

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF HOMELAND SECURITY

RIN 1615-AC33

## DEPARTMENT OF LABOR

### Employment and Training Administration

20 CFR Part 655

[Docket No. ETA-2018-0003]

RIN 1205-AB91

### Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security and Employment and Training Administration, Department of Labor.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) and the Department of Labor (DOL) (collectively, the Departments), are jointly proposing regulatory revisions that would modernize the recruitment an employer seeking H-2B nonimmigrant workers must conduct when applying for a temporary labor certification. In particular, the Departments are proposing to replace the print newspaper advertisements that their regulations currently require with electronic advertisements posted on the internet, which the Departments believe will be a more effective and efficient means of disseminating information about job openings to U.S. workers. The Departments are proposing to replace, rather than supplement, the newspaper requirements because they believe that exclusive electronic advertisements posted on a website appropriate for the workers likely to apply for the job opportunity in the area of intended employment would best ensure that U.S. workers learn of job opportunities.

**DATES:** Comments must be submitted, in writing, on or before December 10, 2018.

**ADDRESSES:** You may send comments, identified by the agencies' names and the DOL Docket No. ETA-2018-0003 or Regulatory Information Number (RIN) 1205-AB91, by any of the following methods:

*Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the website instructions for submitting comments (under "Help" > "How to use Regulations.gov").

*Mail and hand delivery/courier:* Submit written comments and any additional material to Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210.

*Instructions:* Label all submissions with "RIN 1205-AB91." Please submit your comments by only one method. All submissions must include the agencies' names and the DOL RIN 1205-AB91.

Please be advised that DOL will post all comments received that relate to this notice of proposed rulemaking (NPRM) on <http://www.regulations.gov> without making any change to the comments or redacting any information. The <http://www.regulations.gov> website is the Federal e-rulemaking portal, and all comments posted there are available and accessible to the public. Therefore, DOL recommends that commenters remove personal information (either about themselves or others) such as Social Security Numbers, personal addresses, telephone numbers, and email addresses included in their comments, as such information may become easily available to the public via the <http://www.regulations.gov> website. It is the responsibility of the commenter to safeguard personal information.

Also, please note that, due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, DOL encourages the public to submit comments on <http://www.regulations.gov>.

*Docket:* To read or download comments or other material in the electronic docket, go to <http://www.regulations.gov> website (search using RIN 1205-AB91 or Docket No. ETA-2018-0003). DOL also will make all the comments it receives available for public inspection by appointment during normal business hours at the

above address. If you need assistance to review the comments, DOL will provide appropriate aids, such as readers or print magnifiers. DOL will make copies of this proposed rule available, upon request, in large print and electronic file on computer disk. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternative format, contact the Office of Policy Development and Research at (202) 693-3700 (this is not a toll-free number). You may also contact Adele Gagliardi, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210.

*Comments under the Paperwork Reduction Act (PRA):* In addition to filing comments with ETA, persons wishing to comment on the information collection (IC) aspects of this rule may send comments to: Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-ETA, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503, Fax: (202) 395-6881 (this is not a toll-free number), email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). See Paperwork Reduction Act section of this proposal for particular areas of interest.

**FOR FURTHER INFORMATION CONTACT:** Regarding the Department of Labor: William W. Thompson, II, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, Box #12-200, 200 Constitution Ave. NW, Washington, DC 20210, telephone (202) 513-7350 (this is not a toll-free number). Regarding the Department of Homeland Security: Kevin J. Cummings, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529-2120, telephone (202) 272-8377 (not a toll-free call).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:**

## I. Background

### A. Legal Framework

The Immigration and Nationality Act (INA), 8 U.S.C. 1101, *et seq.*, establishes the H–2B nonimmigrant classification for a nonagricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C. 1101(a)(15)(H)(ii)(b).<sup>1</sup> The Secretary of Homeland Security, in administering the H–2B program, may grant a petition for an otherwise eligible H–2B nonimmigrant worker “after consultation with appropriate agencies of the Government.” 8 U.S.C. 1184(c)(1). The Secretary of Homeland Security also may delegate to “any employee of the United States, with the consent of the head of the applicable Department or other independent establishment, . . . any of the powers, privileges, or duties conferred or imposed” on DHS under the INA. 8 U.S.C. 1103(a)(6); *see also* 8 CFR 2.1. DHS regulations provide that an H–2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification from DOL. 8 CFR 214.2(h)(6)(iii)(A) and (iv)(A). Pursuant to and in accordance with the above authorities, the temporary labor certification serves as DHS’s consultation with DOL to determine the question of whether a qualified U.S. worker is available to fill the petitioning H–2B employer’s job opportunity and whether a foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 8 CFR 214.2(h)(6)(iii)(A) and (D).

In order to advise DHS on the availability of U.S. workers and the potential for adverse effect on the wages and working conditions of similarly employed U.S. workers, DOL’s Office of Foreign Labor Certification (OFLC) provides consultation to DHS through issuance of temporary labor certifications, in accordance with 8 U.S.C. 1103(a) and 1184(c);. *See* 8 CFR 214.2(h)(6)(iii)(A) and (D). The Departments have jointly issued regulations that govern the standards and procedures applicable to OFLC’s issuance of temporary labor certifications under the H–2B program. *See* 20 CFR 655 subpart A. The

regulations at 20 CFR 655 subpart A require employers seeking H–2B temporary labor certification to, among other things, actively recruit for U.S. workers before submitting petitions with DHS to hire foreign workers.

