

**DEPARTMENT OF LABOR****Employment and Training  
Administration****20 CFR Part 655****Wage and Hour Division****29 CFR Parts 501, 780, and 788**

RIN 1205-AB55

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

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The Department of Labor (the Department or DOL) is proposing to amend its regulations regarding the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. This notice of proposed rulemaking (NPRM or proposed rule) would re-engineer the process by which employers may obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2A (agricultural temporary worker) status. Re-engineering measures focus on the utilization of an attestation-based application process after an employer conducts pre-filing recruitment and the elimination of duplicative activities currently performed by the State Workforce Agencies (SWAs). In concert with these changes, the Department proposes to amend the wage and hour regulations to provide for enhanced enforcement, including more rigorous penalties, under the H-2A program to complement the modernized certification process so that workers are appropriately protected should an employer fail to meet the requirements of the H-2A program.

**DATE:** Interested persons are invited to submit written comments on the proposed rule on or before March 31, 2008.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB55, by any one of the following methods:

• *Federal e-Rulemaking Portal*  
*www.regulations.gov*: Follow the Web

site instructions for submitting comments.

• *Mail*: Please submit all written comments (including disk and CD-ROM submissions) to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

• *Hand Delivery/Courier*: Please submit all comments to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments via the Web site indicated above.

*Docket*: For access to the docket to read background documents or comments received, go to the Federal eRulemaking portal at *http://www.regulations.gov*. The Department will also make all the comments it receives available for public inspection during normal business hours at the ETA Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as an electronic file on a computer disk. The Department will consider providing the

proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

**FOR FURTHER INFORMATION CONTACT:** For further information regarding 20 CFR part 655, contact Sherril Hurd, Acting Team Leader, Regulations Unit, Employment and Training Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210; Telephone (202) 693-3700 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339. For further information regarding 29 CFR parts 501, 780 and 788, contact James Kessler, Farm Labor Team Leader, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****I. Revisions to 20 CFR Part 655 Subpart B***A. Background***1. Statutory Standard and Current Department of Labor Regulations**

The H-2A worker visa program provides a means for U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services when U.S. labor is in short supply. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act) defines an H-2A worker as a nonimmigrant admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(a), see also 8 U.S.C. 1184(c)(1) and 1188. Although foreign agricultural labor has contributed to the growth and success of America's agricultural sector since the 19th century, the modern-day agricultural worker visa program originated with the creation, in the Immigration and Nationality Act of 1952, of the "H-2 program"—a reference to the INA section that established it. The H-2

program established mechanisms for the use of temporary foreign labor but did not distinguish between agricultural and other types of work.

More than 30 years later, the Immigration Reform and Control Act of 1986 (IRCA) amended the INA to establish a separate H-2A visa classification for agricultural labor under INA Section 101(a)(15)(H)(ii)(A). Public Law 99-603, Title III, 100 Stat. 3359, November 6, 1986. Today, the H-2A nonimmigrant visa program authorizes the Secretary of Homeland Security to permit employers to hire foreign workers to come temporarily to the U.S. and perform agricultural services or labor of a seasonal or temporary nature, if such employment is first certified by the Secretary of Labor (the Secretary).

Section 214(c)(1) of the INA, as amended, requires the Secretary of Homeland Security to consult with appropriate agencies of the Government—in particular, the Department of Labor—before approving a petition from an employer for employment of H-2A nonimmigrant agricultural workers. 8 U.S.C. 1184(c)(1). Section 218 of the Act, together with section 214, establishes the statutory structure for the program and provides that a petition to import H-2A workers may not be approved unless the petitioner has applied to the Secretary of Labor for a certification. Section 218 sets out the explicit obligation for the Department to certify 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. 1188(a)(1).

