

Other commenters suggested that, where an employer has restricted its agents by contract arrangement from receiving recruitment fees or kickbacks

from workers, yet a worker complains that he or she was forced to pay a prohibited fee, the employer should be shielded from liability. The Final Rule requires that H-2A employers contractually prohibit their recruiters and agents from seeking or receiving such payments, directly or indirectly. As in every enforcement case, WHD will examine the evidence and will seek to enforce appropriate remedies against the proper parties. Therefore, if an employer's recruiter or agent has violated this provision, but the employer can show that it had a bona fide contractual provision preventing or barring the violative action by its agent, the employer has not violated the regulation.

12. Section 501.17 Concurrent Actions

The Department proposed to grant concurrent debarment authority to OFLC and WHD, while recognizing the differing roles and responsibilities of each agency under the program. Under the proposed revisions, debarment authority for violations arising out of the application process remained with OFLC, but the WHD Administrator gained debarment authority for issues arising from WHD investigations. The proposal also included safeguards requiring coordination between the agencies to ensure streamlined adjudications and that an employer would not face two debarment proceedings for violations arising from the same facts. The Department is adopting the provisions as proposed without change.

Several employers and employer associations disagreed with the Department's proposal to grant debarment authority to WHD. They noted that the Department had rejected this approach in the 2008 Final Rule. As in 2008, they expressed concerns about conflicting regulatory interpretations by OFLC and WHD, and contended that allowing both agencies to exercise debarment authority would be inefficient and confusing, and result in twice as much bureaucracy for employers.

Worker advocates and others who commented in favor of the proposed change agreed that WHD should have the power to debar employers who violate program requirements. They cited examples where unscrupulous FLCs failed to provide any work, failed to pay their workers, demanded kickbacks, engaged in Ponzi schemes, lied to, assaulted, and abused workers, committed fraud, engaged in human trafficking, and even pled guilty to criminal conduct (assaulting a worker for filing a complaint with OSHA), yet

were permitted to continue operating as H-2ALCs. These commenters welcomed additional enforcement and debarment authority by WHD.

In 2008 the Department considered extending debarment authority to WHD, yet decided not to do so, fearing that such authority could result in unnecessary confusion. However, upon further reflection, the Department has concluded that this fear is unfounded. 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 bureaucracy by removing extra steps. Under the 2008 Final Rule, WHD conducts investigations of H-2A employers, and may assess back wages, civil money penalties, and other remedies, which the employer has the right to challenge administratively. However, under the 2008 Final Rule, WHD cannot order debarment, no matter how egregious the violations, and instead must take the extra step of recommending that OFLC issue a Notice of Debarment based on the exact same facts, which then has to be litigated again. Contrary to the commenters' assertions, 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 employer-violators. 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.

Furthermore, this change is consistent with recommendations made as far back as 1997 in a General Accounting Office (GAO) report to Congress, in which GAO proposed that WHD be given authority to suspend employers with serious labor standard or H-2A contract violations. See U.S. Gen. Accounting Office: "Report to Congressional Committees: H-2A Agricultural Guestworker Program, Changes Could Improve Services to Employers and Better Protect Workers," 68, 70 (1997). Moreover, WHD has extensive debarment experience under regulations implementing other programs, such as H-1B and the Service Contract Act. See, e.g. 29 CFR 5.12, 5.1

Nevertheless, the Department is sensitive to the perception of some employers that OFLC and WHD may interpret certain rules differently, and

that employers should not be faced with double jeopardy for a single violation. Therefore, it has included several safeguards on this new authority. First, each agency must coordinate their activities when considering debarment. Second, the proposal also expressly identifies which violations will be pursued by which agency. For example, OFLC will continue to institute its own debarment proceedings regarding issues that arise during the application or recruitment process, or from an OFLC audit, while WHD may order debarment as a result of different violations which it discovers during its investigations. Third, the standards for debarment to be applied by both OFLC and WHD have been revised to ensure that they are identical and to ensure consistency in application. Finally, the Final Rule also provides that debarment for any violation arising out of the same facts will be addressed only by a single agency. This will allow for more expeditious proceedings and more efficient enforcement, without any negative impact on law-abiding employers.

13. Section 501.18 Representation of the Secretary

The NPRM proposed to modify this provision to conform to the statute, which provides for administrative appeals, but does not grant the Secretary independent litigating authority in civil litigation. No comments were received addressing this section. Therefore, the Final Rule adopts the changes as proposed.

14. Section 501.19 Civil Money Penalty Assessment

The Department proposed to amend this section in several ways. It proposed to increase the maximum civil money penalty (CMP) amount from \$1,000 to \$1,500 for each violation in most cases, noting that this amount had not been adjusted since 1987. It proposed to increase the penalty amount for a failure to meet a condition of the work contract that results in displacing a U.S. worker to up to \$15,000, and added a new penalty of up to \$15,000 for improperly rejecting a U.S. worker who has made application for employment. It also proposed to increase the potential penalty in cases where a violation of an applicable housing or transportation safety and health provision of the work contract causes the death or serious injury of any worker to up to \$50,000 per worker, and to double the maximum penalty to up to \$100,000 per worker where the violation of safety or health provisions causing the death or serious injury was repeated or willful; it

eliminated the separate provision in the 2008 Final Rule which had previously increased the maximum penalty to \$100,000 in cases where the employer failed, after notification, to cure a specific violation. The Department is adopting the provisions as proposed without change, with the exception of moving language regarding layoffs from § 501.19(e) to 20 CFR 655.135(g).

Several employer associations and employers commented that the proposed increases in the penalty structure are too severe, are unsupported by data or by examples of violators, and seem designed to discourage use of or even to destroy the program. Overall, most of these commenters argued that the proposed rules are the worst of both worlds for program users, since they abandon the simplified attestation model of the 2008 Final Rule, but retain the elevated penalties contained in that rule. They contended that the return to supervised recruitment requirements makes the enhanced penalties unnecessary.

Other employer associations expressed concern about the potential multiplier effect of the proposed penalties, and wondered whether a separate penalty could be assessed for each incorrect paycheck, resulting in astronomical penalties. These commenters also questioned the changes to the repeat violation definition, worrying that multiple violations in one incident could be deemed repeat violations, even where the employer has promptly corrected the violations. Other commenters criticized the assessment of a penalty for unintentional violations, for each violation or for each failure to pay a worker, which they characterized as a new provision.

Commenters representing workers applauded the proposal to increase the proposed penalties and enforcement in general. They stated that abuse of H-2A workers by unscrupulous employers is rampant, that enforcement has historically been very weak, and that many workers do not complain for fear of retaliation. They asserted that the lack of enforcement and the occasional fines or sanctions levied by WHD in the past have led to an environment where crew leaders and employers believe that they have immunity from the law, and where financial gains from lawbreaking exceed the costs. One advocacy group claimed that the vast majority of H-2A workers in the U.S. are victims of wage theft for which they have no effective recourse. These groups uniformly supported more consistent, thorough and timely enforcement to serve as a deterrent to worker abuse.

The Department agrees with the commenters who assert that stronger penalties are necessary to adequately protect workers. Increasing the proposed penalties for violators who disregard their obligations will provide the Department with more effective tools to discourage potential abuse of the program and will have little if any impact on law-abiding employers. Such penalties are intended to deter violations, discrimination, and interference with investigations, and strengthen worker protections. These penalties will be especially useful to deter repeat violators, who have committed violations knowing that many H-2A workers are unlikely to file complaints or seek legal assistance to enforce their rights.

The increases in the proposed penalties for violations of applicable safety and health provisions, especially those which cause serious injury or death, and those for repeat violations, are intended to encourage participants to ensure that housing and/or transportation provided to their workers meets all applicable safety and health requirements, and that housing and/or vehicles used in connection with employment do not place workers in danger. The higher penalties are consistent with the increased penalties recently authorized by Congress for child labor violations which cause death or serious injury to a worker (see the Genetic Information Nondiscrimination Act Section 302 (2008), codified at 29 U.S.C. 216(e)). They are also lower than those that can be imposed by the Mine Safety and Health Administration as a result of the MINER Act of 2006, codified at 30 U.S.C. 820 (2006), which increased the penalty for flagrant violations up to \$220,000, and the penalty for failure to notify the agency of a death or injury to up to \$60,000. See 72 FR 13592, Mar. 22, 2007. The Department believes that the increases for H-2A violations are in line with these other recent increases in penalties in other programs administered by the Department.

Contrary to the assumptions of some commenters, the assessment of a particular penalty (or of an enhanced penalty for a repeat or willful violation) is not mandatory, but guided by consideration of the seven factors listed in paragraph (b), the facts of each individual case, and by common sense. For example, before assessing any penalty, the WHD Administrator must consider the type of violation, its gravity, the number of workers affected, and several mitigating and/or aggravating factors including, but not limited to, the explanation offered by

the employer (if any), its good faith or lack thereof, any previous history of violations, and any financial loss, gain or injury as a result of the violation. These safeguards are intended to ensure that inadvertent errors and/or minor violations are not unfairly penalized.

Finally, the assessment of a penalty for each violation is not a new provision, but has been included in the regulations since at least the 1987 Rule, including the 2008 Final Rule. Compare 52 FR 20531, Jun. 1, 1987 and 73 FR 77235, Dec. 18, 2008. Indeed, in the 2008 Final Rule the provision was clarified to reflect the then-existing practice that a CMP could be assessed for each violation committed (with each failure to pay a worker properly or to honor the terms or conditions of a worker's employment constituting a separate violation). The only change made by the Final Rule is to move this explanatory language up from § 501.19(c) into the general provision at § 501.19(a). However, it is not new, and there is no reason to fear that it will be applied in an unfair or arbitrary manner. The provision is written so as to protect smaller employers and first-time unintentional violators while appropriately targeting repeat and willful violators and those who abuse or exploit large numbers of workers with the largest penalties.

15. Other Comments Pertaining to Enforcement and Sanctions

An employer association commented that DOL should have retained the portion of the 2008 Final Rule preamble warning workers that they are not permitted to aid or abet trespassing on an employer's private property, although consulting with legal aid lawyers and other representatives is protected activity under 20 CFR 655.105(k)(4). DOL believes that such language is not necessary. Trespassing is a matter of state law, and is not enforced by the WHD.

16. Section 501.20 Debarment and Revocation

The Department proposed this section to grant concurrent debarment authority to WHD. Under the proposal, OFLC would retain the authority to debar an employer based on violations occurring during the application, recruitment and certification process, while WHD would gain new authority to debar employers, agents or attorneys based on evidence discovered during WHD investigations. The proposal noted that the two agencies would apply identical standards, and would coordinate their activities in this area. It also proposed conforming changes to other sections to

reflect this new debarment authority, with minor clarifying changes.

The Department received many comments regarding these standards. These comments and the Department's responses are explained above in the section of this preamble discussing OFLC's debarment authority. In addition, the reference to *res judicata* in this provision has been deleted because the Department believed it was unnecessary. Otherwise, the Department retains the WHD debarment authority as proposed.

17. Section 501.21 Failure To Cooperate With Investigations

The NPRM proposed to expand this section to include remedies for failure to cooperate with a WHD investigation, and to add debarment to the list of potential remedies for such failure. No comments were received addressing this section. Therefore, the Final Rule adopts the changes as proposed.

18. Section 501.22 Civil Money Penalties—payment and collection

No comments were received on this provision, however; the Final Rule contains several clarifying edits.

19. Sections 501.30–501.47

The NPRM proposed few changes to the administrative proceedings set forth in §§ 501.30–.47 of the 2008 Final Rule. Because the NPRM proposed to authorize the WHD to pursue debarment proceedings, the NPRM added references to debarment in §§ 501.30, 501.31, 501.32(a), and 501.41(d). These sections of the proposal also specified that these procedures will govern any hearing on an increase in the amount of a surety bond. They also replaced the term unpaid wages with the term monetary relief to reflect the fact that WHD may seek to recover other types of relief, such as if an employer fails to provide housing or meet the three-fourths guarantee.

The Department proposed to modify § 501.33 to permit hearing requests to be filed by overnight delivery, as well as by certified mail, and to reiterate that surety bonds must remain in force throughout any stay pending appeal. The Department also proposed to add a new § 501.34(b), in order to conform H-2A procedures to those used in the H-1B program. The new provision provides discretion to an ALJ to ensure the production of relevant and probative evidence while excluding evidence that is immaterial, irrelevant or unduly repetitive without resort to the formal strictures of the Federal Rules of Evidence. Other than very minor editorial changes or corrections of

typographical errors, the NPRM proposed no other changes to §§ 501.30–501.47. The Final Rule adopts the provisions as proposed, with minor changes relating to service so as not to preclude, for example, electronic service.

As noted above, several commenters representing employers generally objected to the breadth of the proposed new remedies, seeking reassurance that the Department would not seek compensatory damages for non-economic injuries such as pain and suffering, or other civil damages of the type available in Federal or State courts. These concerns are unfounded. The Department intended that the term monetary relief as used in this section be limited to its traditional meaning: for example, reimbursement of monies illegally demanded or withheld, or reimbursement of the cash value of insurance benefits, housing, transportation, subsistence or other payments which the employer was required to provide (but failed to do so), in addition to the recovery of back wages where appropriate. Nothing in the regulations allows for the recovery of pain and suffering or other civil or punitive damages for individual workers in addition to actual damages and equitable relief.

IV. Administrative Information

A. Executive Order 12866

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is significant and therefore subject to the requirements of the E.O. and to review by the Office of Management and Budget (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 Department has determined that this Final Rule is significant, but not an economically significant regulatory action under sec. 3(f)(1) of E.O. 12866.

The timeframes and procedures for fixed-site agricultural employers, H-2ALCs, or associations of agricultural producer-members to file a job offer and application, prepare supporting documentation, and satisfy the required assurances and obligations under the H-2A visa category under this regulation are substantially similar to those under the 2008 Final Rule and would not have an annual economic impact of \$100 million or more. This regulation would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. In fact, this Final Rule is intended to provide agricultural employers with clear and consistent guidance on the requirements for participation in the H-2A temporary agricultural worker program. The Department, however, has determined that this Final Rule is a significant regulatory action under sec. 3(f)(4) of the E.O. and, accordingly, OMB has reviewed this Final Rule.

1. Need for Regulation

The Department has significant concerns with the 2008 Final Rule that necessitate new rulemaking. First, the Department has determined that there were insufficient worker protections in the attestation-based model of the 2008 Final Rule in which employers do not actually demonstrate that they have performed an adequate test of the U.S. labor market. It has come to the Department's attention that some employers, due to a lack of understanding or for other reasons, were attesting to compliance with program obligations with which they had not complied. The Department is accordingly concerned about the use of attestations to demonstrate program compliance.

The Department is amending its regulations through the changes discussed in the sections below with the primary purpose of adequately protecting U.S. and foreign H-2A workers. The Department took into account both the regulations promulgated in 1987, as well as the substantive re-working of the regulations in the 2008 Final Rule to arrive at a Final Rule that balances the worker protections of the 1987 Rule and the program integrity measures of the 2008 Final Rule.

Much of the 2008 Final Rule has been retained in format, as it presents an understandable regulatory roadmap; it has been used when its provisions do not conflict with the policies in this Final Rule. To the extent the 2008 Final Rule presents a conflict with the policies underpinning this Final Rule, it

has been rewritten or the provisions of the 1987 Rule have been adopted. To the extent the 1987 Rule advances the policies underlying this Final Rule, those provisions have been retained. These changes are pointed out above.

2. Alternatives

The Department has considered three alternatives: (1) to make the policy changes contained in this Final Rule; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to revert to the 1987 Rule. The Department believes that the first alternative—the policies contained in this Final Rule—represents retention of the best features of both the 1987 Rule and 2008 Final Rule. The Department has chosen not to retain the 2008 Final Rule for the reasons mentioned above. It has also rejected reversion to the 1987 Rule as inefficient and ineffective, given societal and economic changes that have occurred since its promulgation.

3. Economic Analysis

The economic analysis presented below covers the following industry sectors: Crop production; animal production; activities for agriculture; logging; and fishing, hunting, and trapping. Many commenters indicated that because of their uniqueness, reforestation and pine straw activities should not be added to the H-2A Program. The Department has agreed with these concerns and is not including these activities in this Final Rule. Reforestation and pine straw activities remain a part of the H-2B Program.

In 2007, there were over 2.2 million farms, of which 78 percent had annual sales of less than \$50,000, 17 percent had annual sales of \$50,000 to \$499,999, and the remaining 5 percent had annual sales in excess of \$500,000.¹³

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 Final Rule, against the benefits and costs associated with implementation of provisions contained in this Final Rule. The benefits and costs of the provisions of this Final Rule are estimated with respect to the baseline. Thus, costs and benefits that are statutory or that exist as a result of the 2008 Final Rule are not considered as costs and benefits of this Final Rule. We explain how the required actions of workers, employers, government agencies, and other related entities are linked to the expected benefits and costs of this Final Rule.¹⁴

¹³ Source: 2007 Census of Agriculture, United States Department of Agriculture.

¹⁴ In response to comments, the Department includes the calculations used in the estimates of

The Department has quantified and monetized the benefits and costs of this Final Rule where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively. The analysis covers 10 years (2009 through 2018) to ensure it captures all major benefits and costs.¹⁵

In addition, the Department provides a qualitative assessment of transfer payments associated with the increased wages and protections of U.S. workers. 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 costs or benefits to society. When summarizing the benefits or costs of specific provisions of this Final Rule, we present the 10-year averages to estimate the typical annual effect or 10-year discounted totals to estimate the present value of the overall effects.

