DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 654 and 655

RIN 1205—AB19

Labor Certification Process for the Temporary Employment of Nonimmigrant Aliens in Agriculture in the United States; Administrative Measures To Improve Program Performance

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor proposes to amend its regulations relating to the temporary employment of nonimmigrant agricultural workers (H–2A workers) in the United States. The proposed amendments would reduce the period of time from 30 days to 15 days prior to the date worker housing will be occupied that employers are required to assure that their housing is in full compliance with applicable housing standards, and will be available for a pre-occupancy housing inspection; reduce the time from 60 to 45 days before the date the employer needs agricultural workers that an application for temporary agricultural labor certification must be filed; provide an exception to the requirement that employers use registered farm labor contractors (FLC) when it is the prevailing practice in an area and occupation for non-H–2A employers to use such contractors, if a particular FLC has a demonstrated history of using undocumented aliens or serious labor standard violations; eliminate the requirement that employers notify the local Job Service office in writing of the date the H–2A workers depart for the employer's place of employment; and transfer the responsibility for approving H–2A visa petitions for workers outside of the United States, including petition approval for replacement of certified H–2A workers upon proof of the H–2A workers' repatriation, to the Department of Labor from the Commissioner, Immigration and Naturalization Service.

These proposals represent part of an ongoing effort to streamline and improve the operation of the H–2A program. This proposal discusses program changes being implemented administratively as well as proposals for regulatory changes for public review and comment.

DATES: Interested persons are invited to submit written comments on the proposed rule on or before December 1, 1998.

ADDRESSES: Submit written comments to the Assistant Secretary for Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–4456, Washington, DC 20210, Attention: John R. Beverly, III, Director, U.S. Employment Service.

FOR FURTHER INFORMATION CONTACT: Denis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue NW., Room N–4456, Washington, DC 20210. Telephone (202) 219–4369 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Statutory Standard and Implementing Regulations

The decision whether to grant or deny an employer's petition to import a nonimmigrant farm worker to the United States for the purpose of temporary employment is the responsibility of the Attorney General's designee, the Commissioner of the Immigration and Naturalization Service (INS). The Immigration and Nationality Act (INA) (8 U.S.C. 1101 et seq.) provides that the Attorney General may not approve such a petition from an employer for employment of nonimmigrant farm workers (H–2A visa holders) for temporary or seasonal services or labor in agriculture unless the petitioner has applied to the Secretary of Labor (Secretary) for a labor certification showing that:

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

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

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

The Department of Labor has published regulations at 20 CFR part 655, subpart B, and 29 CFR part 501 to implement its responsibilities under the H–2A program. Regulations affecting employer-provided agricultural worker housing are in 20 CFR part 654, subpart E, and 29 CFR 1910.42.

II. Plan To Improve H–2A Program

The Administration has, for some time, been pursuing a dialogue among the Departments of State, Justice (INS), Labor and Agriculture regarding possible changes to the H–2A temporary nonimmigrant program (H–2A program) that could help streamline the program, improve operations, and address complaints raised by some users of the program without weakening worker protections. The General Accounting Office (GAO) and the Department's Office of Inspector General (OIG) have recently completed in-depth reviews of the H–2A program, providing useful analysis and findings and making several recommendations for program changes, many of which have been accepted by the administering agencies. This rulemaking represents the first step towards implementing changes to improve operations of the H–2A program, putting forward a number of proposals for regulatory changes affecting DOL and INS activities and requirements. In addition, DOL describes below some program changes being implemented administratively. DOL is continuing to explore other ways to further streamline and improve the operation of the H–2A program and welcomes input and dialogue with the affected public on other key H–2A issues.

A. Administrative Changes

Some H–2A program changes made to enhance effectiveness and efficiency while maintaining worker protections were made by administrative directives in the form of Field Memoranda (FM) issued by the ETA national office to its 10 Regional Administrators (RA). The RA's make determinations on H–2A labor certification applications and provide functional guidance to the State Employment Security Agencies (SESA) which administer the H–2A program under 20 CFR part 655, subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States. Administrative changes made by FM 17–9, issued January 6, 1997, Subject: *Improvements in H–2A processing* included:

- Clarifying under what conditions U.S. workers are considered to be ''available'' and thus may be counted to fully or partially deny H–2A positions requested on employers' labor certification applications. Only those U.S. workers who are identified by name, address, and social security number can be counted to reduce the number of H–2A workers requested by an employer.