The standards and procedures governing the recruitment of U.S. workers generally are set forth in 20 CFR 655.40–655.48. These regulations generally require, among other things, that an employer seeking an H–2B temporary labor certification (1) place two print advertisements in a newspaper of general circulation serving the area of intended employment, § 655.42(a); (2) contact former U.S. workers employed in the previous year to solicit their return, § 655.43; and (3) contact the bargaining unit, if one exists, to seek referrals of U.S. workers, or if a bargaining unit does not exist, post the job opportunity at the place(s) of employment for at least 15 consecutive business days, § 655.45. An employer may need to conduct additional recruitment, as provided in section 655.46(a), where the OFLC Certifying Officer (CO) determines there is a likelihood that qualified U.S. workers will be available to fill the employer’s job opportunity.

As relevant here, section 655.42(a) requires an employer seeking an H–2B temporary labor certification to place a print advertisement on two separate days, one of which must be a Sunday, in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and workers likely to apply for the job opportunity. If the employer’s job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, then section 655.42(b) permits the CO to direct the employer, in place of a Sunday edition, to place a print advertisement in the regularly published daily edition with the widest circulation in the area of intended employment. Both advertisements must meet the minimum content requirements set forth in section 655.41, and the employer is required to maintain documentation of the actual newspaper advertisement(s) published in the event of an audit or other review. § 655.42(d).

### B. Joint Issuance

In order to effectuate DHS’s requirement for DOL consultation, which is provided in the form of temporary labor certifications, DOL must issue regulations to structure procedures and substantive standards for its issuance of labor certifications, as DOL has done for almost 50 years. On

April 29, 2015, following a court’s vacatur of nearly all of DOL’s H–2B regulations, the Departments jointly promulgated an interim final rule (IFR) governing DOL’s role in issuing temporary labor certifications and enforcing the statutory and regulatory rights and obligations applicable to employment under the H–2B program. *See* Temporary Non-Agricultural Employment of H–2B Aliens in the United States, 80 FR 24,042 (Apr. 29, 2015) (codified at 8 CFR part 214, 20 CFR part 655, and 29 CFR part 503) (“2015 H–2B IFR”).

As explained in the 2015 H–2B IFR, following conflicting legal decisions about DOL’s authority to independently issue legislative rules to carry out its duties for the H–2B program under the INA, the Departments jointly issued the 2015 H–2B IFR “to ensure that there can be no question about the authority for and validity of the regulations in this area.” 80 FR at 24,045; *see also* 80 FR at 24,044–24,047.<sup>2</sup> Specifically, DHS’s participation in the rulemaking is pursuant to its broad authority to issue rules in the H–2B program under 8 U.S.C. 1103(a)(3) and 1184(a), and, as referenced above, DOL—which has the institutional expertise on all matters relating to the domestic labor market and has for decades issued temporary labor certifications and legislative rules governing them in the non-agricultural foreign worker program—is necessarily authorized to promulgate rules governing its issuance of temporary labor certifications pursuant to 8 U.S.C. 1103(a) and 1184(c). The Departments further explained that by issuing the 2015 H–2B IFR jointly, “the Departments affirm that this rule is fully consistent with the INA and implementing DHS regulations and is vital to DHS’s ability to faithfully implement the statutory labor protections attendant to the program.” 80 FR at 24,045–46. Litigation on these and related matters is ongoing. Accordingly, notwithstanding that DOL has authority to independently issue this NPRM, DHS is joining DOL in this rulemaking to ensure that there can be

<sup>2</sup> DOL’s authority to jointly regulate with DHS has not been found invalid. While the same district court twice issued an injunction against DOL’s unilaterally-issued H–2B rules, *see Bayou Lawn & Landscape Servs. v. Solis*, 2012 WL 12887385 (N.D. Fla. Apr. 26, 2012) and *Bayou Lawn v. Perez*, 81 F. Supp. 3d 1291, 1300 (N.D. Fla. 2014) (*Bayou II*), it has since upheld the joint rules, *Bayou Lawn v. Johnson*, 173 F. Supp. 3d 1271, 1277, 1289–91 (N.D. Fla. 2016) (*Bayou III*), with the court noting that the primary difference between the enjoined 2012 rules and the 2015 rules was their joint promulgation. *Id.* at 1277, n2.

<sup>1</sup> For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

no question about the authority underlying this action.

### C. Need for Rulemaking

The Departments are proposing to modernize the recruitment that an employer must conduct under section 655.42 by replacing print newspaper advertisements with electronic advertisements posted on the internet. After due consideration, the Departments believe that advertisements posted on the types of websites described below will reduce burden on employers and applicants, and be a more effective and efficient means of recruiting U.S. workers than the print newspaper advertisements that section 655.42 currently requires.