The Department reviewed the public comments submitted in response to the NPRM and made revisions where feasible in the economic analysis of this Final Rule. The Department used projected H-2A participant values in the NPRM because FY 2009 was not yet complete. The economic analysis of this Final Rule, however, uses the actual participant values for the full FY 2009. The Department also removed reforestation and pine straw employers and workers from the analysis. For many of the impacts included, these modifications caused a relative decrease in magnitude from the NPRM to this Final Rule.

Additional revisions to this Final Rule relative to the NPRM are the inclusion of costs to employers for paying visa and border crossing fees for H-2A workers, costs related to the new requirement that employers disclose the terms and conditions of the employment no later than the time an H-2A worker applies for a visa, and costs related to the requirement that employers provide a copy of revised contracts to affected workers where the employer applies for an extension of the certification. The Department also made several changes to impacts already included in the NPRM, including revising the documentation retention requirement and the assumption related to the time required by employers to review the new rule. Finally, the Department

costs and benefits in order to increase the transparency of the analysis. The total cost and benefit estimates presented in this analysis are subject to rounding errors.

¹⁵ For the purposes of the cost-benefit analysis, the 10-year period starts on October 1, 2009.

includes transfer estimates related to the larger bonding requirement for large H-2ALCs.

4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the following provisions of this Final Rule against the baseline (*i.e.*, the 2008 Final Rule): the new methodology for estimating the AEWR, an enhanced U.S. worker referral period for employers after certification, the increased costs to the Department for developing and maintaining an electronic job registry, changes in administrative burdens placed on SWAs by increased timeframes for recruitment, changes in administrative benefits resulting from eliminating employment verification requirements, enhanced worker protections resulting from compliance certification, enhanced coverage of expenses for transportation to and from the place from which the worker departed to work for the employer, coverage of visa/border crossing expenses, changes in the requirements for contract revisions and the disclosure of terms and conditions, and changes in the requirement for housing inspections. For each of these subjects, the relevant costs and benefits are discussed, as well as transfer payments that may apply.¹⁶

The Department's analysis below does not consider impacts associated with activities not required by this Final Rule or provisions that are not changing between the 2008 Final Rule and this Final Rule. For instance, several commenters expressed concern about the value of the requirement in the NPRM that H-2A employers retain the recruitment report and supporting documentation and other records for 5 years rather than 3 years. The Department concurs with this concern. This Final Rule, similar to the 2008 Final Rule, requires that employers maintain a complete recruitment report and all supporting documentation for 3 years. Because this requirement is not a change from the 2008 Final Rule, there is no additional cost associated with the provision, and the Department does not consider it in this analysis.¹⁷

a. New Methodology for Estimating the AEWR

The Department has determined that the wages of agricultural workers have been adversely impacted to a far greater

¹⁶ For the purpose of this analysis, H-2A workers are considered temporary residents of the U.S.

¹⁷ The NPRM included the assumption that employers require 1 hour to review the new rule. The Department, in response to public comments, increased the estimate for this requirement to 2 hours.

extent than anticipated by the 2008 Final Rule. As discussed further below, the change in the calculation of the AEWR from the method used under the 1987 Rule to a method based on local prevailing wages under the 2008 Final Rule resulted in a reduction of farm worker wages in many labor categories and an increase in only a few others.

The 2008 Final Rule based the estimation of the AEWR on data from the OES Wage Survey collected by BLS. This Final Rule changes the methodology for estimating the AEWR, basing it instead on data from the USDA survey. The change to the OES method of computing the AEWR resulted in a decline in the average certified wage for H-2A workers to \$8.02 per hour. This wage calculated under the 2008 Final Rule was 11.2 percent lower than the \$9.04 average wage for FY 2009 applications received before January 19, 2009 and processed under the 1987 Rule, and it was 10.8 percent lower than the \$9.00 average wage rate for FY 2008 applications, all processed under the 1987 Rule.

The 2008 Final Rule based the estimation of the AEWR on the OES Wage Survey collected by BLS, whereas the basis for the AEWR under the 1987 Rule was data compiled by the USDA NASS. This Final Rule changes the methodology for estimating the AEWR to the USDA survey. As explained above, the wage survey methodology in this Final Rule is associated with a nationwide average wage rate that is \$1.02 higher than that under the 2008 Final Rule. That is, a nationwide average H-2A wage rate of \$9.04 as opposed to \$8.02.

i. Transfers

The principal transfers of the higher wages are from H-2A workers to U.S. citizens and from U.S. employers to both H-2A workers and U.S. citizens.

A transfer from H-2A workers to U.S. citizens arises because, as labor market research indicates, as agricultural wages for U.S. workers increase, a larger number of U.S. workers may be attracted to work in the agricultural labor force. While some of these workers may be drawn from work in other industries, some of these workers would otherwise remain unemployed or out of the labor force entirely, earning no salary. The increase in labor supply resulting from higher wages is captured by the so-called wage elasticity of the U.S. agricultural labor supply. A recent study found that this elasticity is 0.43; for each 1 percent increase in wages, there is a 0.43 percent increase in the labor supply of U.S. agricultural workers. Another study estimated a

labor supply elasticity of 0.36.¹⁸ Although the increase in wages for documented workers in agriculture will lead to complex labor market dynamics which involve both labor supply and demand and which are difficult to quantify, the Department believes that the net effect of the expected increase in wages as a result of this Final Rule will be more U.S. workers employed in agriculture.

The higher wages for workers associated with the new methodology for estimating the AEWR is beneficial to U.S. workers, improving their ability to meet costs of living and to spend money in their local communities.¹⁹ These are important concerns to the current Administration and a key aspect of the Department's mandate to ensure that the wages and working conditions of similarly employed U.S. workers are not adversely affected. The increase in the wage rates for some workers represents a transfer from agricultural employers to their workers, both H-2A and corresponding U.S. workers.

The Department received comments focusing on the spending patterns with respect to the transfers, noting that since the money received by H-2A workers eventually leaves the U.S., it results in a transfer from the U.S. economy to foreign economies. The ultimate destination of the funds, which cannot be assessed with any certainty, is not relevant to this analysis. E.O. 12866 does not require that consumption patterns of recipients of transfers be considered in the cost analysis.

There may be a transfer of costs from government entities to employers as a result of lower expenditures on unemployment insurance benefit claims. Previously unemployed individuals who were not willing to accept a job at the lower wage may now be willing to accept the job and would not need to seek new or continued unemployment insurance benefits. The Department, however, is not able to quantify these transfer payments with precision. Difficulty in calculating these transfer payment arises from uncertainty about the actual entries of H-2A

¹⁸ See Julie L. Hotchkiss and Myriam Quispe-Agnoli, "Employer Monopsony Power in the Labor Market for Undocumented Workers," Federal Reserve Bank of Atlanta, Working Paper 2009-14a, June 2009, and Duffield, J.A. and R. Coltrane, 1992, "Testing for Disequilibrium in the Hired Farm Labor Market," *American Journal of Agricultural Economics*, 74: 412-20. The Department includes these elasticity estimates for reference. They are not used in the analysis.

¹⁹ An additional transfer noted by a commenter is increased remittances to the worker's home country. Due to data limitations, however, the Department does not address this issue quantitatively.

workers, the quantity of corresponding U.S. workers, the types of occupations to be included in future filings, the ranges of wages in the areas of actual employment, and the point at which any occupation in any given area is subject to the prevailing wage (hourly or piece rate) or Federal or State minimum wage or collectively bargained wages, rather than the application of the OES or USDA FLS to the calculation of the AEWR.

Several commenters noted that, in rare instances, the prevailing wage rate increases above the AEWR mid-season due to market forces. In the Department's experience, prevailing wage increases occur rarely. In FY 2009, for instance, the AEWR was not applicable in only 10 percent of the cases certified before the implementation of the 2008 Final Rule. In addition, some states do not perform prevailing wage surveys, so the Department cannot determine the magnitude of the difference between the prevailing wage and the AEWR for those States. Due to these data limitations, the Department is not able to estimate the frequency that the prevailing wage increases beyond the AEWR, the duration for which the difference exists, or the magnitude of the difference and, thus, the Department does not quantify the transfer resulting from such increases.

Other commenters noted that in some instances, the presence of Collective Bargaining Agreements (CBAs) is associated with wages above the AEWR. Agricultural employers who are parties to a CBA would be required by the CBA to pay the collectively-bargained wage rate (unless it was lower than one of the alternative wage rates). The requirement in this Final Rule that employers pay the collectively bargained wage rate when it is the highest alternative only codifies what the Department understands to be required by the labor contract. Therefore, this provision does not in itself represent an additional burden to employers.

ii. Costs

In standard economic models of labor supply and demand, an increase in the wage rate is an increased production cost to employers, and it will lead to a reduction in the demand for agricultural labor. Because production costs increase with an increase in the wage rate, there is a resulting loss in profits for agricultural employers. In addition, workers who would have been hired at a lower wage rate are not hired at the higher wage rate, resulting in forgone earnings for workers. The loss in profits for agricultural employers and the

forgone earnings combine to form what is known as “deadweight loss” because it is lost to society. In order to estimate this lost benefit, we would need to calculate the estimated reduction in employment, assuming an elastic labor demand. The elasticity of labor demand measures the extent to which employers respond to an increase in wages by lowering employment. Using standard estimates of the elasticity of labor demand, the deadweight loss is not projected to be large.²⁰

b. Coverage of Visa/Border Crossing Expenses

Under this Final Rule, the employer must pay the visa and border crossing fees of the H-2A workers they employ. As the Department recognized in the preamble to the 2008 Final Rule, requiring employers to bear the full cost of their decision to import foreign workers is a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers. Government-mandated fees such as visa application, border crossing, and visa fees are integral to the employer's choice to use the H-2A program to bring temporary foreign workers in the country.

Transfers

The reimbursement of visa application and border crossing fees by employers is a transfer from employers to H-2A workers. Each H-2A worker must pay a visa application fee of \$131.00 and a reciprocity fee based on their country of origin. To be conservative in its estimate of costs to U.S. employers, the Department used the maximum reciprocity fee of \$100,000 to obtain a total cost per H-2A worker of \$231.00 (\$131.00 + \$100.00).

c. Enhanced U.S. Worker Referral Period

Although the recruitment requirements of employers will not change substantively, this Final Rule increases the amount of time that employers must accept referrals for temporary agricultural opportunities from qualified U.S. workers. Specifically, this Final Rule requires that SWAs extend their job advertising efforts on behalf of employers so as to keep the job order on active status through 50 percent of the period of employment, as opposed to 30 calendar days after the date of need under the current regulation.

²⁰ Many commenters on the NPRM mentioned the effect of the proposed rule on food prices. The effect on food prices is incorporated in this calculation through the demand curve which fully summarizes the employer's optimization problem—including prices in the product market.

i. Costs

The extension of the referral period in this Final Rule will result in increased SWA staff time required to maintain job orders for the new U.S. worker referrals. SWAs will need to maintain additional job orders for the new applicants to the H-2A program in the States in which temporary workers are expected to perform work and for all applicants to the H-2A program in the States designated as States of traditional or expected labor supply. The Department estimates the average annual cost associated with this activity to be \$0.4 million.²¹

The Department recognizes that the requirement that employers accept referrals for a longer time will likely lead to additional referrals and, therefore, additional costs to employers. However, the Department does not have sufficient data on the number of average additional referrals (and the ensuing additional cost in terms of contractual obligations to a greater number of workers) to accurately monetize such a cost to employers.

The expansion of DOL oversight of the H-2A program will result in increased time dedicated by the Department to review applications. We estimate this cost by multiplying the total number of new applications by the time required for Department staff to review each application, and then by the average hourly compensation of this staff. The Department estimates the average annual cost associated with this activity to be \$0.5 million.²²

²¹ Between July 1, 2007 and June 30, 2008, there were 70,722 U.S. migrant seasonal farm worker referrals, or 194 (70,722/365) referrals per day. The Department scales up this value by the growth of the total number of H-2A applications across the analysis period to estimate the number of referrals per day in each year. The Department multiplies the number of referrals per day (194) by the extension of the recruitment period (86 days) to obtain a total of 16,566 (194 × 86) extra referrals in 2009. We assume that a State employee with a job title of “Compensation, Benefits, and Job Analysis Specialists” conducts this activity. The median hourly wage for this occupation is \$21.69, which we scaled up by a factor of 1.52 to account for employee benefits (source: Bureau of Labor Statistics), resulting in a total hourly labor cost of \$32.97 (\$21.69 × 1.52). The Department then multiplies the total number of extra referrals by the SWA staff time to place a job order, and the hourly compensation of an SWA staff member. The Department assumes that it takes SWA staff 30 additional minutes (0.5 hours) per application to maintain a job order. These assumptions result in a total cost of \$273,087 (16,566 × 0.5 × \$32.97) in 2009. The Department then repeats this calculation for each year of the analysis period and then averages the costs to obtain an average annual cost of \$351,096.

²² The Department assumes that Department staff (GS-12, step 5) spend one additional hour to review each application. The hourly salary for a GS-12, step 5 staff (\$31.34) was multiplied by an index of 1.69 to account for Federal government employee

ii. Transfers

As more U.S. workers are hired as a result of this Final Rule, those workers who were previously unemployed will no longer make claims for new or continued unemployment insurance benefits.²³ Other things constant, we expect the States to experience a reduction in unemployment insurance expenditures as a consequence of U.S. workers being hired. However, the Department is not able to quantify these transfer payments due to a lack of adequate data.

d. New Electronic Job Registry

Under this Final Rule, the Department will create and maintain an electronic job registry. The Department will post and maintain employers' H-2A job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The job registry will serve as a public repository of H-2A job orders for the duration of the enhanced U.S. worker referral period: 50 percent of the certified period of employment. The job orders will be posted in the registry by a CO upon the acceptance of each submission. The posting of the job orders will not require any additional effort on the part of the SWAs or H-2A employers.

i. Benefits

The job registry will improve the visibility of agricultural jobs to U.S. workers. Thus, the job registry represents a benefit to society by expanding the period during which agricultural jobs are available to U.S. workers and, therefore, improving their employment opportunities. In addition, the establishment of a job registry will provide greater transparency with respect to the Department's administration of the H-2A program to the public, members of Congress, and other stakeholders. Transferring these agricultural job orders (Form ETA-790 and attachments) into electronic records for the job registry will eliminate

benefits and proportional operating costs, resulting in an hourly rate of \$52.96. The 1.69 index is derived by using the Bureau of Labor Statistics' index for salary and benefits plus the Department's analysis of overhead costs averaged over all employees of the Department's OFLC. The Department multiplies this hourly labor cost by the cumulative number of new applications received in 2009 (2,717) to obtain a total cost of \$143,887 (\$52.96 × 1 × 2,717) in 2009. The Department repeats this calculation in each year of the analysis, using the number of new applications projected to be received in each year, and averages the results to obtain an average annual cost of \$469,737.

²³ Similarly, when U.S. workers shift from other industries to fill agricultural jobs, additional workers from the pool of the unemployed will inevitably fill the vacant positions.

unnecessary paper records currently maintained by the CO and result in a better and more complete record of H-2A labor certification petitions. Finally, because Form ETA-790 and attachments are among the documents most commonly requested by members of the public, Congress, and other stakeholders, the Department anticipates some reduction in FOIA requests for these agricultural job orders, thereby saving staff time and resources.

ii. Costs

The establishment of an electronic job registry in this Final Rule imposes several costs directly on the Department: The increased costs for developing business requirements and design documentation outlining the functional components of the job registry; increased costs for application programming, testing, and implementation of the electronic job registry into a production environment; increased costs to maintain and continuously improve the electronic job registry; and additional staff time to maintain job orders placed on the registry. The Department expects that the majority of costs to develop and implement the new electronic job registry will occur within the first 12 months of implementing the regulation. Out-year costs will include maintenance and additional staff time to maintain job orders on the registry. The Department estimates average annual costs of maintaining an electronic job registry to be approximately \$0.5 million.²⁴

²⁴ The Department assumes first-year development, testing, and implementation staff time and labor categories as follows: Project Manager II, 1,253 hours; Computer Systems Analyst II, 1,253 hours; Computer Systems Analyst III, 2,037 hours; Computer Programmer III, 3,995 hours; Computer Programmer IV, 3,995 hours. For out-year maintenance costs, the Department assumes that 376 hours will be required for the following labor categories: Program Manager, Computer Systems Analyst II & III, Computer Programmer III & IV, Computer Programmer Manager, Data Architect, Web Designer, Database Analyst, Technical Writer II, Help Desk Support Analyst, and Production Support Manager. Finally, the Department uses the following loaded rates based on an Independent Government Cost Estimate (ICGE) produced by OFLC and inclusive of direct labor and overhead costs for each labor category: Program Manager, \$138.34; Project Manager II, \$106.90; Computer Systems Analyst II, \$92.14; Computer Systems Analyst III, \$109.84; Computer Programmer III, \$89.63; Computer Programmer IV, \$107.72; Computer Programmer Manager, \$123.88; Data Architect, \$104.99; Web Designer, \$124.76; Database Analyst, \$77.80; Technical Writer II, \$84.81; Help Desk Support Analyst, \$55.28; Production Support Manager—\$125.76. The Department multiplies the assumed number of hours by the appropriate labor rates to obtain a first-year cost of \$1,261,554 and a cost in subsequent years of \$464,341. The Department averages the costs over the 10-year analysis period to obtain an average annual cost of \$544,063.

e. Reduced SWA Administrative Burden By Eliminating Employment Verification

Under this Final Rule, SWAs will no longer be responsible for conducting employment eligibility verification activities. These activities include the completion of the Form I-9 and the vetting of application documents by SWA personnel. However, there will be additional costs to employers as they resume the function of their own employment eligibility verification.

i. Benefits

Under the 2008 Final Rule, SWAs are required to complete Form I-9 for agricultural job orders and inspect and verify the employment eligibility documents furnished by the applicants.²⁵ Under this Final Rule, SWAs will no longer be required to complete this process, resulting in cost savings. To estimate the avoided costs of employment eligibility verification activities, the Department multiplies the estimated number of U.S. farm workers that are referred to H-2A jobs through One-Stop Career Centers by the cost per application.²⁶ The Department estimates average annual avoided costs of employment eligibility verification activities to be \$ 0.03 million.