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

The Department has published regulations at 20 CFR part 655, subpart B—“Labor Certification Process for Temporary Agricultural Employment Occupations in the United States (H-2A Workers),” governing the H-2A labor certification process; and at 29 CFR part 501 to implement its enforcement responsibilities under the H-2A program. Regulations impacting employer-provided housing for agricultural workers appear at 20 CFR part 654, subpart E (Housing for Agricultural Workers), and 29 CFR 1910.42 (standards set by the Occupational Safety and Health Administration); see also 20 CFR 651.10, and part 653, subparts B and F.

The INA also sets out the conditions under which a certification may not be granted, including:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment under this paragraph shall terminate on the date the H-2A workers depart for the employer's place of employment.

8 U.S.C. 1188(b).

The statute further sets out strict timelines for the processing of certifications: The Secretary may not require that an application be filed more

than 45 days before the employer's date of need, and certification must occur no later than 30 days prior to the date of need, provided that all the criteria for certification are met. 8 U.S.C. 1188(c). If the application fails to meet threshold requirements for certification, notice must be provided to the employer within 7 days of the date of filing, and a timely opportunity to cure deficiencies must be provided to the employer. The Act does not explicitly provide a timeframe for certification in cases where an application as originally filed failed to meet the criteria for certification and the employer is, upon the date that is 30 days prior to the date of need, still coordinating with the Department and making a good faith effort to cure deficiencies.

The Secretary has delegated her statutory responsibilities under the H-2A program, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA's Office of Foreign Labor Certification (OFLC). Under the current regulations in 20 CFR part 655, subpart B, H-2A labor certification applications are processed concurrently through the State Workforce Agency (SWA) having jurisdiction over the area of intended employment and the applicable National Processing Center (NPC) within the OFLC. The SWA and ETA—through the NPCs—receive the application and review the terms of the job offer concurrently.

Upon receipt of an employer's application, the SWA places in its job clearance system a job order initiating local recruitment, but does not place the job in broader circulation until it receives additional instructions from ETA. By law, ETA has 7 calendar days from the employer's date of filing within which to identify and notify the employer and SWA of deficiencies in the application and provide the employer an opportunity to submit an amended or modified application. Alternatively, in that same time period, ETA may accept the application for processing; acceptance reflects ETA's initial determination that the benefits, wages, and working conditions of the employer's job offer, for which temporary certification of foreign labor is sought, will not have an adverse effect on similarly employed U.S. workers. ETA then notifies the employer and SWA of this threshold determination and authorizes the SWA to place the employer's job order in intrastate/interstate clearance. See 20 CFR part 653, subpart F.

The SWA having jurisdiction over the State where the employer's work site is located is responsible for processing the

employer's request for H-2A labor certification, overseeing the recruitment and directing U.S. worker referrals to the employer. The NPC reviews whether the employers comply with advertising and recruitment requirements, and adjudicates the application—determining whether to approve or deny certification for some or all of the jobs requested.

To obtain a temporary labor certification, the employer must demonstrate that the need for the services or labor is of a temporary or seasonal nature. The employer must also establish that the job opportunity for the temporary position is full-time, and, absent extraordinary circumstances, the period of need is 1 year or less.

Historically, Departmental review and adjudication of applications took place through both the SWAs and ETA's Regional Offices. However, in December 2004, the Department opened two new NPCs, one located in Atlanta, Georgia, and the other in Chicago, Illinois, to consolidate processing of permanent and temporary foreign labor certification cases at the Federal level. In 2005, the Department published a notice in the **Federal Register** at 70 FR 41430, Jul. 19, 2005, clarifying that employers seeking H-2A certifications (with a few limited exceptions discussed below) must file two original copies of Form ETA 750, Part A, and Form ETA 790 directly with the NPC of jurisdiction and, concurrently, a copy with the SWA serving the area of intended employment. SWAs coordinate all activities regarding the processing of H-2A applications directly with the appropriate NPC for their jurisdiction, including transmittal to the NPC of housing inspection results, prevailing wage surveys, prevailing practice surveys, or any other material bearing on an application. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA sends the complete application to the appropriate NPC. The NPC Certifying Officer (CO), on behalf of the Secretary, reviews the application for completeness and either certifies the application for temporary employment under the H-2A program, or denies the certification. Current Department regulations at 20 CFR part 655, subpart B, establish procedures by which an employer may appeal to an administrative law judge either an initial rejection of an application or a final determination denying the application.