The Departments are basing this proposal on several considerations. First, available data suggest that U.S. workers are now much more likely to turn to the internet to search for work than classified newspaper advertisements in print newspapers. For instance, a recent survey conducted by the Pew Research Center indicated that 79 percent of Americans research jobs online, whereas only 32 percent use “ads in print publications,” and only four percent found ads in print publications to be the most useful tool in obtaining their recent employment.<sup>3</sup> This trend is likely to continue as U.S. workers gain increased and more convenient access to the internet via smartphones and other digital devices,<sup>4</sup> and print newspaper circulation continues to decline.<sup>5</sup> Consequently,

<sup>3</sup> Aaron Smith, *Searching for Work in the Digital Era*, Pew Research Center, Nov. 19, 2015, <http://www.pewinternet.org/2015/11/19/searching-for-work-in-the-digital-era/>; see also R. Jason Faberman & Marianna Kudlyak, *What Does Online Job Search Tell Us About The Labor Market?*, Economic Perspectives, Jan. 2016, <https://www.chicagofed.org/~media/publications/economic-perspectives/2016/ep2016-1-pdf.pdf> (observing that the online job search has become the preferred method of search for nearly all types of job seekers and recent research suggests that it is the new norm for how job seekers find work); Richard Hernandez, *Online Job Search: The New Normal*, Monthly Labor Review (Bureau of Labor Statistics, U.S. Dep’t. of Labor, Wash. DC), Jan. 2017, <https://www.bls.gov/opub/mlr/2017/beyond-bls/pdf/online-job-search-the-new-normal.pdf> (reporting that the online job search is now the most popular method of job hunting).

<sup>4</sup> In 2018, 89 percent of American adults used the internet, and 77 percent of American adults owned a smartphone, up from just 35 percent in 2011. See *Internet/Broadband Fact Sheet*, Pew Research Center, Feb. 5, 2018, <http://www.pewinternet.org/fact-sheet/internet-broadband/>; *Mobile Fact Sheet*, Pew Research Center, Feb. 5, 2018, <http://www.pewinternet.org/fact-sheet/mobile/>.

<sup>5</sup> By 2014, fewer than 15 percent of Americans received a daily newspaper. See Elaine C. Kamarck and Ashley Gabriele, *The News Today: 7 Trends in Old and New Media*, The Brookings Institution, Nov. 10, 2015, <https://www.brookings.edu/research/the-news-today-7-trends-in-old-and-new-media>.

classified advertisements in print editions are becoming a less effective means of notifying potential applicants about available job opportunities.<sup>6</sup> In recognition of these facts, many newspapers now offer online classified employment listings using multi-platform content providers, and popular online job search websites power the job boards of thousands of newspaper sites, providing a lower cost recruiting option for employers and job seekers alike.<sup>7</sup>

Second, this general trend is consistent with anecdotal evidence that the Departments have received from stakeholders, who have reported that print newspaper advertisements are not an effective method of recruiting prospective U.S. workers for job opportunities filled by H-2B workers. For instance, two comments submitted in response to the 2015 H-2B IFR indicated that reliance on newspaper advertising to recruit U.S. workers was outmoded. Specifically, the Northwest Workers’ Justice Project (NWJP), a not-for-profit organization that provides civil legal assistance to low-income persons, stated:

We support the general notion of modernizing the forms of outreach to potential workers to be used to recruit domestic workers. The use of alternative advertising forums reflects changes in information exchanges and job searches and is appropriate. Fewer and fewer unemployed U.S. workers search for jobs through newspapers, and the elimination of newspaper advertising should have a minimal impact on domestic worker recruiting. We recommend that the regulations should expressly discuss new innovations now widely used by employers of domestic workers to recruit new employees, such as web-based advertising on sites such as Monster.com and participation in job fairs.

NWJP comment at 11 (July 2, 2015).<sup>8</sup> Similarly, the American Immigration Lawyers Association (AILA), a national not-for-profit organization of immigration attorneys and law

<sup>6</sup> According to the Pew Research Center, the total circulation of U.S. daily newspapers (print and digital combined) in 2017 was approximately 31 million, down 38 percent from more than 50 million in 2007. Pew Research Center, June 13, 2018, <http://www.journalism.org/fact-sheet/newspapers/>; *Newspapers Fact Sheet*. Conversely, job search websites today are attracting a far larger pool of potential applicants to find jobs. For example, the top 15 job search websites alone attract nearly 200 million unique visitors each month to search for employment.

<sup>7</sup> See Christine Del Castillo, *Does Anyone Advertise Jobs in Newspapers Anymore?*, Workable, May 19, 2016, <https://resources.workable.com/blog/newspaper-job-ads>.

<sup>8</sup> Accessed at <https://www.regulations.gov/document?D=ETA-2015-0005-0124>.

professors, requested that the Departments:

move beyond newspaper advertisements as a method for recruiting American workers. Newspaper circulation has been in decline for years, as is evidenced by the overall decline in the number of print newspapers currently on the market. The decrease in newspaper readership, coupled with increased access to internet job banks has changed the way workers look for jobs. Requiring lengthier (and significantly more costly) ads will not result in more applicants, just more funds expended by employers. DOL should focus on new electronic avenues of job notification instead of requiring employers to run expensive advertisements.

AILA Comment at 10 (July 2, 2015).<sup>9</sup>

Finally, electronic advertisements offer employers a less expensive, more convenient means of broadly disseminating information about their job opportunities to potential U.S. workers. Many websites offer standard advertising packages for free or at significantly lower marginal costs than the standard print newspaper advertisement, and advertisements can be posted on these sites for longer periods than a typical print newspaper advertisement remains in circulation, providing greater exposure of the employer’s job opportunity to U.S. workers at no additional cost to the employer. Moreover, unlike print advertisements, which are subject to publishing deadlines that can delay exposure of the job opportunity to U.S. workers, an electronic advertisement can be posted within minutes or hours of submission to the website.