• Emphasizing that regional offices should use discretion in reducing the number of certified positions requested as a result of ''last minute'' replacements of recruited U.S. workers where historical records of similar last minute referrals, or other information, indicate the likelihood that a proportion of the referred workers would not make themselves available for work.

• Clarifying positive recruitment requirements of U.S. farm workers in areas where there are credible reports of ''a significant number of qualified U.S. workers, who, if recruited, would likely be willing to make themselves available for work at the time and place needed,'' thereby targeting recruitment efforts by employers and SESA's to those areas most likely to produce qualified and available U.S. workers.

• Encouraging routine posting of approved agricultural job orders on America's Job Bank in view of the increased use of this resource on the part of employers and U.S. workers.

FM Number 22–98, issued April 14, 1998, Subject: *Clarification of Transportation Requirements Home,* reaffirms and clarifies the regulatory provisions which allow H–2A workers to move from one certified employer to another and the requirement placed on the final H–2A employer to pay for (or provide) the worker's transportation home.

The Department is also committed to improving its performance in meeting the existing requirement that within 7 days after the initial receipt of an employer's application, the employer be notified of deficiencies that preclude acceptance of the application, and to meet the statutory requirement to issue certification (when such certification is warranted) at least 20 days prior to the employer's first date of need for agricultural workers.

B. H–2A Process Improvements Through Regulatory Amendments

The amendments being proposed by ETA are discussed below.

1. Time Limits for Employer Provided Housing To Be Available for Inspection

Currently § 654.403 of the regulations governing housing for agricultural workers (20 CFR part 654, subpart E) provides that, for employers to gain conditional access to the intrastate or interstate agricultural clearance system, which is used for recruitment of non-local workers, they must provide assurances that the employer-provided housing will be in full compliance with the applicable standards 30 days before the housing is to be occupied. This is to allow time for a pre-occupancy housing inspection by the local Employment Service office. The housing regulations apply to all non-local agricultural job opportunities filled through the Employment Service system whether or not they are H–2A related. Reducing this lead time addresses a frequently expressed concern of employers that a 1-month lead time for employer-provided housing to meet applicable standards is not always realistic. This concern is especially common among employers in Northern States that need workers in March or April. Additionally, local employment service staff have had difficulty inspecting employer-provided housing located in Northern States in late winter or early spring. To address this problem, the proposed regulation will reduce the time that worker housing must be available for a pre-occupancy housing inspection from 30 to 15 days prior to occupancy. ETA is convinced that the ''30-day assurance'' can be reduced without lessening protections provided to U.S. and foreign workers.

2. Reduction in Time Limit To File Labor Certification Applications

The regulation at § 655.101(c) requires that employers file an H–2A labor certification application no less than 60 days before the first date the employer estimates the H–2A workers will be needed. Based on program experience, little or no productive recruitment of U.S. workers occurs within the first 15 days after the application is received. The overwhelming majority of qualified U.S. workers do not apply for and make a commitment to temporary agricultural employment earlier than 45 days before the date their services are required. Further, a lead time of 45 days should allow sufficient time for DOL to review the application and meet the requirements to notify an employer of any deficiencies within 7 days and to issue the labor certification not later than 20 days before the first date of need. See 8 U.S.C. 1188(c)(2)(A) and (c)(3)(A). Consequently, DOL is proposing to amend the regulation at § 655.101(c) to provide that H–2A applications shall be filed with the Regional Administrator no less than 45 calendar days before the first date of need, as was recommended by the GAO.