Under the 2008 Final Rule, after the adjudication of employment eligibility, SWAs issue certifications for eligible workers. Under this Final Rule, SWAs will no longer be required to issue such certifications. The avoided costs include the value of staff time to prepare and print the certification form, as well as

²⁵ The cost estimate assumes the use of the Form I-9 rather than the E-Verify system. The most recent cost indicates that relatively few SWAs are using E-Verify.

²⁶ To estimate the cost per application, the Department sums the time for the SWA staff to complete the Form I-9, the time required to review employment eligibility documents, and the time to file the completed form in a systematic manner, to obtain a total of 13 minutes of labor per application. The Department then divides this result by 60 to approximate the fraction of an hour (0.22) required to process each application. The Department assumes this work would be done by a SWA Compensation, Benefits, and Job Analysis Specialist at an hourly rate of \$32.97 (\$21.69 multiplied by 1.52 to account for employee benefits). For 2009, the Department then takes the total number of U.S. migrant seasonal farm worker (MSFW) referrals between July 1, 2007 and June 30, 2008 (70,722) and multiplies this total by the percentage of MSFWs that did not refer themselves (10 percent) and by the percentage of MSFW referrals that were H-2A jobs (67 percent) to obtain an annual total of 4,715 referrals ($70,722 \times 0.10 \times 0.67$). The Department then multiplies this annual number of referrals by the fraction of an hour required to process each application and by the hourly wage rate to obtain a total avoided cost in 2009 of \$33,679 ($4,715 \times 0.22 \times \32.97). The Department then repeats this calculation for each year of the analysis period and averages the results to obtain an average annual avoided cost of \$33,679.

the costs of paper, envelopes, and postage. The Department estimates annual avoided costs of certification issuance to be \$0.02 million.²⁷

SWAs are also required to retain records for the employment eligibility decisions. Under this Final Rule, SWAs will no longer be required to retain the records. The avoided costs include the value of staff time to copy, organize, and store all relevant documents, as well as the material costs of paper and photocopy machine use. The Department estimates average annual avoided costs equal to approximately \$0.02 million.²⁸

The employment eligibility verification activities currently in place require the training of SWA to properly complete the process. Under this Final Rule, SWAs will no longer incur the costs of this training. These costs include the value of staff time to attend training courses, the staff time to teach training courses, and the material costs of producing training manuals. The Department estimates average annual avoided costs of SWA staff training equal to approximately \$0.4 million.²⁹

²⁷ The Department estimates the cost of staff time by multiplying the number of U.S. farm workers who are referred to H-2A jobs through One-Stop Career Centers (4,715 in 2009, as calculated above) by the time required to print the form (5 minutes or 0.08 hours) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist (\$21.69) scaled by 1.52 to account for employee benefits (\$32.97). This results in total labor costs of \$12,954 ($4,715 \times 0.08 \times \32.97) in 2009. The Department then adds to this cost the materials cost per application assuming that the cost of a sheet of paper, cost of an envelope, and cost of postage per envelope are \$0.02, \$0.04, and \$0.44, respectively. This calculation results in total materials cost of \$2,358 ($4,715 \times (\$0.02 + \$0.04 + \$0.44)$). Summing the labor and materials costs results in a total avoided cost of \$15,311 for 2009. The Department repeats this calculation for each year of the analysis period to obtain an average annual avoided cost of \$15,311.

²⁸ The Department estimates the cost of staff time by multiplying the total number of H-2A workers requested (4,715 in 2009, as calculated above) by the time required to copy, organize, and store all relevant documents (5 minutes or 0.08 hours) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist (\$21.69) scaled by 1.52 to account for employee benefits (for a total hourly labor cost of \$32.97). This results in a total labor cost for 2009 of \$12,954 ($4,715 \times 0.08 \times \32.97). The Department then adds to this labor cost the materials cost per record by multiplying the total number of H-2A workers requested (4,715) by the cost per record, assuming the number of sheets photocopied is 5 and cost per photocopy is \$0.12. This calculation results in total materials cost of \$2,829 ($4,715 \times (5 \times \$0.12)$). Summing the labor and materials costs results in a total avoided cost of \$15,782 for 2009. The Department repeated this calculation for each year of the analysis period to obtain an average annual avoided cost of \$15,782.

²⁹ The Department estimates the avoided costs of attending training courses by multiplying the number of One-Stop Career Centers (1,794) by the number of workers trained per center (2), the length

ii. Costs

Costs associated with retention of documentation and application fees exist as a result of the 2008 Final Rule and, therefore, are not considered in this analysis. The Department acknowledges that employers will experience increased costs related to employment eligibility verification for referred employees who will no longer need to be verified by SWAs under this Final Rule. The cost to employers is, however, not equivalent to the cost representing the benefit to SWAs, as employers are not required to also complete the certification required of SWAs.

f. Enhancing Worker Protections Through Compliance Certification

The 2008 Final Rule used an attestation-based model: Employers conducted the required recruitment in advance of application filing and, based upon the results of that effort, applied for certification from the Department for a number of foreign workers to fill openings. That is, under the 2008 Final Rule, employers attested that they had undertaken the necessary activities and made the required assurances to workers. In contrast, under the 1987 Rule, such actual efforts or documentation were reviewed by a Federal or State official to ensure compliance. The Department has determined that there are insufficient worker protections in the attestation-based model in which employers merely confirm, and do not actually demonstrate, that they have performed an adequate test of the U.S. labor market. As a result, this Final Rule mandates a fully-supervised labor market test and requires the submission of documentation, such as workers' compensation, housing certification

of training (3 hours), and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist (\$32.97 as calculated above). This calculation results in a total avoided cost of training courses of \$354,876 in 2009 ($1,794 \times 2 \times 3 \times \32.97). The Department estimates the avoided costs of trainer workload by multiplying the number of trainers (1 per 5 One-Stop Career Centers, or 359 trainers ($1,794/5$)) by the length of training (3 hours) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist (\$32.97). This calculation results in a total avoided cost of trainer workload of \$35,488 in 2009 ($359 \times 3 \times \32.97). The Department estimates the avoided cost of producing training manuals by multiplying the number of One-Stop Career Centers (1,794) by the number of workers trained per center (2), the pages per training manual (30) and the cost per photocopy (\$0.12). This calculation results in a total avoided cost of producing training manuals of \$12,917 in 2009 ($1,794 \times 2 \times 30 \times \0.12). The Department sums these costs to obtain a total avoided training cost of \$403,281 ($\$354,876 + \$35,488 + \$12,917$) in 2009. The Department repeated this calculation for each year of the analysis period to obtain a total average avoided cost of \$403,281.

issued by the SWA, and proof of registration and surety bond for H-2ALCs.

i. Costs

The certification of compliance will impose some costs on employers because they will need to submit copies of recruitment activities, details of job offers, workers' compensation documentation, and for H-2ALCs, registration, surety bond, and work contracts, rather than attesting that they have complied with the required elements of the H-2A program. Employers are already required by the 2008 Final Rule to obtain and retain these documents, and this Final Rule simply requires the submission of those documents, particularly workers' compensation and housing inspections, to the Department in order to satisfy the underlying statutory assurances. The Department estimates the cost of this requirement by multiplying the total number of applications by the difference in time to prepare the new H-2A application as compared to that under the 2008 Final Rule. We then multiply this product by the average compensation of a human resources manager at an agricultural business. Because the H-2A application in this Final Rule requires more to be submitted than the application under the 2008 Final Rule, we add the incremental costs of photocopying the additional pages and the postage required to ship them to DOL.³⁰ This calculation yields an average annual cost to employers of \$0.6 million.³¹

³⁰ The Department received 8,150 applications in 2009 and projects the annual number of applications to increase to 22,601 by 2018. To estimate the materials cost, the Department estimates that 150 additional pages will need to be photocopied at a cost of \$0.12 per photocopy. These assumptions result in a cost of \$146,700 in 2009 ($8,150 \times 150 \times \0.12) for photocopying. The additional pages weigh approximately 17.6 ounces and require \$0.80 in postage per application. This cost estimate is based on mailing the additional 150 pages via Priority Mail (2-day delivery) from Topeka, Kansas to the NPC in Chicago (source: <http://postcalc.usps.gov>). These assumptions result in a cost of \$6,520 ($8,150 \times \0.80) for mailing applications in 2009. Summing the photocopying and mailing costs results in a total materials cost of \$153,220 in 2009.

³¹ The Department received 8,150 applications in 2009 and projects the annual number of applications to increase to 22,601 by 2018, of which approximately 2,717 and 2,421 of the applications submitted in 2009 and 2018, respectively, would not have been previously submitted. The Department estimates that this work would be performed by a human resources manager at an agricultural firm at an hourly rate of \$42.15 (as published by the Department's OES Survey, O*Net Online), which we multiplied by 1.43 to account for employee benefits (source: BLS) to obtain a total hourly wage rate of \$60.27. For applications that would not have been previously submitted, the Department assumes that preparing an application

ii. Transfers

The Department maintains its requirement that an H-2ALC post a surety bond to demonstrate its ability to meet its financial obligations to its employees.³² In addition to the bond amounts specified in the 2008 Final Rule, the Department is adding larger bonding requirements applicable to H-2ALCs with larger crews. Under the 2008 Final Rule, H-2ALCs seeking to employ 50 or more workers are required to obtain a surety bond of \$20,000. Under this Final Rule, H-2ALCs seeking to employ 75 to 99 workers will be required to obtain a surety bond in the amount of \$50,000, and H-2ALCs seeking to employ 100 or more workers are required to obtain a surety bond in the amount of \$75,000. The Department estimates average annual transfers due to increased surety bond requirements to be approximately \$0.03 million.³³

using the certification application process, as compared to the attestation process, will result in increased agricultural employer staff time of 30 minutes (0.5 hours) per application. These assumptions result in a total labor cost of \$81,873 in 2009 ($2,717 \times 0.05 \times \60.27) for applications that would not have been previously submitted. For applications that would have been previously submitted under the H-2A program, the Department assumes there will be a 20-minute (0.33 hours) increase in staff time using the certification application process. The Department determined the number of applications that would have been previously submitted (5,433) by subtracting the number of new applications that would not have been previously submitted (2,717) from the total number of applications received in 2009 (8,150). These assumptions result in a total labor cost of \$109,164 in 2009 ($5,433 \times 0.33 \times \60.27) for applications that would not have been previously submitted. Summing the labor and materials costs for 2009 results in a total cost of \$344,257 ($\$81,873 + \$109,164 + \$153,220$). Using the projected number of applications, the Department repeats this calculation for each year of the analysis period to obtain an average annual cost of \$573,481.

³² Some States (e.g., California) already have existing surety bond requirements for FLCs.

³³ The Department assumes that 4 percent and 2 percent of H-2ALCs hire 75-99 workers and 100 or more workers, respectively. The Department also assumes that the surety bond premium is approximately 1.5 percent of the total bond amount. To calculate the increased cost to H-2ALCs that hire 75-99 workers, the Department multiplies the number of FLCs participating in the H-2A program (594) by the percent of H-2ALCs that hire 75-99 workers (4 percent), the increase in bond size required (\$30,000), and the bond premium as a percent of the total bond value (1.5) to obtain a total of \$10,699 in 2009. To calculate the increased cost to H-2ALCs that hire 100 or more workers, the Department multiplies the number of FLCs participating in the H-2A program (594) by the percent of H-2ALCs that hire 100 or more workers (2 percent), the increase in bond size required (\$55,000), and the bond premium as a percent of the total bond value (1.5 percent) to obtain a total of \$9,807 in 2009. The Department then sums these two values to obtain a total value of the transfer of \$20,506 ($\$10,699 + \$9,807$) in 2009. The Department repeats this calculation for each year of the analysis to obtain an average value of the transfer of \$26,338.

g. Contract Revisions and the Disclosure of Terms and Conditions

This Final Rule requires that employers disclose the terms and conditions of the employment no later than the time an H-2A worker applies for a visa in the foreign country rather than by the first day of employment. This modification to the 2008 Final Rule requires that employers mail the terms and conditions document to workers instead of delivering the document to workers by hand once they arrive at the work site. The Department estimates average annual costs of mailing terms and conditions disclosures to be approximately \$0.2 million.³⁴

This Final Rule requires employers to provide a copy of a revised contract to affected workers when the employer applies for an extension of the H-2A certification. This occurs in situations in which employers are required to adjust their labor schedules due to unforeseen events, such as bad weather. The Department estimates average annual costs of contract revisions to be approximately \$0.02 million.³⁵

h. Changes in the Requirement for Housing Inspections

This Final Rule retains most of the 2008 Final Rule provisions governing housing inspections. The employer's obligations with respect to housing standards, rental or public accommodations, open range housing, deposit charges, charges for public

housing, and family housing under the regulations remain the same as under the 2008 Final Rule. One notable difference, however, is the timeframe in which an inspection of the employer's housing must occur.

In this Final Rule, when an employer places a Form ETA-790 with the SWA serving the area of intended employment 60 to 75 days before the date of need, the employer is required to disclose the location and type of housing to be provided to domestic and H-2A workers. Upon receipt of the Form ETA-790, the SWA will schedule and conduct an inspection of the employer's housing. Unlike the 2008 Final Rule, this Final Rule requires that the pre-occupancy inspection of the employer's housing be completed prior to the issuance of a temporary labor certification, which is 30 days before the date of need.³⁶

The Department expects that this change in timing will have a minimal economic impact on employers. Because employers are required to place the job order with the SWA between 60 and 75 days prior to the date of need, the SWA will have between 30 and 55 days to schedule and conduct a timely inspection of the housing. The Department believes that this enhanced recruitment timeframe will also provide a sufficient amount of time for SWAs to conduct the required pre-occupancy housing inspection. Prior to the 2008 Final Rule, the Department's experience is that most employers who routinely use the H-2A program prepare their housing in advance of inspection and/or communicate with SWA staff with respect to changes in the location(s) or type(s) of housing before application filing occurred at 45 days prior to the date of need. This past practice was necessary, particularly among large grower associations, to allow SWAs to schedule and conduct pre-occupancy housing inspections in a timely manner and to minimize disruptions to the process of obtaining labor certification, petitioning for workers at USCIS, obtaining visas through the U.S. consulate, and bringing foreign workers to the worksite by the certified date of need.

The Department examined program activity data for FY 2007 and FY 2008 to determine if this Final Rule's

requirement of completion of a pre-occupancy housing inspection prior to temporary certification would have a significant negative impact on employers. For employer applications certified in FY 2007 and FY 2008, the Department issued determinations an average of 27 calendar days before the employer's certified start date of need; the median in both years was 29 calendar days before the employer's certified start date of need. This processing timeframe provided employers with sufficient time to petition USCIS and obtain visas from the U.S. consulate in order to bring foreign workers from their place of residence to the worksite by the certified start date of need. Any downstream delays in processing at either USCIS or the U.S. consulate, such as scheduling and conducting interviews for foreign workers, cannot be attributed to the Department's processing of the temporary labor certification.

The Department also examined the percentage of H-2A labor certifications that were issued during FY 2007 and FY 2008 beyond the statutory 30 days timeframe such that the issuance of the determination would have negatively affected the employer's ability to obtain foreign workers by the certified start date of need. To do this, the Department assumed that, following issuance of the temporary labor certification, generally employers would receive the labor certification within 2 days, file an I-129 petition for non-premium processing and receive approval from USCIS within 5 business days, file appropriate applications with DOS and obtain visas within 5 days, and transport foreign workers to the worksite in the U.S. over the course of 3 days. Using these assumptions, the Department determined that any labor certification issued later than 15 business days before the employer's certified start date of need would have negatively impacted the employer's ability to obtain foreign workers.

For FY 2007, of the H-2A labor certification applications approved between October 1, 2006 and September 30, 2007 (273 out of 4,526 certifications) for employers and associations of employer producers, approximately 6 percent were issued by the Department less than 15 days before the certified start date of need, thus having a potential adverse impact. For FY 2008, of the H-2A labor certification applications approved between October 1, 2007 and September 30, 2008 (271 out of 5,014 certifications) for employers and associations of employer producers, approximately 5.4 percent were issued

³⁴ The Department assumes that 50 percent of employers use foreign recruiters, which means that terms and conditions for all recruited workers can be sent directly to the recruiter who then disseminates the terms and conditions to workers. To estimate the cost for this population in 2009, the Department divides the total number of H-2A workers certified in 2009 (99,472) by the average number of workers per employer application (12) and then multiplies this value by 50 percent to obtain a total of 4,145 packages sent to recruiters. This value is then multiplied by the cost of shipping a package to Mexico via the U.S. Postal Service (\$9.60) to obtain a total cost of \$39,789 for mailing terms and conditions to foreign recruiters. To estimate this cost for employers that do not use foreign recruiters in 2009, the Department multiplies the total number of H-2A workers certified in 2009 (99,472) by the percent of employers who do not use foreign recruiters (50 percent) and the cost of shipping a mailer to Mexico via the U.S. Postal Service (\$1.59) for a total cost in 2009 of \$79,080. The Department then sums these two costs to obtain a total cost in 2009 of \$118,869 (\$39,789 + \$79,080). The Department then repeats this calculation for each year of the analysis period, using the projected number of H-2A workers certified each year, to obtain an average annual cost of \$172,200.