Employers receiving approved labor certifications attach them in support of their I-129 petitions to DHS for

authorization to employ foreign workers in H-2A status. For situations where prospective H-2A workers are outside of the U.S., the employer forwards the approved petition notice to its prospective employees who then apply for an H-2A visa at the appropriate U.S. consulate or port of entry. The Department of State then determines whether to issue visas to the foreign workers requested under the employer's petition, who can then be admitted through the appropriate port of entry. For H-2A workers already legally present in the U.S., DHS adjudicates an application to extend or change their current status to H-2A status as part of the petition approval process.

## 2. The Need for a Redesigned System

Modern agriculture is a tremendous benefit to the U.S.—to its culture, its health, and its economic prosperity. The value of U.S. agricultural production was estimated to be \$276 billion in 2006.<sup>1</sup> Farm and farm-related industries employ an estimated 2.7 million workers every year.<sup>2</sup> This includes both wage earning workers and those working for no wages on family farms.

One unfortunate reality of modern American agriculture is that the majority of the foreign workers assisting with the year's harvest are undocumented. In fact, the share of the agricultural workforce that is not work-authorized has increased dramatically in recent years while the number of U.S. workers engaged in agriculture has dropped steadily.<sup>3</sup>

Evidence of a shrinking domestic agricultural workforce is found in the U.S. Department of Agriculture's (USDA) Farm Labor Survey, a quarterly survey of employers. Comparing third-quarter totals over the 10 year period 1998–2007, there were 1,450,000 wage-earning workers on the Nation's farms and ranches in July 1998 but only 1,205,000 for the same quarter of 2007, for a decrease of 245,000 workers. The largest decrease occurred between 2005, when there were 1,344,000 wage-earning workers, and 2006, when 1,196,000 were reported.<sup>4</sup> The 1 year

<sup>1</sup> Bureau of Economic Analysis, National Income and Product Accounts, Table 7.3.5; <http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=263&FirstYear=2005&LastYear=2006&Freq=Year>.

<sup>2</sup> Bureau of Economic Analysis, Regional Economic Accounts, Table SA25N, <http://www.bea.gov/regional/spi/default.cfm?satable=SA25N&series=NAICS>.

<sup>3</sup> National Agricultural Workers Survey, Public Access Data, Fiscal Years 1989–2006. U.S. Department of Labor, Employment and Training Administration, Office of Policy Development and Research. <http://www.doleta.gov/agworker/naws.cfm>.

<sup>4</sup> 2006 USDA National Agricultural Survey.

change between 2005 and 2006 represents an 11 percent decrease. While increases in productivity have contributed to an expanding agricultural output with fewer inputs, including labor, this sudden and dramatic decrease in the supply of workers cannot be entirely attributed to productivity, and poses severe economic consequences for growers, especially those of perishable crops. Indeed, the Department's program experience and survey data have consistently supported the proposition that the agricultural industry has many more jobs than available legal workers.

Recent reports on the state of agriculture in the U.S. confirm the dependence of many agricultural employers on undocumented workers. The National Agricultural Worker Survey (NAWS)<sup>5</sup> conducted each year by the Department shows that in 1990, 17 percent of agricultural workers were illegally present in the U.S. By 2006, the number of agriculture workers who self-identify as being illegal had increased to 53 percent. Some worker advocates have suggested that the actual number of illegal workers is greater than 70 percent.<sup>6</sup>

Data from NAWS further shows that in 2006, 19 percent of all agricultural workers were first time U.S. farm workers (new farm workers are those who have less than a year of U.S. farm work experience). Among the new workers, 85 percent were foreign-born; 15 percent were U.S. citizens. All of the foreign-born new workers were unauthorized (100 percent).