3. Exception From Using Certain Farm Labor Contractors

The regulations at § 655.103(f) require that employers applying for H–2A labor certification must attempt to secure workers through farm labor contractors (FLC), and to compensate FLC's with an override for their services when it is the prevailing practice in the area for non-H–2A agricultural employers to use FLC's. This requirement recognizes that FLC's can be an effective source for recruiting U.S. workers for jobs that would otherwise be filled by foreign temporary workers. In some instances, FLC's have filled these jobs with unauthorized workers and created potential vulnerabilities for growers when the unauthorized workers are identified during INS enforcement actions. At the same time, the furnishing of unauthorized workers—even under the terms and conditions of an H–2A job order—can have an adverse impact on U.S. workers. Similarly, when an FLC has a demonstrated history of serious labor violations, employers should not be compelled to provide an opportunity for recurrence of such violations, nor incur a potential liability due to violations by their contractor.

To minimize adverse effects on U.S. workers and to help assure that employers do not inadvertently employ unauthorized workers hired and supplied by FLC's, or expose themselves to potential liability by using an FLC that has a history of serious violations of labor standards, an amendment is being proposed to the current regulation to provide an exception. The employer need not use an FLC on the Wage and Hour Division's list of contractors whose certificates have been revoked or on a list of employers who have been sanctioned for violations of immigration laws and regulations. The rule also would provide a procedure whereby the employer can demonstrate that an FLC has a history of furnishing unauthorized workers or a history of serious labor standards violations. If so demonstrated, the employer need not use that FLC. This procedure is patterned after the existing procedure at § 655.106(g), which provides that employers may lodge complaints against persons or entities that have willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers under § 655.103(e) (the 50 percent rule) of this part. That rule requires employers (with certain exceptions for small employers) to hire qualified, eligible U.S. workers who apply until 50% of the contract period has elapsed. Section 655.103(f) has been revised to add the complaint procedure at § 655.103(f)(3). It should be noted, however, that the structure of § 655.103(f) has been revised for clarity. Sections 655.103(f) (1), (2), (4) and (5) are merely a redesignation of existing regulatory provisions that are carried forward in the amended rule.

4. Elimination of Requirement to Provide Notice of H–2A Worker's Departure Date

Pursuant to § 655.106 (e)(1), an employer is required to recruit for U.S. workers through the date the H–2A workers depart for the employer's place of employment (the departure date); this marks the beginning of the contract period for administering the ''50 percent rule.'' Employers are required to notify the local employment service office, in writing, of the exact departure date. Program experience indicates that the H–2A workers usually depart for the employer's place of business the day before the date they are needed. In the interest of streamlining H–2A procedures and to relieve employers of the administrative burden of notifying the local office of the departure date, it is proposed that this requirement be removed from the regulations and the H–2A workers will be deemed to have departed for the employer's place of business on the date immediately preceding the first date of need for the foreign workers.

It should be noted, however, that the proposed amendment regarding the departure date does not affect the employer's ability, provided for by § 653.501(d)(2)(v)(D), when using the interstate clearance system, to notify the order-holding office of changes in the date of need at least 10 days prior to the original date of need specified in the job order. Such notification changes the date which starts the employer's obligation to pay eligible U.S. workers for the first week of work.

5. Transfer of Adjudication of Visa Petitions to the Department of Labor

The H–2A labor certification process—from the filing of an application with the Department of Labor to the issuance of a visa by the Department of State, and the arrival of the H–2A workers at the employer's place of work—has been criticized by some employers as complicated, hard to understand, and too time consuming. In some instances, the result is that foreign workers have not arrived by the first date of the employer's need. In an effort to reduce the number of steps, paperwork, and the time necessary to obtain foreign workers necessary to perform critical agricultural functions, the Department of Labor and the INS are proposing that the function of adjudicating visa petitions be transferred to the Department of Labor, including petition approval for replacement of a certified H–2A worker upon proof of the worker's repatriation. (INS is proposing the transfer by a separate proposed rule, soon to be published in the **Federal Register**.) Accordingly, a new § 655.114 is proposed to be added to the H–2A regulations to authorize the proposed transfer of the INS visa petitioning and adjudication function to the Department of Labor. This change is expected to eliminate what can be a 2-to 3-week step in the current pre-entry process. The Department of Labor is considering adapting into the final rule the actual regulatory text currently found in 8 CFR 214.2(h) within the text of 20 CFR 655.114. This would provide the regulated community a single source for regulations governing the H–2A petition process. The Department welcomes comments on this rulemaking issue.