³⁵ To estimate the cost of photocopying the revised ETA-790 for each worker in 2009, the Department multiplies the total number of H-2A workers certified (99,472), the number of pages in the ETA-790 (1 page), and the cost per photocopy (\$0.12) to obtain a total cost in 2009 of \$11,937. The Department repeats this calculation each year to obtain an average annual cost of \$17,292.

³⁶ The Department notes that such inspection is mandated by other regulations governing the agricultural clearance process. Pursuant to 20 CFR 654.400, SWAs must deny intrastate and interstate recruitment services unless, among other things, a pre-occupancy inspection has been conducted (with conditional access permitted for H-2A employers for a limited time period). These regulations govern all migrant seasonal worker housing inspections.

by the Department less than 15 days before the certified start date of need. Some proportion of these resulted from delays in the housing inspection, but the Department cannot identify how many were delayed for this reason alone apart from those delayed for other reasons (for example, a failure of the employer to provide the Department with evidence of the coverage of workers by workers' compensation). The Department's program experience has demonstrated that the new requirement for a pre-occupancy housing inspection prior to temporary labor certification has not and will not have a significant impact on employers' ability to obtain foreign workers by the certified start date of need.

Because of data limitations, we were not able to monetize the costs and benefits associated with this provision. The Department believes such costs will be minimal.

i. Enhanced Coverage of Transportation Expenses

Under the 2008 Final Rule, the employer provides for travel expenses and subsistence for foreign workers only to and from the place of recruitment, defined as the appropriate U.S. consulate or port of entry. Under this Final Rule, the Department no longer limits the definition of the place of recruitment to the appropriate U.S. consulate or port of entry but rather reverts to the standard in place under the 1987 Rule. The employer is required to pay the costs of transportation from the worker's place of recruitment to and from the place of employment. The Department estimates average annual costs of these additional transportation expenditures to be approximately \$9.1 million.³⁷

j. Other

During the first year that this Final Rule would be in effect, all employers would need to learn about the new application process and how compliance will be judged. We estimate the cost of this process by multiplying the number of applications submitted by employers by the time required to read

³⁷ The Department estimates the cost of this requirement in 2009 by multiplying the total number of H-2A workers certified in 2009 (99,472) by the cost of bus fare from the worker's place of recruitment to the consulate and back. The Department multiplies by two the one-way cost of bus fare of \$31.50 (based on the cost of a bus trip from Oaxaca to Mexico City, source: <http://www.ticketbus.com.mx>). These assumptions result in a total cost for this requirement in 2009 of \$6,266,736 (99,472 × \$31.50 × 2). The Department repeats this calculation, using the projected number of H-2A workers, for each year of the analysis period to obtain an average annual cost of \$9,078,346 for this requirement.

the new Final Rule and any educational and outreach materials that explain the H-2A application process under this Final Rule by the average compensation of a human resources manager at an agricultural business. The Department estimates this one-time cost to employers at \$1.0 million.³⁸

This Final Rule requires that contracts be translated into the languages of employees who do not speak English. Employers are already required to provide contract translation for Spanish-speaking workers. The Department multiplies the percent of H-2A workers who do not speak English or Spanish by the total number of H-2A applications to estimate the number of contract translations required.³⁹ The Department then multiplies the resulting value by the average number of pages per contract and the cost per page for translation.⁴⁰ The Department estimates average annual costs of contract translation at \$0.08 million.

This Final Rule also requires that H-2ALCs submit photocopies of contracts with fixed agricultural sites as well as the original surety bonds. To estimate the number of H-2ALCs that will be subject to this requirement, the Department multiplies the total number of H-2A applications by the percent of H-2A employers who are foreign labor contractors. To estimate the cost of submitting photocopies of contracts, the Department multiplies the resulting value by the average number of pages per employer contract and the cost per photocopy, resulting in average annual costs of contract submission of \$0.006

³⁸ The Department estimates that employers will spend 2 hours to read the new rule and outreach and educational materials explaining the program. The Department assumes that this labor will be performed by a human resources manager at an agricultural firm at an hourly wage rate of \$60.27, as calculated above. The Department multiplies this hourly wage rate by 2 and by the total number of H-2A applications received in 2009 (8,150) to obtain a total cost for this requirement of \$982,474 in 2009.

³⁹ Approximately 0.6 percent of H-2A workers do not speak English or Spanish (source: <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table32d.xls>). The Department multiplies this percentage by the total number of H-2A applications certified in 2009 (7,665) to obtain a total of 47 contracts needing to be translated in 2009.

⁴⁰ The Department assumes that the average number of pages per contract is 50, and the cost per page for translation is \$19.50 (source: <http://www.languagescape.com>). The Department multiplies the number of contracts needing to be translated in 2009 (47) by the average number of pages per contract (50) and the cost per page for translation to obtain a total cost of \$45,720 in 2009. The Department repeats this calculation for each year of the analysis period using the projected number of H-2A applications certified to obtain an average annual cost of \$80,233 for this requirement.

million.⁴¹ To estimate the cost of providing the surety bond, the Department multiplies the number of H-2ALCs that will be subject to this requirement by the average number of pages per surety bond and the cost per photocopy, resulting in average annual costs of surety bond documentation of \$0.001 million.⁴²

To inform the public about this Final Rule, the Department will produce and deliver outreach and education materials to employers in order to explain the new application process and how compliance will be judged. We estimate this cost by multiplying the hours required to develop, maintain, and distribute such materials by the average compensation of Department staff and find average annual cost to the Department equal to \$0.1 million.⁴³

Several commenters noted that H-2A employers would incur additional costs associated with off-site interviews and

⁴¹ The Department estimates that approximately 7 percent of H-2A employers are foreign labor contractors. The Department multiplies this percentage by the total number of H-2A applications requested in 2009 (8,150) by the average number of pages in a contract (50) and the cost per page for photocopying (\$0.12) to obtain a total cost in 2009 of \$3,566. The Department repeated this calculation for each year using the projected number of H-2A applications requested to obtain an average annual cost of \$6,258 for this requirement.

⁴² The Department estimates that the average number of pages per surety bond is 5, and the cost per photocopy is \$0.12. Using these assumptions and the same assumptions as above for the number of applications results in a total cost for this requirement of \$357 (0.07 × 8,150 × 5 × \$0.12) in 2009. The Department repeats this calculation for each year using the projected number of H-2A applications requested to obtain an average annual cost of \$626 for this requirement.

⁴³ The Department estimates that Department staff (GS-12 step 5) will spend 160 hours during the first year of the program to develop educational and outreach materials. For every subsequent year, the Department estimates that staff will spend 40 hours to review and update educational materials, as appropriate. The hourly salary for Department staff (\$31.34) was multiplied by an index of 1.69 to account for employee benefits and proportional operating costs, resulting in an hourly rate of \$52.96 for a GS-12, step 5. These assumptions result in a total labor cost of \$8,474 (\$52.96 × 160) for 2009 and \$2,119 (\$52.96 × 40) in subsequent years. To estimate the materials cost of this requirement in 2009, the Department used the total number of H-2A applications requested in 2009 (8,150) and multiplied it by the assumed percentage of applicants that are small farms (98 percent) to obtain a total of 7,987 compliance guides needed. The Department then determines the cost for photocopying by multiplying the average page length of a compliance guide (100 pages) by the cost of \$0.12 per page. The Department then includes the cost of a clasp for a heavyweight envelope (\$0.12) and a cost of \$4.95 per compliance guide for postage. Multiplying these costs together results in a total materials cost of \$56,468 for this requirement in 2009. Summing the labor and materials costs together results in a total cost of \$64,942 (\$8,747 + \$56,468) for this requirement in 2009. The Department repeats this calculation for each year to obtain an average annual cost of \$101,849.

courier (overnight mail) services. The use of private off-site interview space and courier services is not required by this Final Rule. Therefore, any costs associated with such activities are not considered in this analysis.

5. Summary of Cost-Benefit Analysis

Exhibit 1 presents a summary of the cost-benefit analysis of this Final Rule. The monetized costs and benefits displayed are the yearly summations of the calculations described above. In some cases, the totals for 1 year are less than the totals of the annual averages described above. For example, the annual average cost of enhanced transportation expenses—the largest cost component of this Final Rule—is \$9.1 million across the 10-year time horizon, but the individual yearly values range from \$6.3 million in 2009 to \$12.5 million in 2018. This increase in yearly costs is due to the changes in program participation across the time horizon of the cost-benefit analysis. The monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate. The size of the net benefits, the absolute difference between the projected benefits and costs, is negative.

EXHIBIT 1—SUMMARY OF MONETIZED BENEFITS AND COSTS

Year	Monetized benefits (\$millions/year)	Monetized costs (\$millions/year)
1. 2009	0.47	9.52
2. 2010	0.47	8.34
3. 2011	0.47	9.03
4. 2012	0.47	9.77
5. 2013	0.47	10.58
6. 2014	0.47	11.46
7. 2015	0.47	12.41
8. 2016	0.47	13.45
9. 2017	0.47	14.58
10. 2018	0.47	15.80
Undiscounted total	4.68	114.93
Total with 7 Percent discounting	3.29	77.70
Total with 3 Percent discounting	3.99	96.41

Totals may not add because of rounding.

Due to lack of adequate data, the Department is not able to provide monetary estimates of several important benefits to society, including the increased employment opportunities for U.S. workers and the enhancement of worker protections for U.S. and H-2A workers.

The Department has concluded that after consideration of both the quantitative and qualitative impacts of this Final Rule, the societal benefits of the rule justify the societal costs.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce a compliance guidance for small entities if the rule has a significant economic impact. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), under the RFA at 5 U.S.C. 605(b), and certified that this rule will not have a significant economic impact on a substantial number of small entities.

1. Definition of a Small Business

A small entity is one that is independently owned and operated and which is not dominant in its field of operation. The definition of small business varies from industry to industry to the extent necessary to properly reflect industry size differences. An agency must either use the SBA definition for a small entity, or, establish an alternative definition for the agricultural industry. The Department has adopted the SBA definition, which is an establishment with annual revenues of less than \$0.75 million.

2. Impact on Small Businesses

The Department has estimated the incremental costs for small businesses from the 2008 Final Rule (the baseline) to this rule. We have estimated the costs of the increased wages paid to H-2A workers, reading and reviewing the new application and compliance processes, the enhanced coverage of transportation expenses, coverage of visa and border crossing expenses, the enhanced worker protections through compliance certification, the changes in the requirement for housing inspections, the enhanced U.S. worker referral period, the changes in the requirements for contract revisions, and the disclosure of terms and conditions. This analysis includes the incremental cost of this

rule as it adds to the requirements in the 2008 Final Rule. This analysis does not include the baseline costs of the 2008 Final Rule, such as the associated application fees and costs for record keeping, because none of these requirements have changed from the 2008 Final Rule.

Approximately 98 percent of U.S. farms have revenues of less than \$0.75 million and, therefore, fall within the SBA's definition of small entity. The Department estimates that by 2018 there will be approximately 22,601 applications (not necessarily applicants) to the H-2A program. Even if all 22,601 applications are filed by unique small farms, the percentage of small farms applying for temporary agricultural worker certification will be only 1.2 percent of the total number of small U.S. farms.⁴⁴ Because the rule will impact less than 10 percent of the total number of small U.S. farms, the rule will not have an impact on a substantial number of small entities as described by the RFA.

To examine the impact of this rule on small entities, the Department evaluates the impact of the incremental costs on the average small entity, which is assumed to apply for 12 temporary workers. The Department estimates that these farms have annual revenues of about \$367,000.⁴⁵

a. Increased Wages Paid to H-2A Workers

As discussed earlier, the use of the USDA survey for the determination of wages as opposed to the BLS OES Wage Survey, which was used in the 2008 Final Rule, results in an increase of \$1.02 in hourly wages paid to H-2A workers. The Department multiplies this hourly wage increase by 8 hours to obtain a daily cost of the increase in wages of \$8.16 (\$1.02 × 8). The

⁴⁴ Based on the number of farms in 2007 and assuming that the number of farms will decline at the same average annual rate as it has in the past 10 years, the Department estimates that in 2018 there will be approximately 1,878,971 farms.

⁴⁵ Based on the average duration of temporary agricultural workers' stay, the Department estimates that these workers work, on average, 198 days. As already discussed, temporary agricultural workers will be paid, on average, \$9.36 per hour. Given this hourly rate and 1,584 working hours per year, a small entity hiring 12 temporary workers incurs hired farm labor costs of \$177,915 (\$9.36 × 1,584 × 12). Based on the 2002 Census of Agriculture, hired farm labor costs account, on average, for 41.2 percent of total farm costs while total costs represent, on average, 86.3 percent of total revenues. Applying these rates to the estimated hired labor costs, we estimate that a small farm employing 12 temporary agricultural workers would have total production expenses of \$316,777, revenues of \$366,936, and net farm income (i.e., revenues minus production expenses) of \$50,159 per year.

Department then multiplies this daily labor cost by 198, which is the average number of days worked by H-2A workers. This results in a total cost of \$1,615.68 ($\8.16×198) per H-2A worker per year and an average annual cost of \$1,615.68 over the 10-year analysis period due to the increase in wages. For employers hiring the average number (12) of H-2A workers, this results in a total cost of \$19,388.16 ($\$1,615.68 \times 12$) per year due to the increase in wages, or an average annual cost of \$19,388.16 over the 10-year analysis period.

b. Reading and Reviewing the New Application and Compliance Processes

During the first year that this rule would be in effect, employers would need to learn about the new application process and how compliance will be determined. We estimate this cost by multiplying the time required to read the new rule and any educational and outreach materials that explain the H-2A application process under this rule by the average compensation of a human resources manager at an agricultural business. In the first year of the rule, the Department estimates that the average small farm will spend approximately 2 hours of staff time to read and review the new application and compliance processes, which amounts to approximately \$120.55 ($\60.27×2) in labor costs in the first year and an average annual cost of \$12.06 ($\$120.55/10$) over the 10-year analysis period.⁴⁶

c. Enhanced Coverage of Transportation Expenses

Under the 2008 Final Rule, the employer provides for travel expenses and subsistence for foreign workers only to and from the appropriate U.S. consulate or port of entry. Under this Final Rule, the employer is required to pay the costs of transportation from the worker's place of recruitment to and from the place of employment. The Department estimates that the average small farm would incur costs of \$63.00 ($\31.50×2) per worker per year related to the enhanced coverage of transportation expenses, or an average annual cost of \$63.00 per worker.⁴⁷ For

⁴⁶ The Department estimates that employers will spend 2 hours to read the new rule and outreach and educational materials explaining the program. In addition, the Department estimates that the median hourly wage for a human resources manager is \$42.15 (as published by the Department's OES survey, O*Net Online), which we increased by 1.43 to account for private-sector employee benefits (source: BLS for an hourly wage rate of \$60.27).

⁴⁷ The Department estimates these costs by multiplying the total number of H-2A workers certified by the cost of bus fare from the worker's

employers hiring the average number of workers (12), this requirement results in an average annual cost of \$756.00 ($\63.00×12).

d. Coverage of Visa/Border Crossing Expenses

Under this Final Rule, the employer must pay the visa and border crossing fees of the H-2A workers they employ. Although this cost is a transfer from U.S. employers to H-2A workers, this requirement represents an increase in the cost of U.S. employers. Each H-2A worker must pay a visa application fee of \$131.00 and a reciprocity fee based on their country of origin.⁴⁸ To estimate the cost of the reciprocity fee to employers, the Department researched the reciprocity fee for the five top countries supplying H-2A workers. The reciprocity fees for these countries ranged from \$0 to \$100.00, which is the reciprocity fee for Mexico, the top source of H-2A workers.⁴⁹ To be conservative in its estimate of costs to U.S. employers, the Department used the maximum reciprocity fee of \$100.00 to obtain a total cost per worker of \$231.00 ($\$131.00 + \100.00). For employers hiring the average number of workers (12), this requirement results in an average annual cost of \$2,772.00 ($\231.00×12).

e. Enhancing Worker Protections Through Compliance Certification

The certification of compliance will represent minimal costs to employers because they will need to submit copies of recruitment activities, details of job offers, workers' compensation documentation, and for H-2ALCs, registration, surety bond, and work contracts, rather than attesting that they have complied with the required elements of the H-2A program. Under the 2008 Final Rule, employers are already required to obtain and retain these documents and this rule simply requires the submission of those existing documents, particularly workers' compensation and housing inspections, to the Department in order to satisfy the program's underlying statutory assurances. The Department estimates this cost by multiplying the difference in time to prepare the new H-2A application as compared to that under the 2008 Final Rule for both new H-2A applicants and previous applicants. We then multiply these products by the average compensation

home to the consulate and back. The Department assumes one-way cost of bus fare of \$31.50.

⁴⁸ Source: http://travel.state.gov/visa/temp/types/types_1263.html#temp.

⁴⁹ Source: http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3272.html.

of a human resources manager at an agricultural business (\$60.27 per hour, as calculated above).