In light of the foregoing, the Departments are proposing to revise the recruitment that an employer must conduct under section 655.42 to replace print newspaper advertisements with electronic advertisements posted on the internet, as described below. The Departments are also proposing minor amendments to sections 655.48 and 655.71 to conform those sections with the Departments’ proposed elimination of print newspaper advertisements.

## II. Discussion of Proposed Revisions to 20 CFR Part 655, Subpart A

### A. Revise Section 655.42 To Replace Newspaper Advertisements With Electronic Advertisements

The Departments are proposing to revise section 655.42(a) to replace the requirement that an employer place print newspaper advertisements with a requirement that the employer advertise its job opportunity on a website that is widely viewed and appropriate for use

<sup>9</sup> Accessed at <https://www.regulations.gov/document?D=ETA-2015-0005-0125>.

by workers who are likely to apply for the job opportunity in the area of intended employment. The Departments propose to remove the word "occupation" from the text in order to address a possible redundancy in the language. This proposed drafting change is stylistic only, and the Departments intend to effect no substantive change by it.

The proposed rule would not mandate that an employer post its advertisement on a specific website. Rather, proposed section 655.42(a) would allow an employer to place an advertisement on any of a variety of websites that are widely viewed and appropriate for use by workers who are likely to apply for the job opportunity in the area of intended employment, including websites that specialize in advertising job opportunities for the specific industry or occupation, and websites that specifically serve the local area, such as localized online job listing services and digital classified sections of local newspapers. Proposed section 655.42(a) also contemplates the use of websites that are not specifically directed at workers in the area of intended employment or the particular occupation, so long as the website is appropriate for the occupation and adequately serves the area of intended employment.

The Departments anticipate that advertisements posted on the types of websites described above will provide greater exposure of job opportunities to U.S. workers than the print newspaper advertisements that section 655.42 currently requires, because they can be more easily accessed by applicants across a much larger geographic area and for a longer period. The Departments invite comments on whether they should establish qualifying criteria (e.g., minimum number of unique visitors per month), or define the types of websites on which an employer may place an electronic advertisement under the proposed rule, and whether the rule should exclude websites maintained by the employer and/or the employer-client of a job contractor seeking to employ H-2B workers, as defined in section 655.5. The Departments also solicit comments on whether, instead of eliminating print newspaper advertisements, they should instead offer electronic advertisements as an alternative means of satisfying the existing print advertising requirement in section 655.242. The Departments are not proposing this option, given the data and trends discussed in Section I.C., which suggest that electronic advertisements will be more effective in disseminating information about job

opportunities to the American workforce. However, the Departments invite comments on whether there are employers that lack the technology or internet access necessary to place the electronic advertisements described in the proposed rule, and if so, how the Departments should determine whether such employers have met their obligation to recruit U.S. workers. For instance, the Departments could leave current recruitment requirements in place as an option for such employers. The Departments solicit comments on whether there are alternative methods that would more broadly and effectively disseminate information about available job opportunities to U.S. workers.

Proposed section 655.42(b) specifies that an employer's advertisement must be clearly visible on the website's homepage or be easily retrievable using the search tools on the website. Any advertisement that is not clearly visible on the website's homepage must be easily retrievable. An advertisement is easily retrievable if it can be quickly accessed using a prominently displayed link on the website's homepage or the search tools and filters that are prominently displayed on the website's homepage. Each navigation choice or interaction that a job seeker has with the website should take him or her closer to the job opportunity being advertised, and applicants should be able to quickly locate job vacancies using a number of search criteria, such as occupation, job or position title, geographic location, pay range, and keywords in the job description. The employer must use commonly understood terms and keywords to describe its job opportunity when placing the advertisement, so that U.S. workers who are likely to apply for the position will retrieve the advertisement when using the website's search function.

Proposed section 655.42(b) would also require an employer to post the electronic advertisement for a period of no less than 14 consecutive calendar days. Unlike the print newspaper advertisements that an employer must place under the current rule, which are typically published once, many websites offer standard advertising packages that allow an employer to place an advertisement for a weekly period or up to 30 calendar days for free or at a much lower marginal cost than a standard print newspaper advertisement. Accordingly, the Departments anticipate that the fourteen-day consecutive posting period in proposed section 655.42(b) will attract more U.S. workers to job opportunities than the print newspaper advertisements that this section

currently requires, because an employer's job opportunity will be easily accessible to U.S. workers seeking jobs for a longer period than a print newspaper advertisement, at no additional cost to the employer.

Further, in order to assure that the job opportunity described in the advertisement is readily available to U.S. workers, proposed section 655.42(b) would require that the advertisement be publicly accessible at no cost to an applicant. To meet this requirement, the website on which the advertisement is placed cannot require U.S. workers to pay fees to establish personal accounts or make payments of any kind to view the advertisement. The website must also be functionally compatible with the latest commercial web browser platforms and easily viewable on mobile smartphones and similar portable devices. Moreover, like the current rule, proposed section 655.42(b) would require that the advertisement comply with the minimum content requirements set forth in section 655.41.

In order to ensure that an employer retains the evidence necessary to demonstrate compliance with proposed section 655.42(a) and (b), proposed section 655.42(c) would require an employer to print and retain screen shots of the web pages on which its advertisement appears and screen shots of the web pages establishing the path used to access the advertisement. Although the proposed rule does not require employers to submit this documentation to the CO with their recruitment reports, an employer must nevertheless retain this documentation in accordance with 20 CFR 655.56 and provide it to DOL in the event of an audit or other review.