The INS has initiated steps in the development of a Notice of Proposed Rulemaking to delegate to the Secretary of Labor certain authorities conferred on the Attorney General under 8 U.S.C. 1184(c) involving the petition by employers for H–2A workers.

Pursuant to section 103 of the INA, the INS Commissioner will delegate to the Secretary of Labor the authority to determine on any specific case whether an employer may import temporary agricultural workers to the United States under section 101(a)(15)(H)(ii)(a) of the INA. The INS will propose any changes in form or content of the importing employer's petition which will be filed directly with the Secretary of Labor. The Secretary of Labor will approve the petition before a visa may be issued to an agricultural worker. The proposed rule states broadly that such authority will be delegated. The final rule will delineate DOL's functions with specificity.

Removing the INS adjudication will result in a streamlined process through which an importing employer needs to file only with one Federal agency. The Federal Government will ensure that the employer's petition moves through the remainder of the process, eliminating the need for the employer to interact with various different agencies. The Secretary of State will receive petition approval information for purposes of initiating the visa issuance process. This transfer does not affect the procedures whereby the alien beneficiaries obtain visas or other entry documents from the State Department or INS, as appropriate.

Further, the INS will propose streamlined processing for employers seeking to replace one certified H–2A worker with another worker based on proof that the first worker has repatriated.

It is estimated that, initially, it will take employers approximately the same amount of time as it does currently to furnish the information necessary to file a completed visa petition with an ETA Regional Office since no change is contemplated in the information requested from the current INS visa petition. The Department, however, is planning to consolidate the labor certification application form and the visa petition into one form that will support both labor certification and visa petitioning requirements. Design and approval of the new form may take up to 1 year from the time the responsibility for visa approval is transferred to the Department. This consolidation of forms will ultimately result in a substantial reduction of the paperwork burden now placed on employers.

Executive Order 12866

The Department has determined that this proposed rule is a ''significant regulatory action'' within the meaning of Executive Order 12866 because of the novel legal and policy issues raised by the rulemaking. However, this rule is not an ''economically significant regulatory action'' because it will not have an economic effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Regulatory Flexibility Act

The Department of Labor has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant economic impact on a substantial number of small entities. All of the proposed amendments would alleviate the administrative burden on employers seeking H–2A workers and, at the same time, they would not singly or together have a significant economic impact on any employer. Furthermore, the total number of employers utilizing H–2A workers is only approximately 6,000. Therefore, the proposed amendments would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The proposed rule contains collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA'95), 44 U.S.C. 3501 *et seq.*, and the regulation at 5 CFR 1320. PRA'95 defines collection of information to mean, ''the obtaining, causing to be

obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless of form or format.'' (44 U.S.C. 3502 (3)(A)).

The title, description of the need for and proposed use of the information, summary of the collections of information, description of respondents, and frequency of response of the information collection are described below with an estimate of the annual cost and reporting burden, as required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2). Included in the estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information.

ETA invites comments on whether the proposed collection of information:

(1) Ensures that the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Estimates the projected burden accurately, including whether the methodology and assumptions are valid;

(3) Enhances the quality, utility, and clarity of the information to be collected; and

(4) Minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Title: A Voluntary Procedure to Obtain an Exception to a Requirement that Employers Must Use Registered Farm Labor Contractors (FLC) in Applying for Temporary Agricultural H–2A Workers.

OMB Number: 1205–0NEW.

Frequency: On Occasion.

Affected Public: Business or other for-profit; Farms; Ranches.

Number of Respondents: 600 (estimated 10% of 6,000 H–2A employers).

Total Responses: 600.

Estimated Time per Respondent: It is estimated that it will take those few employers who chose to avail themselves of the option of filing complaints about an FLC not on a list maintained by ESA or INS that has a demonstrated history of employing or providing a substantial number of unauthorized workers, or a history of serious labor standard violations, about 1 hour to assemble the necessary information to support a credible complaint.