For small employers applying to the program for the first time, the Department estimates that the application will take approximately one-half hour (0.5 hours) more to complete. This results in additional labor costs equal to \$30.14 ($\60.27×0.5). For applicants familiar with the process, the Department estimates that the application will require approximately 20 additional minutes (0.33 hours) to complete. The result is additional labor costs of \$20.09 ($\60.27×0.33) for applicants familiar with the program. Because the application will be longer, the Department adds the costs of photocopying additional pages and additional postage required to the labor costs above.⁵⁰ In total, the Department estimates that the average small farm that is a new H-2A applicant would incur an average annual cost of \$48.94 ($\$30.14 + \18.80), and the average small farm that is a previous H-2A applicant would incur an average annual cost of \$38.89 ($\$20.09 + \18.80).

This rule also requires that contracts be translated into the languages of employees who do not speak English. Employers are already required to provide contract translations for employees who speak Spanish. We multiply the percent of H-2A workers who do not speak English or Spanish by the average number of pages per contract and the cost per page for translation.⁵¹ The Department estimates the average small farm would incur average annual costs of contract translation of \$5.96 ($0.6 \text{ percent} \times 50 \times \19.50).

f. Changes in the Requirement for Housing Inspections

This Final Rule retains most of the 2008 Final Rule provisions governing housing inspections. The employer's obligations with respect to housing standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and family housing under this

⁵⁰ The Department estimates that an average of 150 additional pages will need to be photocopied at a cost of \$0.12 per photocopy. The additional pages weigh approximately 17.6 ounces and require \$0.80 in postage per application. These assumptions result in a total materials cost of this requirement of \$18.80 ($(150 \times \$0.12) + 0.80$).

⁵¹ Approximately 0.6 percent of H-2A workers do not speak English or Spanish (source: <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table32d.xls>). The Department assumes that the average number of pages per contract is 50, and the cost per page for translation is \$19.50 (source: <http://www.languagescape.com>).

rule have remained the same as under the 2008 Final Rule.

One notable difference, however, is the timeframe in which an inspection of the employer's housing must occur. Unlike the 2008 Final Rule, this rule requires that the pre-occupancy inspection of the employer's housing be completed prior to the issuance of a temporary labor certification, which is 30 days before the date of need for the workers.

The Department expects that this change in timing will have a minimal economic impact on employers. Prior to the effective date of the 2008 Final Rule, the Department's experience was that the majority of employers who routinely used the H-2A program prepared their housing in advance of inspection and/or communicated with SWA staff with respect to changes in the location(s) or type(s) of housing before application filing occurred at 45 days prior to the date of need. Because of data limitations, we were not able to monetize the costs and benefits associated with this provision.

g. Contract Revisions and the Disclosure of Terms and Conditions

This rule requires that employers disclose the terms and conditions of the employment no later than the time an H-2A worker applies for a visa in the foreign country rather than by the first day of employment. As discussed above, this requires that employers mail the terms and conditions documents to workers instead of delivering the document to workers by hand once they arrive at the work site. To estimate the cost of this requirement to a small entity, the Department uses the cost of shipping a package to Mexico via the United States Postal Service (\$9.60) for entities required to mail packages for the average number (12) of H-2A workers. For the smallest of entities employing only one H-2A worker, the Department assumed the cost of this requirement was equal to the cost of shipping a mailer to Mexico via the United States Postal Service (\$1.59). The average annual cost of this requirement is thus \$9.60 for entities employing the average number of H-2A workers, and \$1.59 for the smallest of entities employing only one H-2A worker.

As discussed previously, this rule requires employers to provide a copy of a revised contract to affected workers when the employer applies for an extension of the H-2A certification. To determine the cost to small entities, the Department multiplied the number of pages in the Form ETA-790 (one page) and the cost per page for photocopying (\$0.12) to obtain a total cost per affected

entity of \$0.12 ($\0.12×1) for Form ETA-790 revision. The average annual cost of this requirement is thus \$1.44 ($\0.12×12) for entities employing the average number (12) of H-2A workers and \$0.12 for the smallest of entities employing only one H-2A worker.

h. Additional Costs for Small Employers Who Are H-2ALCs

Employers who are H-2ALCs will incur additional costs related to the submission of contracts and the provision of the surety bond. For both categories, we estimate the cost by multiplying the additional photocopies required by the cost per photocopy. The Department estimates that the average small H-2ALC will incur average annual costs of \$6.00 for the submission of contract photocopies ($50 \times \$0.12$) and \$0.60 ($5 \times \$0.12$) for the provision of the surety bond.⁵²

i. Other Issues

The Department does not anticipate that the increased SWA activity under this rule will result in significant processing delays, as the Department continues to operate under the statutory mandate to make a determination of whether or not the application meets the threshold requirements for certification within 7 days of filing. The Department's analysis pursuant to E.O. 12866, above, contains an analysis of potential delays for all employers, including small employers, incurred for all reasons, not just for the reason of delays that may happen as a result of increased SWA activity. The conclusion that the Department has drawn from this analysis is that the increased SWA activity, which the Department believes is required by statute, will not result in increased delays to employers.

Several commenters on the proposed rule noted that H-2A employers would incur additional costs associated with off-site interviews and courier services. As discussed above, the use of private off-site interview space and courier services are not required by this Final Rule and, therefore, do not constitute a cost to small entities.

3. Total Cost Burden for Small Entities

The Department's calculations indicate that the total average annual cost of this rule is \$22,994 for the average small entity applying to the program for the first time and \$22,984 for the average small entity that has previous program familiarity.⁵³

⁵² We assume that the average number of pages per contract is 50, the number of pages per surety bond is 5, and the cost per photocopy is \$0.12.

⁵³ For illustration, the total cost of \$22,994 for the average small entity applying to the program for the

For small entities that apply for 1 worker instead of 12 (representing the smallest of the small farms that hire workers), the Department estimates that the total average annual cost of the rule ranges from \$1,968 for those that have previous program familiarity to \$1,978 for small entities new to the program.⁵⁴

For employers that are H-2ALCs, the Department estimates that the total average annual cost of this rule is an additional \$85 for the average small entity applying to the program for the first time and an additional \$75 for the average small entity that has previous program familiarity.⁵⁵

For the smallest H-2ALCs that would apply for only one worker instead of the average of 12 workers, the Department estimates that the total annual average cost of the rule ranges from an additional \$65 for those that have previous program familiarity and an additional \$75 for small entities new to the program.⁵⁶

Due primarily to the increase in wages paid to H-2A workers, the rule is expected to have a significant impact on affected small entities. The affected small entities, however, represent approximately 1.2 percent of all small U.S. farms. Therefore, the Department believes that this Final Rule is expected to have a net direct cost impact on a very limited number of small agricultural employers, above and beyond the baseline of the current costs required by the program as it is currently implemented under the 2008 Final Rule.

4. Alternatives Considered as Options for Small Businesses

While we have concluded that this regulation will not have a significant economic impact on a substantial number of small entities, we have recognized the concerns expressed by small businesses and have made every

first time results from summing the totals for the various rule requirements described above as follows: \$22,998 = \$19,388.16 + \$12.06 + \$756.00 + \$2,772.00 + \$48.94 + \$5.96 + \$9.60 + \$1.44.

⁵⁴ For illustration, the total cost of \$1,968 for small entities with previous program familiarity and employing only one worker results from summing the totals for the various rule requirements described above as follows: \$1,968 = \$1,615.68 + \$12.06 + \$63.00 + \$231.00 + \$38.89 + \$5.96 + \$0.12 + \$1.59.

⁵⁵ For illustration, the total cost of \$85 for the average small H-2ALC applying to the program for the first time results from summing the totals for the various rule requirements described above as follows: \$85 = \$12.06 + \$48.94 + \$5.96 + \$1.44 + \$9.60 + \$6.00 + \$0.60.

⁵⁶ For illustration, the total cost of \$65 for small H-2ALCs with previous program familiarity and employing only one worker results from summing the totals for the various rule requirements described above as follows: \$65 = \$12.06 + \$38.89 + \$5.96 + \$0.12 + \$1.59 + \$6.00 + \$0.60.

effort to minimize the burden on all users. The Department's responsibilities under the INA, however, severely constrain our ability to make any adjustments to program requirements in an effort to address concerns unique to small business. The Department's mandate under the H-2A program is to set requirements for employers who wish to import foreign agricultural workers. Those standards are designed to both ensure that foreign worker are imported only if qualified domestic workers are not available and that the importation of H-2A workers will not adversely effect the wages and working conditions of similarly employed domestic workers. These regulations set those minimum standards. To create different and likely lower standards for one class of employers, *e.g.*, small business, would essentially sanction the very adverse effect that the Department is compelled to prevent. The need for parity among all employers is illuminated by the fact that Congress within the INA carved out a specific dispensation for small businesses in a specific area of the statute. Section 218 (c)(3)(B)(ii) of the INA (8 U.S.C. 1188(c)(3)(B)(ii)) exempts certain small businesses from the application of the 50 percent rule. The suggestion from the small business community that small farmers who file master applications with other small farmers not lose their 50 percent exemption is specifically precluded by Congress at 8 U.S.C. 1188(c)(3)(B)(ii)(II) & (III). Where Congress has so clearly demonstrated its ability to modify H-2A program requirements to accommodate small businesses, it would be inappropriate, and outside of the Secretary's authority, for the Department to carve out additional exceptions.

Commenters asked the Department to waive the surety bond requirement for H-2ALCs without violations for 3-5 years. In the 2008 Final Rule, surety bond amounts were set at \$5,000 for H-2ALCs seeking certification to employ fewer than 25 employees, \$10,000 for those seeking certification to employ 25 to 49 employees, and \$20,000 for H-2ALCs wanting to hire 50 or more employees. However, assuming that an H-2ALC with 50 employees pays approximately the same for a \$20,000 bond as an H-2ALC with 300 employees, the 2008 Final Rule framework disproportionately advantages larger H-2ALCs while providing diminishing levels of protection for the employees of such contractors. Under the proposed rule, the first two bond amount tiers for the smaller H-2ALCs remained unchanged

(\$5,000 for H-2ALCs who apply for certification to employ fewer than 25 employees and \$10,000 for those H-2ALCs who are applying for certification to employ 25 to 49 workers). The NPRM proposed to require H-2ALCs seeking certification to employ from 50 to 74 workers to obtain a bond of \$20,000. In addition, we proposed to require H-2ALCs seeking certification to employ from 75 to 99 workers to obtain a surety bond of \$50,000, and those seeking certification to employ 100 or more workers to obtain a bond of \$75,000. The Department determined to retain the surety bond levels as proposed in the NPRM. Waiver of the bond requirements is not feasible and is inconsistent with the policy objective of the bonding requirement—to reduce the potential for H-2ALCs with insufficient capital to meet program obligations from receiving H-2A certifications. A past pattern of performance with respect to payment of wages does not equal the continuation of future funding to do so, and the point of the bond is to ensure that H-2ALCs can each year meet wage obligations.

Several small business commenters asked the Department to exempt small businesses who apply through a master job order from the multistate recruitment requirement. Commenters from the small business community also recommended that the Final Rule exempt all small businesses from multistate recruitment requirement. After deliberation on the statutory limitations imposed on and operational challenges of such a distinction, the Department has determined that such exemptions are not statutorily permitted and would, moreover, undermine our statutory obligation to ensure access of U.S. workers to the jobs. We were; therefore, unable to include the proposed exemptions.

The Department proposed a return to the small farm exemption from the 50 percent rule, as implemented in the 1987 Rule. The regulation as proposed, and this Final Rule, reflects that statute's exemption for small business applicants. This exemption applies to small farms as defined in the FLSA which are not members of an association or which have not petitioned for foreign workers under a master application. This exemption is not applicable in the case of an association filing a master application because the association can assign any workers referred under the 50 percent rule to member-employers who need additional workers or who can more easily accommodate the referred workers, thus minimizing or eliminating the burden on small farmers. Most of the

commenters further requested that the Department eliminate the provisions limiting the application of the small farm exemption to those small farms as described above. The Department cannot accommodate this request. The exemption and its limitations are statutory, not regulatory. See 8 U.S.C. 1188(c)(3)(B)(ii). In that provision, Congress specifically excluded small employers who are members of associations from the small-employer exemption to the 50 percent rule, on the basis that associations have the ability to apportion referred workers among employers where they may be needed. Therefore, the statute prevents the Department from implementing this alternative.

Relatedly, a small business commenter recommended that the Department expand the small farm exemption from the 50 percent rule to businesses meeting the SBA small business test rather than only those meeting the FLSA definition of small farm. Again, we are prevented by statute from making the requested expansion as the INA specifically uses the FLSA small farm definition and not the SBA small business definition. (8 U.S.C. 1188(c)(3)(B)(ii)).

Several small employers asked us to change the definitions of incidental employment and corresponding employment to exempt small business from their application. Commenters were concerned that the removal of incidental activities from the definition of agricultural labor or services would limit employers' flexibility in assigning tasks to workers not specifically included in the job order. Commenters were apprehensive that this proposed change, coupled with the Department's proposed change in the definition of corresponding employment, could subject employers to penalties, including revocation or debarment, if H-2A workers perform work that is outside the scope of the job order for even a small fraction of their time. In response, we have made changes to the incidental employment definition to address several of the concerns raised during the comment period. As discussed more fully elsewhere in this preamble, the Department does not intend to debar an employer whose H-2A workers perform an insubstantial amount of agricultural work not listed in the Application, and will exercise our enforcement discretion when an employer has worked an H-2A worker outside the scope of activities listed in the job order due to unplanned and uncontrollable events. The regulations concerning revocation and debarment require that the violation be substantial

and a number of factors must be considered in making that determination. The good faith assignment of a worker to work not listed in the Application for a small amount of time would not result in debarment. We are unable to make further amendments, as our statutory obligation is to protect U.S. workers from adverse affect and ensure U.S. workers access to these agricultural jobs, without regard to the size of the employer offering those jobs.

Several commenters from the reforestation industry recommended that the Department not implement the proposal to add reforestation and pine straw activities to the definition of agricultural labor or services, as proposed in the NPRM. Currently, employers engaged in these activities may use the H-2B program. Reforestation, a sub-industry of forestry, is commonly performed by migrant crews who are overseen by labor contractors and share the same characteristics as traditional agricultural crews. The same reasoning was used in proposing to include pine straw activities within the scope of H-2A. A number of employer commenters claimed that the way in which contracts are awarded to reforestation companies would preclude applicants from being able to file H-2A applications in realistic timeframes and would make it difficult to comply with H-2A provisions; they asserted that such contracts are often for short duration, making it particularly difficult to provide documentation that housing, typically hotels or motels, had been secured far in advance. Some of the commenters projected their increased costs and predicted the costs could put them out of business or preclude them from using the program to employ an authorized workforce. The Department considered these comments and concerns of the industry, as discussed in more detail above, and we decided against including reforestation and pine straw activities in the Final Rule.

One small business commenter suggested that the Department exempt small employers with marginal net revenues from the requirement to house or hire local workers. After consideration, the Department determined that we are unable to do so, as our statutory obligation is to protect U.S. workers from adverse affect and ensure U.S. workers access to the jobs, without regard to the size or economics of the employer who is participating in the program.

A few commenters suggested that small businesses in particular would be adversely affected by the remote

interview requirements in the proposed rule. The Department has clarified in the Final Rule that no interviews are required, but that if interviews are to take place that they do so in a manner to ensure that the referred worker is not adversely impacted. The ability to conduct telephone interviews, to meet at a mutual site (such as a One-Stop Career Center, will limit the potential for adverse monetary impact on all businesses, including small businesses.

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. This 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 which is not voluntary. A decision by a private entity to obtain an H-2A worker is purely voluntary and is; therefore, excluded from any reporting requirement under the Act.

SWA activities under the H-2A program are currently funded by the Department through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this Final Rule, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs. The Department did not receive any comments related to this section.

D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department has determined that this rulemaking will not impose a significant impact on a substantial number of small entities under the RFA, therefore, the Department is not required to produce any Compliance Guides for Small Entities as mandated by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801) (SBREFA). The Department does, however, intend to produce compliance guides for all businesses, in order to provide users with more effective participation in the program. The Department has similarly concluded that this Final Rule is not a major rule requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual

effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. The Department did not receive any comments related to this section.

E. Executive Order 13132—Federalism

The Department has reviewed this Final Rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The 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, the Department has determined that this Final Rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement. The Department did not receive any comments related to this section.

F. Executive Order 13175—Indian Tribal Governments

This Final Rule was reviewed under the terms of E.O. 13175 and determined not to have tribal implications. The rule 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. The Department did not receive any comments related to this section.

G. 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 the Department to assess the impact of this 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.

The Department has assessed this Final Rule and determines that it will not have a negative effect on families.

The Department did not receive any comments related to this section.

H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

This 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. The Department did not receive any comments related to this section.

I. Executive Order 12988—Civil Justice

This 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 regulation has been written to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities. The Department did not receive any comments related to this section.

J. Plain Language

The Department drafted this Final Rule in plain language. The Department did not receive any comments related to this section.

K. Executive Order 13211, Energy Supply

This Final Rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy. The Department did not receive any comments related to this section.

L. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, DOL conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l).

The information collected is mandated in this Final Rule at Title 20 CFR 655.122, 655.130, 655.131, 655.132, 655.133, 655.134, 655.135, 655.144, 655.145, 655.150, 655.151, 655.152, 655.153, 655.154, 655.156, 655.157, 655.167, 655.170, 655.171, 655.172, 655.173, 655.180, 655.181, 655.182, 655.185, and Title 29 CFR 501.2, 501.4, and 501.6.