The proposed section 655.42(d) includes a transition provision that would permit an employer submitting an *Application for Temporary Employment Certification* with a date of need prior to October 1, 2019 to elect between placing (a) an electronic advertisement in accordance with the requirements in the proposed rule, or (b) two newspaper advertisements in accordance with existing requirements. Because the Departments are proposing to have this rule take effect immediately upon publication of the final rule, the Departments are including this transition period to provide flexibility to employers that seek additional time to understand and comply with the proposed regulatory revisions, while simultaneously permitting employers that wish to place electronic advertisements immediately upon the effective date of the final rule the ability

to do so. The transition provision is intended to better ensure, among other things, that employers who have purchased newspaper advertising space in advance do not lose the benefit of such purchase.

However, the option to elect between the placement of newspaper and electronic advertisements would apply only to those applications with a date of need prior to October 1, 2019. All employers submitting an *Application for Temporary Employment Certification* with a date of need after the transition period ends (*i.e.*, employers with dates of need beginning on or after October 1, 2019) would be required to place an advertisement in accordance with the proposed revisions to 655.42(a)–(c).

#### *B. Other Minor Changes for Conformance*

The Departments are proposing minor revisions to two other sections in subpart A in order to conform the regulatory text of those sections with the proposed revision to section 655.42. First, the Departments are proposing to amend section 655.48(a)(i), relating to recruitment reports, by revising the requirement that an employer provide the name of the newspaper used to satisfy the recruitment requirement in section 655.42 to instead require the name of the website used to satisfy this requirement. Second, the Departments are proposing to amend section 655.71(c)(2) by deleting the option to use newspaper advertisements for assisted recruitment.

#### *C. DOL-Assisted Advertising*

DOL, with the concurrence of DHS, has taken initial steps toward creating an online platform to assist employers in complying with the requirements for electronic advertising under this proposed rule. Pending the outcome of this rulemaking, DOL intends to leverage the latest advertising technologies by establishing a mechanism to make advertising data available to popular job-search websites. Specifically, DOL is evaluating the development of a centralized platform to automate the electronic advertising of approved H–2B job opportunities. DOL anticipates that, once fully developed and implemented, this electronic advertising platform would maintain a standard set of data on each job opportunity that can be integrated with a wide array of job search website technologies. Through this platform, DOL would make available to job-search websites real-time access to the information that employers provide about their job opportunities subject to

agreement to abide by terms of service. The companies that operate job-search websites would execute standard protocols to pull new H–2B jobs from the online platform in real time for advertising to U.S. workers.

If developed as currently envisioned, DOL expects that employers would provide information about their job opportunities, at the time of filing their H–2B temporary labor certification applications, and indicate their intention to use the electronic advertising platform. Employers that elect to use this platform would have information about their job opportunities transmitted by DOL to companies offering to provide advertising services, which in turn would advertise these jobs on the companies' job search websites.

The Departments believe that facilitating employers' use of technology is in the best interest of employers and U.S. workers. Because information about the job opportunity would already be provided at the time of filing the H–2B temporary labor certification application and transmitted by DOL to companies operating these job search websites, the burden associated with placing separate electronic advertisements would be significantly reduced. The goal is to reduce burdens on the regulated community, while ensuring that the maximum number of U.S. workers learn about job opportunities. Having DOL maintain a publicly available list of the companies participating in this advertising platform would give U.S. workers and other organizations that provide employment placement services a greater degree of certainty regarding where these temporary or seasonal jobs will be advertised and available for U.S. workers to apply. Employers that elect to use the new platform would satisfy the advertising requirements in § 655.42. Finally, offering this platform to employers would ensure more uniform compliance with advertising requirements.

The Departments are not soliciting comments on this electronic advertising platform at this time, but the Departments, or DOL acting alone, may inform the public about the advertising platform's completion through a notice in the **Federal Register**.

### **III. Administrative Information**

#### *A. Administrative Procedure Act*

The Departments propose to claim an exception under 5 U.S.C. 553(d)(1) from the 30-day delayed effective date requirement on the basis that relieves the restriction against on-line

advertising of jobs for which an employer seeks to hire H–2B workers. The final rule would relieve regulated parties of the requirement that they only place paper advertisements in newspapers of general circulation in the area of intended employment. During the transition period, which would apply to all employers who file an *Application for Temporary Employment Certification* with a date of need prior to October 1, 2019, the rule would allow employers to select between placing two paper newspaper advertisements or placing an online advertisement. After the transition period ends, the rule would altogether replace the newspaper advertising requirement with online advertising, which is anticipated to be more cost-effective and flexible for employers, as well as a more effective way of reaching U.S. workers who may be able, willing, and qualified for the employers' job opportunities. The online advertising would also provide flexibility for U.S. workers who are job seekers to identify and apply for the job opportunities for which employers seek to hire H–2B workers. As discussed in greater detail in this preamble, this approach is in line with commenter requests on the 2015 H–2B joint Interim Final Rule, urging the Departments to transition to an online recruitment model. The Departments anticipate that allowing employers additional time to transition away from advertising by newspaper over an approximately six-month period after the rule's publication would provide needed flexibility, and thus provide employers with notice and time to conform their business practices to the new rule. This rule would take effect immediately upon publication of the final rule.