Total Burden Hours: 600 hours.

Total annualized capital/startup costs: 0.

Total annual costs: (operating/maintaining systems or purchasing services): 0.

Description: The proposal will provide an exception to the requirement that employers use registered farm labor contractors (FLCs) when it is the prevailing practice in an area and occupation for non-H–2A employers to use such contractors, if a particular FLC has a demonstrated history of using undocumented aliens or serious labor standard violations.

The Agency has submitted a copy of the information collection request to OMB for its review and approval. Interested parties are requested to send comments regarding this information collection to the Office of Information and Regulatory Affairs, Attn: ETA Desk Officer, OMB, New Executive Office Building, 725 17th Street NW, Room 10235, Washington, D.C. 20503.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the final information collection request; they will also become a matter of public record.

Copies of the referenced information collection request may be obtained by contacting Dennis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue NW., Room N–4456, Washington, DC 20210. Telephone (202) 219–4369 (this is not a toll-free number).

With respect to the transfer of the visa adjudication function to DOL, it is estimated that, initially, it will take employers about the same amount of time to furnish the information necessary to file a completed visa petition with an ETA Regional Office since no change is contemplated in the information requested from the current INS visa petition. The Department, however, is planning to consolidate the labor certification application form and the visa petition form into one form to obtain information that will support both labor certification and visa petitioning requirements. This planned consolidation of forms will ultimately result in a substantial reduction of the paperwork burden now placed on employers.

Catalogue of Federal Domestic Assistance Number

This program is listed in the *Catalogue of Federal Domestic Assistance* as Number 17.202, ''Certification of Foreign Workers for Agricultural and Logging Employment.''

List of Subjects

20 CFR Part 654

Agriculture, Employment, Government procurement, Housing standards, Labor, Migrant labor, Unemployment.

20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Forests and forest products, Guam, Health professions, Immigration, Labor, Longshore and harbor workers, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and recordkeeping requirements, Specialty occupation, Students, Wages.

Proposed Rule

Accordingly, parts 654 and 655 of chapter V of title 20, Code of Federal Regulations, are proposed to be amended as follows:

PART 654—SPECIAL RESPONSIBILITIES OF THE EMPLOYMENT SERVICE SYSTEM

Subpart E—Housing for Agricultural Workers

1. The authority citation for part 654, subpart E is revised to read as follows:

Authority: 29 U.S.C. 49k; 8 U.S.C. 1188(c)(4); 41 Op.A.G. 406 (1959).

§ 654.403 [Amended]

2. Section 654.403 is amended as follows:

a. In paragraph (a)(1) the phrase ''30 calendar days'' is removed and the phrase ''15 calendar days'' is added in lieu thereof.

b. In paragraph (a)(3) remove the phrase ''30 calendar days'' and add in lieu thereof the phrase ''15 calendar days''.

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

3. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); P.L. 103–206, 107 Stat. 2419; and 8 CFR 214.2(h)(4)(i).

Section 665.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288 (c) and (d); and 29 U.S.C. 49 *et seq.*; and P.L. 103–206, 107 Stat 2419.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

§ 655.100 [Amended]

4. In § 655.100, paragraph (a)(1) is amended by removing the phrases ''60 calendar days'' and ''60-calendar-day period'' and adding in lieu thereof the phrases ''45 calendar days'' and ''45-calendar-day period'', respectively.

§ 655.101 [Amended]

5. In § 655.101, paragraph (c) is amended as follows:

a. In the introductory text of paragraph (c), the phrase ''60 calendar days'' is removed and the phrase ''45 calendar days'' is added in lieu thereof.

b. In paragraph (c)(1), the phrase ''60 calendar days'' is removed in the two places it appears and the phrase ''45 calendar days'' is added in lieu thereof.

c. In paragraph (c)(2), the phrase ''60-calendar-day filing requirement'' is removed and the phrase ''45-calendar-day filing requirement'' is added in lieu thereof.

d. In paragraph (c)(3), the unit modifier ''60-calendar-day'' is removed in the two places it appears and the compound modifier ''45-calendar-day'' is added in lieu thereof.