In accordance with the PRA (44 U.S.C. 3501) information collection requirements, which must be implemented as a result of this regulation, a clearance package containing proposed changes to the already approved collection was submitted to OMB on September 4, 2009, along with the proposed rule to reform the H-2A agricultural foreign labor certification program.

The public was given 60 days to comment on this information collection. The Department did not receive any comments specifically related to this section. The Department did receive one general comment simply stating that the paperwork is becoming repetitious and excessive. However, without more specificity, the Department cannot address this commenter's concerns. The forms used to comply with this Final Rule are the same as those required under the 2008 Final Rule, except that Form ETA-9142 was modified slightly to reflect the assurances and obligations of the H-2A employer as required under the non-attestation based system created by the NPRM and this Final Rule. The Department used a chart format to list all of the information collection requirements in the NPRM, which perhaps gave the impression of being excessive. However, the hourly or cost burden on the public actually decreased from the 2008 Final Rule burden because Appendix A.1 was eliminated by this Final Rule. Therefore, the Department made no changes based on this comment to the Information Collection submitted to OMB.

The Department has made changes to this Final Rule after receiving comments to the proposed rule and has made changes to the forms for clarity. However, these changes do not impact the overall annual burden hours for the H-2A program information collection. The total costs associated with the form, as defined by the PRA, is a maximum of \$1,100 per employer for the Form ETA-9142.

The majority of the information collection requirements for the current H-2A program are approved under two OMB control numbers—OMB Control Number 1205-0466 (which includes Form ETA-9142) and OMB Control Number 1205-0134 (which includes

Form ETA-790). This Final Rule implements the use of the new information collection, which OMB first approved on November 21, 2008 under OMB control number 1205-0466. The Expiration Date is November 30, 2011. OMB pre-approved the minor changes the Department proposed to the Form ETA-9142 as part of this rulemaking on November 17, 2009 and extended the expiration date to November 30, 2012. The changes recently approved by OMB to the Form ETA-9142 and Appendix A.2 become effective upon the effective date of this Final Rule. The Form ETA-9142 has a public reporting burden estimated to average 1 hour for Form ETA-9142 and Appendix A.2 per response or application filed. (Appendix A.1 will no longer be used in the H-2A program under this Final Rule.) Under this Final Rule, and the implementation schedule it establishes, employers applying to the H-2A program will continue to use the Form ETA-790 to submit a job order. The information collection for the Form ETA-790 (OMB control number 1205-0134) was recently approved by OMB on November 9, 2009 and it extended permission to use the form until November 30, 2012.

For an additional explanation of how the Department calculated the burden hours and related costs, the PRA packages for these information collections may be obtained from the RegInfo.gov Web site at <http://www.reginfo.gov/public/do/PRAMain> or by contacting the Department at: Office of Policy Development and Research, 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 e-mail at DOL_PRA_PUBLIC@dol.gov.

List of Subjects

20 CFR Part 655

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

29 CFR Part 501

Administrative practice and procedure, Agriculture, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

■ For the reasons stated in the preamble, the Department of Labor amends 20 CFR part 655 and 29 CFR part 501 as follows:

Title 20—Employees' Benefits

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

■ 1. Revise the authority citation for part 655 to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

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

Subparts A and C issued under 8 CFR 214.2(h).

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

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), 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 J and K authority repealed.

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

■ 2. Revise the heading of part 655 to read as set forth above.

■ 3. Revise § 655.1 to read as follows:

§ 655.1 Purpose and scope of subpart A.

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

■ 4. Revise subpart B to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

Sec.

655.100 Scope and purpose of subpart B.

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Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

§ 655.100 Scope and purpose of subpart B.

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) under the authority given in 8 U.S.C. 1188 to acquire information sufficient to make factual determinations of:

(a) Whether there are sufficient able, willing, and qualified United States (U.S.) workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and

(b) Whether the employment of H–2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.

§ 655.101 Authority of the Office of Foreign Labor Certification (OFLC) Administrator.

The Secretary has delegated her authority to make determinations under 8 U.S.C. 1188 to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). The determinations are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members; *e.g.*, a Certifying Officer (CO).

§ 655.102 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements, the OFLC Administrator has the authority to establish, continue, revise, or revoke special procedures for processing certain H–2A applications. Employers must demonstrate upon written application to the OFLC Administrator that special procedures are necessary. These include special procedures currently in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine harvesting crews. Similarly, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the OFLC Administrator has the authority to establish monthly, weekly,

or semi-monthly adverse effect wage rates (AEWR) for those occupations for a statewide or other geographical area. Prior to making determinations under this section, the OFLC Administrator may consult with affected employer and worker representatives. Special Procedures in place on the effective date of this regulation will remain in force until modified by the Administrator.

§ 655.103 Overview of this subpart and definition of terms.

(a) *Overview.* In order to bring nonimmigrant workers to the U.S. to perform agricultural work, an employer must first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. This rule describes a process by which the Department of Labor (Department or DOL) makes such a determination and certifies its determination to the Department of Homeland Security (DHS).

(b) *Definitions.* For the purposes of this subpart:

Administrative Law Judge (ALJ). A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

Adverse effect wage rate (AEWR). The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

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

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

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits,

solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Area of intended employment. The geographic area within normal commuting distance of the place 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. 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. Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

Certifying Officer (CO). The person who makes determination on an *Application for Temporary Employment Certification* filed under the H-2A program. The OFLC Administrator is the national CO. Other COs may be designated by the OFLC Administrator to also make the determinations required under this subpart.

Corresponding employment. The employment of workers who are not H-2A workers by an employer who has an approved H-2A *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

Date of need. The first date the employer requires the services of H-2A workers as indicated in the *Application for Temporary Employment Certification*.

Employee. A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer. 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 employee) with respect to an H-2A 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).

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart, who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation.

H-2A Labor Contractor (H-2ALC). Any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8

U.S.C. 1188, 29 CFR part 501, or this subpart.

H-2A worker. Any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

Job offer. The offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

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

Job Order. The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter- and intra-state job clearance systems based on the employer's *Agricultural and Food Processing Clearance Order* (Form ETA-790), as submitted to the SWA.

Joint employment. 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.

Master application. An *Application for Temporary Employment Certification* filed by an association of agricultural producers as a joint employer with its employer-members. A master application must cover the same occupations or comparable agricultural employment; the same start date of need for all employer-members listed on the *Application for Temporary Employment Certification*; and may cover multiple areas of intended employment within a single State but no more than two contiguous States.

National Processing Center (NPC). The office within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification*.

Office of Foreign Labor Certification (OFLC). OFLC means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

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

Positive recruitment. The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of the OFLC, in recruiting and interviewing individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing practice. A practice engaged in by employers, that:

(1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(2) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H-2A and non-H-2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of labor contractors.

Prevailing wage. Wage established pursuant to 20 CFR 653.501(d)(4).

State Workforce Agency (SWA). State government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Strike. 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. (1) Where an employer has violated 8 U.S.C. 1188, 29 CFR part 501, or these regulations, 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.

Temporary agricultural labor certification. Certification made by the OFLC Administrator with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

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

United States worker (U.S. worker). A worker who is:

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

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) 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)) with respect to the employment in which the worker is engaging.

Wages. All forms of cash remuneration to a worker by an employer in payment for personal services.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 29 CFR part 501, or this subpart. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations

required under 8 U.S.C. 1188, 28 CFR part 501, or this subpart.

(c) *Definition of agricultural labor or services.* For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C.

1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed below.

(1)(i) *Agricultural labor* for the purpose of paragraph (c) of this section means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a

cooperative organization) in the performance of service described in paragraph (c)(1)(iv) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (c)(1)(iv) and (c)(1)(v) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living

tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g) or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

(d) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

Prefiling Procedures

§ 655.120 Offered wage rate.

(a) To comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEW, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.

(b) If the prevailing hourly wage rate or piece rate is adjusted during a work contract, and is higher than the highest of the AEW, the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time the work is performed, the employer must pay that higher prevailing wage or piece rate, upon notice to the employer by the Department.

(c) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the AEWs for each State as a notice in the **Federal Register**.

§ 655.121 Job orders.

(a) *Area of intended employment.*

(1) Prior to filing an *Application for Temporary Employment Certification*, the employer must submit a job order, Form ETA-790, to the SWA serving the area of intended employment for intrastate clearance, identifying it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H-2A workers. The employer must submit this job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites.

(2) Where the job order is being placed in connection with a future master application to be filed by an association of agricultural employers as a joint employer, the association may submit a single job order to be placed in the name of the association on behalf of all employers that will be duly named on the *Application for Temporary Employment Certification*.

(3) The job order submitted to the SWA must satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F and the requirements set forth in § 655.122.

(b) *SWA review.*

(1) The SWA will review the contents of the job order for compliance with the requirements specified in 20 CFR part 653, subpart F and this subpart, and will work with the employer to address any noted deficiencies. The SWA must notify the employer in writing of any deficiencies in its job order no later than 7 calendar days after it has been submitted. The SWA notification will direct the employer to respond to the noted deficiencies. The employer must respond to the deficiencies noted by the SWA within 5 calendar days after receipt of the SWA notification. The SWA must respond to the employer's response within 3 calendar days.

(2) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer may file an *Application for Temporary Employment Certification* pursuant to the emergency filing procedures contained in § 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted above. If upon review of the *Application for Temporary Employment Certification* and the job

order and all other relevant information, the CO concludes that the job order is acceptable, the CO will direct the SWA to place the job order into intrastate and interstate clearance and otherwise process the Application in accordance with the procedures contained in § 655.134(c). If the CO determines the job order is not acceptable, the CO will issue a Notice of Deficiency to the employer under § 655.143 of this subpart directing the employer to modify the job order pursuant to paragraph (e) of this section. The Notice of Deficiency will offer the employer the right to appeal.

(c) *Intrastate clearance.* Upon its clearance of the job order, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers. Where the employer's job order references an area of intended employment which falls within the jurisdiction of more than one SWA, the originating SWA will also forward a copy of the approved job order to the other SWAs serving the area of intended employment.

(d) *Duration of job order posting.* The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an *Application for Temporary Employment Certification* is made) for the job opportunity.

(e) *Modifications to the job order.*

(1) Prior to the issuance of the final determination, the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. Such modifications must be made or certification will be denied pursuant to § 655.164 of this subpart.

(2) The employer may request a modification of the job order, Form ETA-790, prior to the submission of an *Application for Temporary Employment Certification*. However, the employer may not reject referrals against the job order based upon a failure on the part of the applicant to meet the amended criteria, if such referral was made prior to the amendment of the job order. The employer may not amend the job order on or after the date of filing an *Application for Temporary Employment Certification*.

(3) The employer must provide all workers recruited in connection with the *Application for Temporary Employment Certification* with a copy of the modified job order or work contract which reflects the amended terms and conditions, on the first day of

employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first.

§ 655.122 Contents of job offers.

(a) *Prohibition against preferential treatment of aliens.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Job qualifications and requirements.* Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) *Minimum benefits, wages, and working conditions.* Every job order accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) *Housing.*

(1) Obligation to provide housing. The employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) Employer-provided housing. Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) Rental and/or public accommodations. Rental or public accommodations or other substantially similar class of habitation must meet

local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.

(2) Standards for range housing. Housing for workers principally engaged in the range production of livestock must meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for shepherders and other workers engaged in the range production of livestock must meet guidelines issued by OFLC.

(3) Deposit charges. Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(4) Charges for public housing. If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) Family housing. When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) Certified housing that becomes unavailable. If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable

housing standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to provide housing that complies with the applicable standards will result in either a denial of a pending *Application for Temporary Employment Certification* or revocation of the temporary labor certification granted under this subpart.

(e) *Workers' compensation.*

(1) The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(g) *Meals.* The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

(h) *Transportation; daily subsistence.*

(1) Transportation to place of employment. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer,

whether in the U.S. or abroad to the place of employment. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A 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 payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a). Note that the FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages.

(2) Transportation from place of employment. If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite, the employer must provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in § 655.135(d) of this subpart with respect to the referrals made after the employer's date of need.

(3) Transportation between living quarters and worksite. The employer must provide transportation between

housing provided or secured by the employer and the employer's worksite at no cost to the worker.

(4) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 29 CFR 500.120 to 500.128. If workers' compensation is used to cover transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and they must have property damage insurance.

(i) *Three-fourths guarantee.*

(1) Offer to worker. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks \times 48 hours/week = 480 hours \times 75 percent = 360). If a Federal holiday occurred during the 10-week span, the

8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks \times 48 hours/week = 480 hours - 8 hours (Federal holiday) \times 75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or H-2A worker less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

(2) Guarantee for piece rate paid worker. If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(3) Failure to work. Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) Displaced H-2A worker. The employer is not liable for payment of the three-fourths guarantee to an H-2A worker whom the CO certifies is displaced because of the employer's compliance with the 50 percent rule described in § 655.135(d) with respect to referrals made during that period.

(5) Obligation to provide housing and meals. Notwithstanding the three-fourths guarantee contained in this section, employees are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the U.S. from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) *Earnings records.*

(1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G-28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph.

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the

number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the date of the certification.

(k) *Hours and earnings statements.* The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

(6) If piece rates are used, the units produced daily;

(7) Beginning and ending dates of the pay period; and

(8) The employer's name, address and FEIN.

(l) *Rates of pay.* If the worker is paid by the hour, the employer must pay the worker at least the AEW, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly, or monthly basis that equals or exceeds the AEW, prevailing hourly wage or piece rate, the legal Federal or State minimum wage, or any agreed-upon collective bargaining rate, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for H-2A temporary labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the area of intended employment.

(m) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) *Abandonment of employment or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and DHS in the case of an H-2A worker, in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the **Federal Register** not later than 2 working days after such abandonment occurs, 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 (i) of this section. Abandonment will be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work

contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) 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-2A employer, whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.*

(1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such

amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. 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.

(q) *Disclosure of work contract.* The employer must provide to an H-2A worker no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H-2A worker going from an H-2A employer to a subsequent H-2A employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2A employer. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified *Application for Temporary Employment Certification* will be the work contract.

Application for Temporary Employment Certification Filing Procedures

§ 655.130 Application filing requirements.

All agricultural employers who desire to hire H-2A foreign agricultural workers must apply for a certification from the Secretary by filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. The following section provides the procedures employers must follow when filing.

(a) *What to file.* An employer, whether individual, association, or an H-2ALC, that desires to apply for temporary employment certification of one or more nonimmigrant foreign workers must file a completed *Application for Temporary Employment Certification* form and, unless a specific exemption applies, a copy of Form ETA-790, submitted to the SWA serving the area of intended employment, as set forth in § 655.121(a).

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's date of need.

(c) *Location and method of filing.* The employer may send the *Application for Temporary Employment Certification* and all required supporting documentation by U.S. Mail or private mail courier to the NPC. The Department will publish a Notice in the **Federal Register** identifying the address(es), and any future address changes, to which *Applications for Temporary Employment Certification* must be mailed, and will also post these addresses on the OFLC Internet Web site at <http://www.foreignlaborcert.doleta.gov/>. The Department may also require

Applications for Temporary Employment Certification, at a future date, to be filed electronically in addition to or instead of by mail, notice of which will be published in the **Federal Register**.

(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 represented by an attorney or agent). An association filing a master application as a joint employer may sign on behalf of its employer members. An association filing as an agent may not sign on behalf of its members but must obtain each member's signature on each *Application for Temporary Employment Certification* prior to filing.

(e) Information received in the course of processing *Applications for Temporary Employment Certification* and program integrity measures such as audits may be forwarded from OFLC to Wage and Hour Division (WHD) for enforcement purposes.

§ 655.131 Association filing requirements.

If an association files an *Application for Temporary Employment Certification*, in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.

(a) *Individual applications.* Associations of agricultural employers may file an *Application for Temporary Employment Certification* for H-2A workers as a sole employer, a joint employer, or agent. The association must identify in the *Application for Temporary Employment Certification* in what capacity it is filing. The association must retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation in response to a Notice of Deficiency from the CO prior to issuing a Final

Determination, or in the event of an audit.

(b) *Master applications.* An association may file a master application on behalf of its employer-members. The master application is available only when the association is filing as a joint employer. An association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the *Application for Temporary Employment Certification* and all employer-members are located in no more than two contiguous States. The association must identify on the *Application for Temporary Employment Certification* by name, address, total number of workers needed, and the crops and agricultural work to be performed, each employer that will employ H-2A workers. The association, as appropriate, will receive a certified *Application for Temporary Employment Certification* that can be copied and sent to the United States Citizenship and Immigration Services (USCIS) with each employer-member's petition.

§ 655.132 H-2A labor contractor (H-2ALC) filing requirements.

If an H-2ALC intends to file an *Application for Temporary Employment Certification*, the H-2ALC must meet all of the requirements of the definition of employer in § 655.103(b), and comply with all the assurances, guarantees, and other requirements contained in this part, including Assurances and Obligations of H-2A Employers, and in part 653, subpart F, of this chapter.

(a) *Scope of H-2ALC Applications.* An *Application for Temporary Employment Certification* filed by an H-2ALC must be limited to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees.

(b) *Required information and submissions.* An H-2ALC must include in or with its *Application for Temporary Employment Certification* the following:

(1) The name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site.

(2) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.

(3) Proof of its ability to discharge financial obligations under the H-2A program by including with the *Application for Temporary Employment Certification* the original surety bond as required by 29 CFR 501.9. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 CFR 501.9) and any identifying designation used by the surety for the bond.

(4) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section.