*B. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)*

Under Executive Order (E.O.) 12866, the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735, Sec. 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also

referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* OMB has determined that this proposed rule is a significant, but not an economically significant, regulatory action under Sec. 3(f) of E.O. 12866. Consequently, OMB has reviewed this rule.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

E.O. 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. This proposed rule is expected to be an E.O. 13771 deregulatory action because the cost savings to H-2B employers associated with the rule are larger than the costs. The estimated cost savings associated with this regulatory action are derived from the proposed revision to section 655.42(a), which would replace print newspaper advertisements with electronic advertisements posted on the internet.

### 1. Subject-by-Subject Analysis

The Departments' analysis below considers the expected impacts of the following aspects of the proposed rule against the baseline (*i.e.*, the 2015 Interim Final Rule): (a) The replacement of newspaper advertisements with electronic advertisements, and (b) the time it takes the regulated community to read and review the rule.

#### a. Electronic Advertisements

The Departments are proposing to modernize the positive recruitment that an employer must conduct under the regulations by eliminating the use of print newspaper advertisements and replacing it with electronic advertisements posted on the internet,

which will make the job opportunity more broadly available to U.S. workers. Specifically, the Departments are proposing to revise section 655.42(a) to replace print newspaper advertisement requirements with a requirement for an electronic advertisement posted on a website appropriate for the workers who are likely to apply for the job opportunity in the area of intended employment. As discussed in section I.C. of the preamble to this NPRM, the basis for this proposal is rooted in the Departments' determination that electronic advertisements will be a more effective and efficient means of recruiting U.S. workers than the print newspaper advertisements that the regulations currently require.

#### i. Cost Savings

To estimate the cost savings to employers that would result from the proposed rule, the Departments first calculated the average number of H-2B temporary labor certifications approved in a Fiscal Year (FY) based on data from FY 2015–2017, which yielded an annual average of 5,879.<sup>10</sup> Next, the Departments identified the top five states in which prospective H-2B employers received temporary labor certifications and researched the cost of placing a newspaper advertisement in the most populous city in each of these states (for several newspapers, including large and local papers) that would satisfy the advertising content requirements.<sup>11</sup> The Departments then averaged the data obtained to estimate the average cost of complying with section 655.42. Based on these data, the Departments determined that the average cost of placing a single, one-day newspaper advertisement required by section 655.42 is \$803.08.<sup>12</sup>

As mentioned above, the Departments believe, based on preliminary research, that employers can choose to advertise using online job search websites free of charge or at significantly lower marginal costs, so removing the requirement to advertise in a print newspaper would result in a cost savings equal to the cost of complying with the current

<sup>10</sup> The average is based on 5,106 H-2B temporary labor certifications in FY 2015; 5,933 temporary labor certifications in FY 2016; and 6,599 temporary labor certifications in FY 2017. Calculation:  $(5,106 + 5,933 + 6,599)/3 = 5,879$  (rounded). See <https://www.foreignlaborcert.doleta.gov/performance/cfm>.

<sup>11</sup> The top 5 states in which employers seek to place H-2B workers are Colorado, Florida, Louisiana, Texas, and Virginia.

<sup>12</sup> The Departments assume that these advertisements would be placed in the newspaper classified section for employment.

regulation.<sup>13</sup> Although section 655.42 currently requires employers to advertise on two consecutive days, one of which must be a Sunday, the Departments did not identify a significant difference in cost between advertisements placed on Sundays and weekdays, so the Departments did not distinguish between these two costs when calculating total advertising cost savings. To estimate the annual cost savings of newspaper advertising costs that employers will avoid under the proposed rule, the Departments multiplied the average annual number of approved H-2B temporary labor certifications (5,879) by the average newspaper advertising cost of \$803.08, and multiplied it by two to account for each of the days that employers seeking H-2B workers are currently required to place newspaper advertisements. This yielded an average annual cost savings of \$9.44 million<sup>14</sup> for employers.

#### b. Time To Understand Rule

During the first year that this rule would be in effect, employers seeking H-2B workers would need time to learn about the new requirements. The Departments assume that many employers participating in the H-2B program would learn about the requirements of the new rule from an industry newsletter or bulletin. The Departments assume that the amount of time required to understand the rule change to be 10 minutes. The proposed rule addresses only the job advertising requirements for employers seeking H-2B workers.

#### i. Costs

This requirement represents a cost to employers participating in the H-2B program in the first year of the rule. The Departments estimate this cost by multiplying the time required to read and review the new rule (10 minutes) by the median hourly wage of a human resources specialist (\$31.84),<sup>15</sup> multiplied by a factor of two (2) to account for fringe benefits and overhead, which yields a cost of \$10.61<sup>16</sup> per employer. The Departments estimate the total cost of reading and reviewing the rule by

<sup>13</sup> The Departments have data on three commonly used job-search websites that allow employers to advertise free of charge.

<sup>14</sup> Calculation:  $5,879 \times \$803.08 = \$9,442,615 = \$9.44$  million (rounded).

<sup>15</sup> Wage derived from Bureau of Labor Statistics median hourly wage for HR Specialists (occupation code 13-1071), U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2017, Human Resources Specialist: <https://www.bls.gov/oes/2017/may/oes131071.htm>.

<sup>16</sup> Calculation:  $(\$31.84 \times 2)/6$  (10 minutes) = \$10.61 (rounded).

multiplying \$10.61 by the average annual number of employers participating in the H–2B program over FY 2015–2017 (6,151). This calculation results in a cost of \$65,283<sup>17</sup> in the first year.