6. Section 655.103 is amended by revising paragraph (f) to read as follows:

§ 655.103 Assurances.

* * * * *

(f) *Other recruitment*—(1) *RA required recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by § 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment.

(2) *Farm labor contractors.* When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors (FLC) and to compensate FLC's with an override for their services, the employer shall make the same level of effort as non-H–2A agricultural employers and shall provide an override which is no less than that being provided by non-H–2A agricultural employers.

(3) *Exception to Using Certain FLC's.* Employers are not required to use a FLC who is on the Wage and Hour Division's (WHD's) list of contractors whose certificates have been revoked, or on a list of employers that have been sanctioned for violations of immigration laws and regulations maintained by the Immigration and Naturalization Service (INS).

(i) *Complaints.* Any employer who has reason to believe it can document that an FLC, although not on the lists maintained by WHD or INS, has a history of employing or providing a substantial number of workers who do not have authorization to work in the U.S., or a history of serious labor standard violations, may submit a written complaint to the local office before or during the recruitment period. The complaint shall clearly identify the FLC who the employer believes has a demonstrated history of furnishing unauthorized workers, or a history of serious labor standard violations, and shall specify sufficient facts to support the allegation (*e.g.*, dates, places, numbers of unauthorized workers involved) and any available supporting documentation (*e.g.*, newspaper articles, notice of INS or DOL enforcement action) which will permit an investigation to be conducted by the local office.

(ii) *Investigations.* The local office shall inform the RA by telephone that a complaint under the provisions of paragraph (f)(3)(i) of this section has been filed and shall immediately investigate the complaint. Such investigation shall, to the extent feasible, include interviews with the employer who has submitted the complaint, the FLC, and any available INS or DOL officials who may have knowledge of any enforcement action conducted against the FLC named. In the event the local office fails to conduct such an interview, the RA, to the extent feasible, shall do so.

(iii) *Reports of findings.* Within 10 working days after receipt of the complaint, the local office shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the RA.

(iv) *Written findings.* The RA shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the RA deems appropriate. No later than 5 working days after receipt of the employer's complaint and the local office's report, the RA shall issue written findings to the local office and the employer. Where the RA determines that the employer's complaint is valid and justified, the RA shall immediately suspend the application of paragraph (f)(2) of this section with respect to the FLC named in the employer's complaint. Such suspension shall not take place, however, until the interviews required by paragraph (f)(3)(ii) of this section have been conducted. The RA's determination under the provisions of this paragraph (f)(3)(iv) shall be the final decision of the Secretary, and there shall be no further review by any DOL official.

(4) *Centralized cooking facilities.* Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an override.

(5) *Housing.* The employer shall not be required to provide for housing through an override.

* * * * *

§ 655.106 [Amended]

7. Section 655.106(e)(1) is amended by removing from the first sentence the phrase ''and shall notify the local office, in writing, of the exact date on which the H–2A workers depart for the employer's place of employment'', and by adding in lieu thereof the phrase ''which shall be deemed for the purposes of this subpart to be the day immediately preceding the employer's first date of need''.

8. Immediately following § 655.113, a new undesignated heading is added to read as follows:

Visa Petitioning

9. Immediately following the newly-added undesignated heading ''VISA PETITIONING'', a new § 655.114 is added to read as follows:

§ 655.114 H–2A Visa Petitions.

The Commissioner of the Immigration and Naturalization Service has delegated to the Secretary of Labor the functions performed by INS under 8 CFR 214.2(h)(5), *''Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H–2A),''* with respect to approving visa petitions for workers outside the United States, including petition approval for replacement of certified workers upon proof of the workers' repatriation. Within the Department of Labor, the

functions are delegated to the Regional Administrators. The Regional Administrators shall perform these functions consistently with 8 CFR 214.2(h) and such instructions as the Director, U.S. Employment Service, shall prescribe.

Signed at Washington, DC, this 25th day of September, 1998.

Alexis M. Herman,

Secretary of Labor.

[FR Doc. 98–26320 Filed 10–1–98; 8:45 am]

BILLING CODE 4510–30–P