(5) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that:

(i) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA; and

(ii) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 500.120 to 500.128, except where workers' compensation is used to cover such transportation as described in § 655.125(h).

§ 655.133 Requirements for agents.

(a) An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer.

(b) In addition the agent must provide a copy of the MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.134 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural

season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

(b) *Employer requirements.* The employer requesting a waiver of the required time period must concurrently submit to the NPC and to the SWA serving the area of intended employment a completed *Application for Temporary Employment Certification*, a completed job order on the Form ETA-790, and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

(c) *Processing of emergency applications.* The CO will process emergency *Applications for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167. The CO may advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.161. Such notification will so inform the employer using the procedures applicable to a denial of certification set forth in § 655.164.

§ 655.135 Assurances and obligations of H-2A employers.

An employer seeking to employ H-2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will

abide by the requirements of this subpart and make each of the following additional assurances:

(a) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only 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 hires and rejections as required by § 655.167.

(b) *No strike or lockout.* The worksite for which the employer is requesting H-2A certification does not currently have workers on strike or being locked out in the course of a labor dispute.

(c) *Recruitment requirements.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an *Application for Temporary Employment Certification* is made) for the job opportunity until the end of the period as specified in paragraph (d) of this section and must independently conduct the positive recruitment activities, as specified in § 655.154, until the date on which the H-2A workers depart for the place of work. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.

(d) *Fifty percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer must provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed. Start of the work contract timeline is calculated from the first date of need stated on the *Application for Temporary Employment Certification*, under which the foreign worker who is in the job was hired. This provision will not apply to any employer who certifies to the CO in the *Application for Temporary Employment Certification* that the employer:

(1) Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in sec. 203(u) of Title 29;

(2) Is not a member of an association which has petitioned for certification under this subpart for its members; and

(3) Has not otherwise associated with other employers who are petitioning for temporary foreign workers under this subpart.

(e) *Compliance with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification*, the employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents. H-2A employers may also be subject to the FLSA. The FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.

(f) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per work week.

(g) *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 except for lawful, job-related reasons within 60 days of the date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the *Application for Temporary Employment Certification* to those laid-off U.S. worker(s) and the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired. A layoff for lawful, job-related reasons such as lack of work or the end of the growing season is permissible if all H-2A workers are laid off before any U.S. worker in corresponding employment.

(h) *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, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188, or this subpart or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or

related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any other Department 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. 1188 or this subpart or any other Department regulation promulgated thereunder.

(i) *Notify workers of duty to leave United States.*

(1) The employer must inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under paragraph (i)(2) of this section, unless the H-2A worker is being sponsored by another subsequent H-2A employer.

(2) As defined further in DHS regulations, a temporary labor certification limits the validity period of an H-2A petition, and therefore, the authorized period of stay for an H-2A worker. See 8 CFR 214.2(h)(5)(vii) A foreign worker may not remain beyond his or her authorized period of stay, as determined by DHS, nor beyond separation from employment prior to completion of the H-2A contract, absent an extension or change of such worker's status under DHS regulations. See 8 CFR 214.2(h)(5)(viii)(B).

(j) *Comply with the prohibition against employees paying fees.* The employer and its agents have not sought or received payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H-2A labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. 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.

(k) *Contracts with third parties comply with prohibitions.* The employer has contractually forbidden any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or

recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees. This documentation is to be made available upon request by the CO or another Federal party.

(l) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188.

Processing of Applications for Temporary Employment Certification

§ 655.140 Review of applications.

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO(s) to an employer requiring a response will be sent using the provided address via traditional methods to assure next day delivery. The employer's response to such a notice or request must be filed using traditional methods to assure next day delivery and be sent by the date due or the next business day if the due date falls on a Sunday or Federal Holiday.

§ 655.141 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* or job order are incomplete, contain errors or inaccuracies, or do not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification*. A copy of this notification will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice will:

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 5 business days from date of receipt stating the modification that is needed for the CO to issue the Notice of Acceptance;

(3) Except as provided for under the expedited review or de novo administrative hearing provisions of this section, state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* within 5 business days and in a manner specified by the CO;

(4) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the Notice of Deficiency. The notice will state that in order to obtain such a review or hearing, the employer, within 5 business days of the receipt of the notice, must file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(5) State that if the employer does not comply with the requirements of § 655.142 or request an expedited administrative review or a de novo hearing before an ALJ within 5 business days the CO will deny the *Application for Temporary Employment Certification*. That denial is final cannot be appealed and the Department will not further consider that *Application for Temporary Employment Certification*.

(c) *Appeal from Notice of Deficiency.* The employer may timely request an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

§ 655.142 Submission of modified applications.

(a) *Submission requirements and certification delays.* If the employer chooses to submit a modified *Application for Temporary Employment Certification*, the CO's Final Determination will be postponed by 1 calendar day for each day that passes beyond the 5 business-day period allowed under § 655.141(b) to submit a modified *Application for Temporary Employment Certification*, up to maximum of 5 days. The *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Employment Certification* within 12 calendar days after the notice of deficiency was issued.

(b) *Provisions for denial of modified Application for Temporary Employment Certification.* If the modified *Application for Temporary Employment Certification* is not approved, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.164.

(c) *Appeal from denial of modified Application for Temporary Employment Certification.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* are the same as for a non-modified *Application for Temporary Employment Certification* as long as the employer timely requests an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

§ 655.143 Notice of acceptance.

(a) *Notification timeline.* When the CO determines the *Application for Temporary Employment Certification* and job order are complete and meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification*. A copy will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice must:

(1) Authorize conditional access to the interstate clearance system and direct the SWA to circulate a copy of the job order to other such States the CO determines to be potential sources of U.S. workers;

(2) Direct the employer to engage in positive recruitment of U.S. workers in a manner consistent with § 655.154 and to submit a report of its positive recruitment efforts as specified in § 655.156;

(3) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 of this subpart and will terminate on the actual date on which the H-2A workers depart for the place of work, or 3 calendar days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first; and

(4) State that the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* no later than 30 calendar days before the date of need, except as provided for under § 655.144 for modified *Applications for Temporary Employment Certification*.

§ 655.144 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.143, the CO will promptly place for public examination a copy of the job order on an electronic job registry maintained by the Department, including any required modifications approved by the CO, as specified in § 655.142. This procedure will be implemented once the Department initiates operation of the registry.

(b) *Length of posting on electronic job registry.* Unless otherwise provided, the Department will keep the job order posted on the Electronic Job Registry until the end of 50 percent of the contract period as set forth in § 655.135(d).

§ 655.145 Amendments to applications for temporary employment certification.

(a) *Increases in number of workers.*

The *Application for Temporary Employment Certification* may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial *Application for Temporary Employment Certification* by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the employer demonstrates that the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. All requests for increasing the number of workers must be made in writing.

(b) *Minor changes to the period of employment.* The *Application for Temporary Employment Certification* may be amended to make minor changes in the total period of employment. Changes will not be effective until submitted in writing and approved by the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional

recruitment period. If the request is for a delay in the start date and is made after workers have departed for the employer's place of work, the CO may only approve the change if the employer includes with the request a written assurance signed and dated by the employer that all workers who are already traveling to the job site will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

Post-Acceptance Requirements

§ 655.150 Interstate clearance of job order.

(a) *SWA posts in interstate clearance system.* The SWA must promptly place the job order in interstate clearance to all States designated by the CO. At a minimum, the CO will instruct the SWA to transmit a copy of its active job order to all States listed in the job order as anticipated worksites covering the area of intended employment.

(b) *Duration of posting.* Each of the SWAs to which the job order was transmitted must keep the job order on its active file until 50 percent of the contract term has elapsed, and must refer each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

§ 655.151 Newspaper advertisements.

(a) The employer must place an advertisement (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 is appropriate to the occupation and the workers likely to apply for the job opportunity. Newspaper advertisements must satisfy the requirements set forth in § 655.152.

(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.

§ 655.152 Advertising requirements.

All advertising conducted to satisfy the required recruitment activities under § 655.151 must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those offered to the H-2A

workers. All advertising must contain the following information:

(a) The employer's name, or in the event that a master application will be filed by an association, a statement indicating that the name and location of each member of the association can be obtained from the SWA of the State in which the advertisement is run;

(b) 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;

(c) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of services or labor to be performed and the anticipated start and end dates of employment of the job opportunity;

(d) The wage offer, or in the event that there are multiple wage offers (such as where a master application will be filed by an association and/or where there are multiple crop activities for a single employer), the range of applicable wage offers and, where a master application will be filed by an association, a statement indicating that the rate(s) applicable to each employer can be obtained from the SWA of the State in which the advertisement is run;

(e) The three-fourths guarantee specified in § 655.122(i);

(f) If applicable, a statement that work tools, supplies, and equipment will be provided at no cost to the worker;

(g) A statement that housing will be made available at no cost to workers, including U.S. workers who cannot reasonably return to their permanent residence at the end of each working day;

(h) A statement that transportation and subsistence expenses to the worksite will be provided by the employer or paid by the employer upon completion of 50 percent of the work contract, or earlier, if appropriate;

(i) A statement that the position is temporary and a specification of the total number of job openings the employer intends to fill;

(j) 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.

Employers who 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 at little or no cost to the worker. Employers cannot provide potential H-2A workers more favorable treatment with respect to the

requirement and conduct of interviews; and

(k) Contact information for the applicable SWA and, if available, the job order number.

§ 655.153 Contact with former U.S. employees.

The employer must contact, by mail or other effective means, its former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. This contact must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance and documentation sufficient to prove contact must be maintained in the event of an audit.

§ 655.154 Additional positive recruitment.

(a) *Where to conduct additional positive recruitment.* The employer must conduct positive recruitment within a multistate region of traditional or expected labor supply where the CO finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed.

(b) *Additional requirements should be comparable to non-H-2A employers in the area.* The CO will ensure that the effort, including the location(s) and method(s) of the positive recruitment required of the potential H-2A employer must be no less than the normal recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of intended employment, and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain foreign workers.

(c) *Nature of the additional positive recruitment.* The CO will describe the precise nature of the additional positive recruitment but the employer will not be required to conduct positive recruitment in more than three States for each area of intended employment listed on the employer's application.

(d) *Proof of recruitment.* The CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the positive recruitment requirements were met.

§ 655.155 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 have indicated, by accepting referral to the job opportunity,

that he or she is qualified, able, willing, and available for employment.

§ 655.156 Recruitment report.

(a) *Requirements of a recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted on a date specified by the CO in the Notice of Acceptance set forth in § 655.141 and contain the following information:

(1) Identify the name of each recruitment source;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker;

(3) Confirm that former U.S. employees were contacted and by what means; and

(4) If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update recruitment report.* The employer must continue to maintain the recruitment report throughout the recruitment period including the 50 percent period. The updated report is not to be automatically submitted to the Department, but must be made available in the event of a post-certification audit or upon request by authorized representatives of the Secretary.

§ 655.157 Withholding of U.S. workers prohibited.

(a) *Filing a complaint.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the worksite of H-2A workers in order to force the hiring of U.S. workers during the recruitment period, as set forth in § 655.135(d), may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(b) *Duty to investigate.* Upon receipt, the CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(c) *Duty to suspend the recruitment period.* Where the CO determines, after

conducting the interviews required by paragraph (b) of this section, that the employer's complaint is valid and justified, the CO will immediately suspend the application of the 50 percent rule of the recruitment period, as set forth in § 655.135(d), to the employer. The CO's determination is the final decision of the Secretary.

§ 655.158 Duration of positive recruitment.

Except as otherwise noted, the obligation to engage in positive recruitment described in §§ 655.150 through 655.154 shall terminate on the date H-2A workers depart for the employer's place of work. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.

Labor Certification Determinations

§ 655.160 Determinations.

Except as otherwise noted in this section, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* no later than 30 calendar days before the date of need identified in the *Application for Temporary Employment Certification*. An *Application for Temporary Employment Certification* that is modified under § 655.142 or that otherwise does not meet the requirements for certification in this subpart is not subject to the 30-day timeframe for certification.

§ 655.161 Criteria for certification.

(a) The criteria for certification include whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; complied with the requirements of parts 653 and 654 of this chapter; complied with all of this subpart, including but not limited to the timeliness requirements in § 655.130(b); complied with the offered wage rate criteria in § 655.120; made all the assurances in § 655.135; and met all the recruitment obligations required by § 655.121 and § 655.152.

(b) In making a determination as to 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 or who has not been

provided with a lawful job-related reason for rejection by the employer.

§ 655.162 Approved certification.

If temporary labor certification is granted, the CO will send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer's agent or attorney.

§ 655.163 Certification fee.

A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part will include a bill for the required certification fees. Each employer of H-2A workers under the *Application for Temporary Employment Certification* (except joint employer associations, which may not be assessed a fee in addition to the fees assessed to the members of the association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the *Application for Temporary Employment Certification* (in whole or in part), as follows:

(a) *Amount.* The *Application for Temporary Employment Certification* fee for each employer receiving a temporary agricultural labor certification is \$100 plus \$10 for each H-2A worker certified under the *Application for Temporary Employment Certification*, provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than \$1,000. There is no additional fee to the association filing the *Application for Temporary Employment Certification*. The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its H-2A employer members, the aggregate fees for all employers of H-2A workers under the *Application for Temporary Employment Certification* must be paid by one check or money order.

(b) *Timeliness.* Fees must be received by the CO no more than 30 days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182.

§ 655.164 Denied certification.

If temporary labor certification is denied, the Final Determination letter will be sent to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer's agent or attorney. The Final Determination Letter will:

(a) State the reason(s) certification is denied;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the denial. The notice must state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, must file by facsimile (fax), or other means normally assuring next day delivery, a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within the 7 calendar days, the denial is final and the Department will not further consider that *Application for Temporary Employment Certification*.

§ 655.165 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*, an audit, or otherwise. The number of workers certified will be reduced by one for each referred U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and has not been rejected for lawful job-related reasons, to perform the services or labor. If a partial labor certification is issued, the Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H-2A workers requested has been reduced;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the decision. The notice will state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, will file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing

before an ALJ within the 7 calendar days, the partial certification is final and the Department will not further consider that *Application for Temporary Employment Certification*.

§ 655.166 Requests for determinations 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 able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or 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 able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The 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 the procedures contained in § 655.171.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO by telephone or electronic mail, and must be confirmed by the employer in writing as required by this paragraph. If the employer telephonically or via electronic mail requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

(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 able, willing, eligible, and 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 eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.167 Document retention requirements.

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H-2A agricultural workers under this subpart are required to retain the documents and records proving compliance with this subpart.

(b) *Period of required retention.* Records and documents must be retained for a period of 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of determination if the *Application for Temporary Employment Certification* is denied or withdrawn.

(c) *Documents and records to be retained by all applicants.*

(1) Proof of recruitment efforts, including:

(i) Job order placement as specified in § 655.121;

(ii) Advertising as specified in § 655.152, or, if used, professional, trade, or ethnic publications;

(iii) Contact with former U.S. workers as specified in § 655.153; or

(iv) Additional positive recruitment efforts (as specified in § 655.154).

(2) Substantiation of information submitted in the recruitment report prepared in accordance with § 655.156, such as evidence of nonapplicability of contact of former employees as specified in § 655.153.

(3) The final recruitment report and any supporting resumes and contact information as specified in § 655.156(b).

(4) Proof of workers' compensation insurance or State law coverage as specified in § 655.122(e).

(5) Records of each worker's earnings as specified in § 655.122(j).

(6) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in 29 CFR 501.10 and specified in § 655.122(q).

(d) *Additional retention requirement for associations filing Application for Temporary Employment Certification.* In addition to the documents specified in paragraph (c) above, Associations must retain documentation substantiating their status as an employer or agent, as specified in § 655.131.

Post Certification

§ 655.170 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances.

(a) *Short-term extension.* Employers seeking extensions of 2 weeks or less of the certified *Application for Temporary Employment Certification* must apply directly to DHS for approval. If granted, the *Application for Temporary Employment Certification* will be deemed extended for such period as is approved by DHS.

(b) *Long-term extension.* Employers seeking extensions of more than 2 weeks may apply to the CO. Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). Such requests must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. The CO will not grant an extension where the total work contract period under that *Application for Temporary Employment Certification* and extensions would be 12 months or more, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.171.

(c) *Disclosure.* The employer must provide to the workers a copy of any approved extension in accordance with § 655.122(q), as soon as practicable.

§ 655.171 Appeals.

Where authorized in this subpart, employers may request an administrative review or de novo hearing before an ALJ of a decision by the CO. In such cases, the CO will send a copy of the OFLC administrative file to the Chief ALJ by means normally assuring next-day delivery. The Chief ALJ will immediately assign an ALJ (which may be a panel of such persons designated by the Chief ALJ from the Board of Alien Labor Certification Appeals (BALCA)).

(a) *Administrative review.* Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's

decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

(b) *De novo hearing.*

(1) Conduct of hearing. Where the employer has requested a de novo hearing the procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 5 business days after the ALJ's receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence; and

(iii) The ALJ's decision must be rendered within 10 calendar days after the hearing.

(2) Decision. After a de novo hearing, the ALJ must affirm, reverse, or modify the CO's determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, CO, OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

§ 655.172 Withdrawal of job order and application for temporary employment certification.

(a) Employers may withdraw a job order from intrastate posting if the employer no longer plans to file an *Application for Temporary Employment Certification*. However, a withdrawal of a job order does not nullify existing obligations to those workers recruited in connection with the placement of a job order pursuant to this subpart or the filing of an *Application for Temporary Employment Certification*.