The Departments acknowledge, however, that there are some potentially limited situations—particularly in rural communities—where the upfront costs associated with accessing the internet and learning how to post such advertisements may result in notable opportunity costs for employers. The Departments believe that very few employers who currently participate in the H–2B program do not currently have access to the internet. For those employers that do not currently have internet access, the Departments estimate that it will take two hours to access the internet (which may include transportation to the nearest library), research the websites and pick one to use, establish an account on that website, learn how to post a job on the website, and establish an email account. In addition, employers would need to make additional trips to check for responses from U.S. workers. Because of the uncertainties, we are unable to provide an estimate of the number of employers who do not have access to the internet and would incur these additional costs to post advertisements online. The Departments seek comment from the public on the likely magnitude and incidence of these costs. For employers with access to the internet who are not familiar with posting such advertisements online, there will be some up front costs associated with the time it takes to research job advertisement sites, establish an account, and learn how to post a job on the website.

However, online advertisements for H–2B employment would increase the visibility of job openings to potential U.S. workers and increase the number of workers that would be able to access these jobs. This benefit would significantly outweigh any cost potentially incurred by the negligible number of employers who do not currently have access to the internet due to transitioning from print newspaper advertisements to online job postings. The Departments therefore believe that the net societal benefit of implementing this rule would be maximized if all H–2B employers are required to utilize online advertisements. As such this rule constitutes as a deregulatory action.

## 2. Summary of Impacts

The Departments estimate the total first-year costs of the proposed rule to be \$65,283. This cost results from the estimated time required to read and review the proposed rule by a human resources specialist. This cost is incurred by all employers seeking H–2B workers subject to proposed section 655.42(a). The Departments estimate a first-year cost savings of \$9.44 million. This cost savings results from replacing the requirement that employers place print newspaper advertisements with a requirement that employers place internet advertisements. Net first-year cost savings amount to \$9.38 million.<sup>18</sup> This estimated cost savings excludes any increase in costs to employers without current access to the internet.

Generally, annual cost savings are expected to be \$9.44 million in all years following the first year due to the lack of monetized costs regarding the time required to read and review the proposed rule. The 10-year discounted net cost savings of the proposed rule range from \$66.25 million to \$80.46 million (with 7- and 3-percent discount rates, respectively). The annualized net cost savings of the proposed rule is \$9.43 million (with 3- and 7-percent discount rates). When the Departments use a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost savings of this proposed rule are \$9.44 million at a discount rate of 7 percent (excluding any increased costs to employers without access to the internet).

### C. Regulatory Flexibility Act

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

This proposed rule may impact small businesses that request H–2B temporary labor certifications. The Departments

assume that the average number of H–2B temporary labor certifications requested by any small business per year would be one. The Departments estimate that small businesses would incur a one-time cost of \$10.61 to familiarize themselves with the rule and would incur annual cost savings of \$1,606.16 associated with advertising online rather than in print newspapers. Over a 10-year analysis period, the net annualized cost savings for a small business would be \$1,604.74 at a 7-percent discount rate.

The Departments reviewed the impacts of the proposed rule for two North American Industry Classification System (NAICS) Codes that frequently request H–2B temporary labor certifications: NAICS 561730: Landscaping Services, and NAICS 721110: Hotels (except Casino Hotels) and Motels. The Small Business Administration estimates that revenue for a small business with NAICS Code 561730 is \$7.5 million and for NAICS Code 721110 is \$32.5 million.<sup>19</sup> The impact of the proposed rule would be less than 1 percent of annual revenue for the smallest businesses in these industries with the employment size fewer than 5 (\$197,491 for NAICS 561730 and \$321,239 for NAICS 721110).<sup>20</sup> Based on this determination, the Departments certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

### D. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to OMB and obtained approval using

<sup>19</sup> U.S. Small Business Administration (2017), *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, retrieved from: [https://www.naics.com/wp-content/uploads/2017/10/SBA\\_Size\\_Standards\\_Table.pdf](https://www.naics.com/wp-content/uploads/2017/10/SBA_Size_Standards_Table.pdf).

<sup>20</sup> U.S. Census, *2012 SUSB Annual Data Tables by Establishment Industry*, <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html>.

<sup>17</sup> Calculation: \$10.61 × 6,151 = \$65,283 (rounded).

<sup>18</sup> Calculation: \$9,442,615 – \$65,283 = \$9,377,332 = \$9.38 million (rounded).

emergency clearance procedures outlined at 5 CFR 1320.13.

More specifically, this rule proposes to replace print newspaper advertisements with an advertisement posted on at least one website that is widely viewed and appropriate for use by U.S. workers who are likely to apply for the job opportunity in the area of intended employment. The proposed rule would require that this advertisement be clearly visible on the website's homepage or be easily retrievable through the website, posted for a period of no less than 14 consecutive calendar days, publicly accessible to U.S. workers at no cost using the latest browser technologies and mobile devices, and satisfy the advertising content requirements set forth in § 655.41. Under the proposed rule and in accordance with 20 CFR 655.56(c)(2)(ii), an employer would be required to retain documentation demonstrating that it posted an electronic advertisement in compliance with the requirements in the proposed rule, including screen shots of the web page on which the advertisement appears and screen shots of the web pages establishing the path that U.S. workers must follow to access the advertisement. The employer must be prepared to produce all information and records contained in this information collection in the event of an audit examination, investigation, or other enforcement proceedings in the H-2B program. The Departments are using technology to reduce burden by replacing newspaper advertisements with electronic advertisements. The information collection requirements associated with this rule are summarized as follows:

*Agency:* DOL-ETA.