(b) Employers may withdraw an *Application for Temporary Employment Certification* once it has been formally accepted by the NPC. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* with respect to workers recruited in connection with that application.

§ 655.173 Setting meal charges; petition for higher meal charges.

(a) *Meal charges.* Until a new amount is set under this paragraph, an employer

may charge workers up to \$10.64 for providing them with three meals per day. The maximum charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12 month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the OFLC Administrator as a Notice in the **Federal Register**. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206 the charge or deduction must meet the requirements of 29 U.S.C. 203(m) of the FLSA, including the recordkeeping requirements found at 29 CFR 516.27.

(b) *Filing petitions for higher meal charges.* The employer may file a petition with the CO to charge more than the applicable amount for meal charges if the employer justifies the charges and submits to the CO the documentation required by paragraph (b)(1) of this section.

(1) Documentation submitted must include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period must be retained and must be available for inspection by the CO for a period of 1 year.

(2) The employer may begin charging the higher rate upon receipt of a favorable decision from the CO unless the CO sets a later effective date in the decision.

(c) *Appeal rights.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief ALJ, pursuant to § 655.171.

§ 655.174 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers

applying for temporary agricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

Integrity Measures

§ 655.180 Audit.

The CO may conduct audits of applications for which certifications have been granted.

(a) *Discretion.* The applications selected for audit will be chosen within the sole discretion of the CO.

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's agent or attorney. The audit letter will:

(1) State the documentation that must be submitted by the employer;

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

(3) Advise that failure to comply with the audit process may result in the revocation of the certification or program debarment.

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

(d) *Potential referrals.* In addition to steps in this subpart, the CO may determine to provide the audit findings and underlying documentation to DHS or another appropriate enforcement agency. The CO will refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.181 Revocation.

(a) *Basis for DOL revocation.* The OFLC Administrator may revoke a temporary agricultural labor certification approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process;

(2) The employer substantially violated a material term or condition of the approved temporary agricultural labor certification, as defined in § 655.182;

(3) The employer failed to cooperate with a DOL investigation or with a DOL

official performing an investigation, inspection, audit (as discussed in § 655.180), or law enforcement function under 8 U.S.C. 1188, 29 CFR part 501, or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by the WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(b) *DOL procedures for revocation.*

(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's temporary labor certification, the OFLC Administrator will send to the employer (and its attorney or agent) a Notice of Revocation. The Notice will contain a detailed statement of the grounds for the revocation, and it will 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 14 days of the date of the Notice of Revocation, the Notice is the final agency action and will take effect immediately at the end of the 14-day period.

(2) *Rebuttal.* The employer may submit evidence to rebut the grounds stated in the Notice of Revocation within 14 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed by the employer, the OFLC Administrator will inform the employer of the OFLC Administrator's final determination on the revocation within 14 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification should be revoked, the OFLC Administrator will inform the employer of its right to appeal according to the procedures of § 655.171. The employer must file the appeal within 10 calendar days after the OFLC Administrator's final determination, or the OFLC Administrator's determination is the final agency action and will take effect immediately at the end of the 10-day period.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the OFLC Administrator after the review of rebuttal evidence, according to the appeal procedures of § 655.171. 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 agricultural labor certification is revoked, the OFLC Administrator will send a copy of the final agency action

of the Secretary to DHS and the Department of State (DOS).

(c) *Employer's obligations in the event of revocation.* If an employer's temporary agricultural labor certification is revoked pursuant to this section, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(1);

(2) The worker's outbound transportation expenses, as if the worker meets the requirements for payment under § 655.122(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.122(i); and

(4) Any other wages, benefits, and working conditions due or owing to the worker under this subpart.

§ 655.182 Debarment.

(a) *Debarment of an employer.* The OFLC Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Debarment of an agent or attorney.* The OFLC Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501, if the OFLC Administrator finds that the agent or attorney participated in an employer's substantial violation. The OFLC Administrator may not issue future labor certifications under this subpart to any employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of Limitations and Period of Debarment.*

(1) The OFLC Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

- (i) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or workers in corresponding employment;
 - (ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
 - (iii) Failure to comply with the employer's obligations to recruit U.S. workers;
 - (iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;
 - (v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;
 - (vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180 of this subpart;
 - (vii) Employing an H-2A 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;
 - (viii) A violation of the requirements of § 655.135(j) or (k);
 - (ix) A violation of any of the provisions listed in 29 CFR 501.4(a); or
 - (x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;
- (2) The employer's failure to pay a necessary certification fee in a timely manner;
- (3) Fraud involving the *Application for Temporary Employment Certification*; or
- (4) A material misrepresentation of fact during the application process.
- (e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial so as to merit debarment, the factors the OFLC Administrator may consider include, but are not limited to, the following:
- (1) Previous history of violation(s) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;
 - (2) The number of H-2A 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) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;

- (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 whether the person has previously violated 8 U.S.C. 1188;
- (7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

(f) *Debarment procedure.*

(1) Notice of Debarment. If the OFLC Administrator makes a determination to debar an employer, attorney, or agent, the OFLC Administrator 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 it will 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 will be the final agency action and the debarment will take effect at the end of the 30-day period.

(2) Rebuttal. The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 30 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a final determination on the debarment within 30 days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party should be debarred, the OFLC Administrator will inform the party of its right to request a debarment hearing according to the procedures of § 655.182(f)(3). The party must request a hearing within 30 calendar days after the date of the OFLC Administrator's final determination, or the OFLC Administrator'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 may 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 OFLC Administrator after review of rebuttal evidence submitted pursuant to § 655.182(f)(2). To obtain a debarment hearing, the debarred party must, within 30 days of the date of the Notice or the final determination, file a written request to the Chief Administrative Law Judge, United States Department of

Labor, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the OFLC Administrator. The debarment will take effect 30 days from the date the Notice of Debarment or final determination is issued, unless a request for review is properly filed within 30 days from the issuance of the Notice of Debarment or final determination. The timely filing of a request for a hearing stays the debarment pending the outcome of the hearing. Within 10 days of receipt of the request for a hearing, the OFLC Administrator 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 OFLC Administrator's determination. The ALJ will prepare the decision within 60 days after completion of the hearing and closing of the record. The ALJ's decision will be provided immediately 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 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 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 days after the receipt of a timely filing of the petition, the decision of the ALJ will be deemed 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 such 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 such presentation must be submitted.

(6) ARB Decision. The ARB's final decision must be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ. If the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final agency decision.

(g) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and the WHD may inform one another and may 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 promptly.

(h) *Debarment involving members of associations.* If the OFLC Administrator determines that an individual employer-member of a joint employer association has committed a substantial violation, the debarment determination will apply only to that member unless the OFLC Administrator determines that the association or another association member participated in the violation, in which case the debarment will be invoked against the association or other complicit association member(s) as well.

(i) *Debarment involving associations acting as joint employers.* If the OFLC Administrator determines that an association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association. However, if the OFLC Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit association member as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(j) *Debarment involving associations acting as sole employers.* If the OFLC Administrator determines that an association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

§ 655.183 Less than substantial violations.

(a) *Requirement of special procedures.* If the OFLC Administrator determines that a less than substantial violation has occurred, but the OFLC Administrator has reason to believe that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before and after the temporary labor certification determination. These special procedures may include special on-site positive recruitment and streamlined interviewing and referral techniques. The special procedures are designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary agricultural labor certification. Such requirements will be reasonable; will not require the employer to offer better wages, working conditions, and benefits than those specified in § 655.122; and will be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart.

(b) *Notification of required special procedures.* The OFLC Administrator will notify the employer (or agent or attorney) in writing of the special procedures that will be required in the coming year. The notification will state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary agricultural labor certification, and will offer the employer an opportunity to request an administrative review or a de novo hearing before an ALJ. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.171 will apply.

(c) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (a) of this section, the OFLC Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H-2A certification determination will be reduced by 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC

Administrator in the OFLC Administrator's written certification determination. The notice will offer the employer an opportunity to request administrative review or a de novo hearing before an ALJ. If administrative review or a de novo hearing is requested, the procedures prescribed in § 655.171 will apply, provided that if the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (a) of this section, the reduction in the number of workers requested will be 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year.

§ 655.184 Applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification*, the CO may refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If the WHD, a court or the DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* and certification has been granted, a finding under this paragraph will be cause to revoke the certification. The finding of fraud or willful misrepresentation may also constitute a debarable violation under § 655.182.

§ 655.185 Job service complaint system; enforcement of work contracts.

(a) *Filing with DOL.* Complaints arising under this subpart must be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints involving allegations of fraud or misrepresentation must be referred by the SWA to the CO for appropriate handling and resolution. Complaints that involve worker contracts must be referred by the SWA to the WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, the WHD may report the results of its investigation to the OFLC Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) *Filing with the Department of Justice.* Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or

discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if OSC becomes aware of a violation of the regulations in this subpart, it may provide such information to the appropriate SWA and the CO.

Title 29—Labor

■ 5. Revise part 501 to read as follows:

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

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Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

Subpart A—General Provisions

§ 501.0 Introduction.

The regulations in this part cover the enforcement of all contractual obligations, including requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B applicable to the employment of H–2A workers 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 B.

§ 501.1 Purpose and scope.

(a) *Statutory standards.* 8 U.S.C. 1188 provides that:

(1) A petition to import an alien as an H–2A worker (as defined at 8 U.S.C. 1188) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied for and received a temporary labor certification from the U.S. Secretary of Labor (Secretary). The temporary labor certification establishes that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(ii) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

(2) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR part 655, subpart B, or the regulations in this part, including imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations. See 8 U.S.C. 1188(g)(2).

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certification under 8 U.S.C. 1188 has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an employer of H–2A workers related to the 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 B.

(c) *Role of the Wage and Hour Division (WHD).* Certain investigatory, inspection, and law enforcement functions to carry out the provisions under 8 U.S.C. 1188 have been delegated by the Secretary to the WHD. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and workers in corresponding employment are enforced by WHD, including whether employment was offered to U.S. workers as required under 8 U.S.C. 1188 or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The 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 certification(s), and to seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages and reinstatement of laid off or displaced U.S. workers.

(d) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in this part apply to the employment of any H–2A worker and any other worker in corresponding employment as the result of any *Application for Temporary Employment Certification* filed with the Department on and after March 15, 2010.

§ 501.2 Coordination between Federal agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H-2A labor standards between the employer and the employee will be immediately forwarded to the appropriate WHD office for appropriate action under the regulations in this part.

(b) Information received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H-2A program, other agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is imposed will be cited in a single debarment proceeding. OFLC and the WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to the DHS promptly.

§ 501.3 Definitions.

(a) *Definitions of terms used in this part.*

Administrative Law Judge (ALJ). A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

Adverse effect wage rate (AEWR). The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this section with respect to a specific *Application for Temporary Employment Certification*; and

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

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes,

houses, or transports any worker that is subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Area of intended employment. The geographic area within normal commuting distance of the place 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.

Corresponding employment. The employment of workers who are not H-2A workers by an employer who has an approved H-2A *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

Date of need. The first date the employer requires the services of H-2A workers as indicated in the *Application for Temporary Employment Certification*.

Employee. A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer. 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 employee) with respect to an H-2A 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).

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this part, who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part, as incident to or in conjunction with the owner's or operator's own agricultural operation.

H-2A Labor Contractor (H-2ALC). Any person who meets the definition of employer under this part and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part.

H-2A worker. Any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a).

Job offer. The offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

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

Job order. The document containing the material terms and conditions of employment that is posted by the SWA on its inter- and intra-state job clearance systems based on the employer's Form ETA-790, as submitted to the SWA.

Joint employment. Where two or more employers each have sufficient definitional indicia of 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.

Prevailing wage. Wage established pursuant to 20 CFR 653.501(d)(4).

State Workforce Agency (SWA). State government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Successor in interest. Where an employer has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in 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:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same facilities;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (7) Similarity in machinery, equipment, and production methods;
- (8) Similarity of products and services; and
- (9) The ability of the predecessor to provide relief.

For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations at issue.

Temporary agricultural labor certification. Certification made by the OFLC Administrator with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

United States (U.S.). The continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands,

and the Commonwealth of the Northern Mariana Islands (CNMI).

United States worker (U.S. worker). A worker who is:

- (1) A citizen or national of the U.S.; or
- (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the Immigration and Nationality Act (INA) or by DHS) 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)) with respect to the employment in which the worker is engaging.

WHD Administrator. The Administrator of the Wage and Hour Division (WHD), and such authorized representatives as may be designated to perform any of the functions of the WHD Administrator under this part.

Wages. All forms of cash remuneration to a worker by an employer in payment for personal services.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part.

(b) *Definition of agricultural labor or services.* For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition shall be agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed below.

(1) (i) *Agricultural labor* for the purpose of paragraph (b) of this section means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(1)(iv) but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (b)(1)(iv) and (b)(1)(v) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the

employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (b) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine and gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g) or as applied in sec. 3(f) of FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this part, employment is of a seasonal nature where it is tied to a certain time

of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

§ 501.4 Discrimination prohibited.

(a) A person may not 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. 1188 or the regulations in this part;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188 or the regulations in this part;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or the regulations in this part;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, or to this subpart or any other Department regulation promulgated pursuant to 8 U.S.C. 1188; or

(5) Exercised or asserted on behalf of himself or others any right or protection afforded by 8 U.S.C. 1188 or the regulations in this part.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any such violator's current labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

§ 501.5 Waiver of rights prohibited.

A person may not seek to have an H-2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive

any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in these parts. Any agreement by an employee purporting to waive or modify any rights given to said person under these provisions shall be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

§ 501.6 Investigation authority of Secretary.

(a) *General.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, either pursuant to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, housing, vehicles, and records (and make transcriptions thereof), question any person and gather any information as may be appropriate.

(b) *Confidential investigation.* The WHD shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(c) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, 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 shall refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.7 Cooperation with Federal officials.

All persons must cooperate with any Federal officials assigned to perform an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and the regulations in this part during the performance of such duties. The WHD will take such action as it deems appropriate, including initiating debarment proceedings, seeking an injunction to bar any failure to cooperate with an investigation and/or assessing a civil money penalty therefor. In addition, the WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing labor certification be revoked. In addition, 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.

§ 501.8 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with 8 U.S.C. 1188 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, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both.

§ 501.9 Surety bond.

(a) Every H-2ALC must obtain a surety bond demonstrating its ability to discharge financial obligations under the H-2A program. The original bond instrument issued by the surety must be submitted with the *Application for Temporary Employment Certification*. At a minimum, the bond instrument must identify the name, address, phone number, and contact person for the surety, and specify the amount of the bond (as required in paragraph (c) of this section), the date of issuance and expiration and any identifying designation used by the surety for the bond.

(b) The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210. The bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits owed to an H-2A worker or to a worker engaged in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 20 CFR part 655, subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond must be written to cover liability incurred during the term of the period listed in the *Application for Temporary Employment Certification* for labor certification made by an H-2ALC, and shall be amended to cover any extensions of the labor certification requested by an H-2ALC.

(c) The bond must be in the amount of \$5,000 for a labor certification for which an H-2ALC will employ fewer than 25 workers; \$10,000 for a labor certification for which an H-2ALC will employ 25 to 49 workers; \$20,000 for a labor certification for which an H-2ALC will employ 50 to 74 workers; \$50,000 for a labor certification for which an H-2ALC will employ 75 to 99 workers; and \$75,000 for a labor certification for which an H-2ALC will employ 100 or more workers. The WHD Administrator may require that an H-2ALC obtain a bond with a higher face value amount after notice and opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(d) The bond must remain in force for a period of no less than 2 years from the date on which the labor certification expires. If the WHD has commenced any enforcement action under the regulations in this part against an H-2ALC employer or any successor in interest by that date, the bond shall remain in force until the conclusion of such action and any related appeal or related litigation. Surety bonds may not be canceled or terminated unless 45 days' notice is provided by the surety in writing to the WHD Administrator at the address set forth in paragraph (b) of this section.

Subpart B—Enforcement

§ 501.15 Enforcement.

The investigation, inspection, and law enforcement functions to carry out the provisions of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, as provided in the regulations in this part for enforcement by the WHD, pertain to the employment of any H-2A worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. Such enforcement includes the work contract provisions as defined in § 501.3(a).

§ 501.16 Sanctions and remedies—general.

Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a)(1) Institute appropriate administrative proceedings, including: the recovery of unpaid wages (including recovery of recruitment fees paid in the absence of required contract clauses (see 20 CFR 655.135(k)); the enforcement of

provisions of the work contract, 8 U.S.C. 1188, 20 CFR part 655, subpart B, 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 up to 3 years.

(2) The remedies referenced in paragraph (a)(1) of this section will be sought either directly from the employer, or from its successor in interest, as appropriate. In the case of an H-2ALC, the remedies will be sought from the H-2ALC directly and/or monetary relief (other than civil money penalties) from the insurer who issued the surety bond to the H-2ALC, as required by 20 CFR part 655, subpart B and § 501.9 of this part.

(b) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including to prohibit the withholding of unpaid wages and/or for reinstatement, or to restrain violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, by any person.

(c) Petition any appropriate District Court of the U.S. for an order directing specific performance of covered contractual obligations.

§ 501.17 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 501.1(b) of this part and in 20 CFR part 655, subpart B. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c) of this part. The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.182 or under § 501.20 of the regulations in this part.

§ 501.18 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, shall represent the WHD Administrator and the Secretary in all administrative hearings under 8 U.S.C. 1188 and the regulations in this part.

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or