*Type of Information Collection:* New.

*Title of the Collection:* Advertising Requirements for Employers Seeking to Employ H-2B Nonimmigrant Workers.

*Agency Form Number:* None.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 5,879.

*Average Responses per Year per Respondent:* 2.

*Total Estimated Number of Responses:* 11,758.

*Average Time per Response:* 7 minutes per application.

*Total Estimated Annual Time Burden:* 686 hours.

*Total Estimated Other Costs Burden:* \$0.

#### *D. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.

This NPRM, if finalized, does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation, and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

#### *E. Small Business Regulatory Enforcement Fairness Act of 1996*

This NPRM, if finalized, would not be a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104-121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). The Office of Information and Regulatory Affairs has found that this rule is not likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic or export markets.

#### *F. Executive Order 13132: Federalism*

This NPRM does not have federalism implications because it would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, Executive Order 13132, Federalism, requires no further agency action or analysis.

#### *G. Executive Order 13175, Indian Tribal Governments*

This NPRM does not have “tribal implications” because it would 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. Accordingly, Executive Order 13175,

Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

#### *H. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families*

This NPRM would have no effect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action, analysis, or assessment.

#### *I. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

This NPRM would have no adverse impact on children. Accordingly, Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by Executive Orders 13229 and 13296, requires no further agency action or analysis.

#### *J. Environmental Impact Assessment*

This action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This action is therefore categorically excluded from further review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4375.

#### *K. Executive Order 13211, Energy Supply*

This NPRM has not been identified to have impacts on energy supply. Accordingly, Executive Order 13211 requires no further agency action or analysis.

#### *L. Executive Order 12630, Constitutionally Protected Property Rights*

This NPRM, would not implement a policy with takings implications. Accordingly, Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, requires no further agency action or analysis.

#### *M. Executive Order 12988, Civil Justice Reform Analysis*

This NPRM was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. It was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the

Federal court system. It meets the applicable standards provided in section 3 of Executive Order 12988.

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

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

For the reasons stated in this document, 20 CFR part 655 is proposed to be amended as follows:

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

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

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; sec. 205 of division M, Pub. L. 115-141, 132 Stat. 348; 8 CFR 2.1, 214.2(h)(4)(i), and 214.2(h)(6)(iii).

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

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(m) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

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

■ 2. Revise § 655.42 to read as follows:

#### § 655.42 Advertising in the area of intended employment.

(a) *Where to conduct recruitment.* The employer must place an advertisement for the job opportunity on at least one website that is widely viewed and appropriate for use by U.S. workers who

are likely to apply for the job opportunity in the area of intended employment.

(b) *Nature of the recruitment.* The advertisement must be clearly visible on the website's homepage or be easily retrievable through the website, posted for a period of no less than 14 consecutive calendar days, publicly accessible to U.S. workers at no cost using the latest browser technologies and mobile devices, and satisfy the requirements set forth in § 655.41.

(c) *Proof of recruitment.* An employer must retain documentation in accordance with § 655.56(c)(2)(ii) that demonstrates compliance with paragraphs (a) and (b) of this section. Such documentation must include screen shots of the web page on which the advertisement appears and screen shots of the web pages establishing the path that U.S. workers must follow to access the advertisement.

(d) *Transition period for applications with dates of need prior to October 1, 2019.* (1) All employers submitting an *Application for Temporary Employment Certification* with a date of need on or after October 1, 2019 must place and retain documentation of an electronic advertisement in accordance with paragraphs (a) through (c) of this section.

(2) An employer submitting an *Application for Temporary Employment Certification* with a date of need prior to October 1, 2019 may elect to place two newspaper advertisements in compliance with requirements in paragraphs (d)(2)(i) through (iv) of this section, in lieu of placing and retaining documentation of the electronic advertisement required by paragraphs (a) through (c) of this section.

(i) The employer must place an advertisement (which must be in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (d)(2)(ii) of this section), in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity.

(ii) 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.

(iii) The newspaper advertisements must satisfy the requirements in § 655.41.

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

■ 3. Amend § 655.48 by revising paragraph (a)(1) to read as follows:

#### § 655.48 Recruitment report.

(a) \* \* \*

(1) The name of each recruitment activity or source (e.g., job order and the name of the website as required in § 655.42(a) on which the job opportunity was advertised);

\* \* \* \* \*

■ 4. Amend § 655.71 by revising paragraph (c)(2) as follows:

#### § 655.71 CO-ordered assisted recruitment.

\* \* \* \* \*

(c) \* \* \*

(2) Designating the sources where the employer must recruit for U.S. workers, directing the employer to place the advertisement(s) in such sources;

\* \* \* \* \*

Kirstjen M. Nielsen,

Secretary of Homeland Security.

R. Alexander Acosta,

Secretary of Labor.

[FR Doc. 2018-24498 Filed 11-8-18; 8:45 am]

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#### DEPARTMENT OF LABOR

#### Employment and Training Administration

#### 20 CFR Part 655

[Docket No. ETA-2018-0002]

RIN 1205-AB90

#### Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Labor (the Department or DOL) is proposing regulatory revisions that would