Authorized workers appear to be leaving farm jobs because of age or opportunities for more stable and higher paying employment outside of agriculture, and are being replaced almost exclusively by unauthorized foreign-born workers. In addition, enhanced enforcement of Federal immigration law appears to have also contributed to a reduction in the availability of agricultural workers, which has in turn had the unintended consequence of sparking a series of agricultural crises across a number of States in the past year. As increased border enforcement efforts have succeeded in limiting the number of border crossings by illegal workers, U.S.

<sup>5</sup> The National Agricultural Workers Survey (NAWS) is a Department-sponsored employment-based, random survey of the demographic, employment, and health characteristics of the U.S. crop labor force. The information is obtained directly from farm workers through face-to-face interviews.

<sup>6</sup> See, e.g., Marcos Camacho, General Counsel, United Farm Workers, Testimony Before the Committee on the Judiciary, U.S. House of Representatives, May 24, 2007.

employers, which all too often relied on such workers in the past, have had an increasingly difficult time finding enough workers to harvest their crops.

Numerous reports of shrinking or nonexistent farm seasonal labor, with attendant crop loss for lack of harvest help, have been prominent in recent months and reflect Department survey data. See, e.g., "Pickers are Few, and Growers Blame Congress," *The New York Times*, September 22, 2006; "Farmers to Congress: Crops are Rotting," *Austin-American Statesman*, January 10, 2007. As stepped-up enforcement efforts have diminished the availability of agricultural workers, States and farmers have increasingly resorted to sometimes extreme means to address the resulting labor shortage. For example, the State of Colorado has initiated the use of inmate labor on farms where migrant labor was previously used. "Facing Illegal Immigrant Crackdown, Farms Look to Inmate Labor," *ABC News*, July 25, 2007. In addition, an increasing number of farmers have been investigating alternatives such as raising crops across the Mexican border to secure needed workers that they cannot legally hire in the U.S. "Short on Labor, Farmers in U.S. Shift to Mexico," *The New York Times*, September 5, 2007.

This critical need for legal workers in the U.S. agricultural industry has been recognized by many Members of Congress, including during recent deliberations over immigration reform. Senator Feinstein highlighted the unique labor needs of agriculture and the importance of foreign labor in a September 2006 floor statement:

We have 1 million people who usually work in agriculture. I must tell you they are dominantly undocumented. Senator Craig pointed out the reason they are undocumented is because American workers will not do the jobs.

When I started this I did not believe it, so we called all the welfare departments of the major agriculture counties in California and asked—can you provide agricultural workers? Not one worker came from the people who were on welfare who were willing to do this kind of work. That is because it is difficult work. The Sun is hot. The back has to be strong. You have to be stooped over. It is extraordinarily difficult work.

For a State as big as mine, there is an immigrant community which is professionally adept at this kind of work. They can pick, they can sort, they can prune, they can harvest—virtually better than anybody. This is what they do. This is what makes our agricultural community exist.

It is very hard for a farmer to hire a documented worker. It is very hard to find that documented worker. So if they are going

to produce they have to find the labor somewhere.

My State produces one-half of the Nation's fruits, vegetables and nuts. One-half comes from California. We produce 350 different crops. We have an opportunity now, with this bill, to get adequate labor for this harvest season on this border security bill.

In my State of California, growers are reporting that their harvesting crews are 10 to 20 percent of what they were previously due to two things: Stepped up enforcement, a dwindling pool of workers, and the problem that ensues from both.<sup>7</sup>

In January 2007, Senator Craig summarized the problem facing U.S. agriculture in this way:

[T]his economic sector, more than any other, has become dependent for its existence on the labor of immigrants who are here without legal documentation. The only program currently in place to respond to a lack of legal domestic agricultural workers, the H-2A guest worker program, is profoundly broken. Outside of H-2A, farm employers have no effective, reliable assurance that their employees are legal.

We all want and need a stable, predictable, legal workforce in American agriculture. Willing American workers deserve a system that puts them first in line for available jobs with fair market wages. All workers should receive decent treatment and protection of fundamental legal rights. Consumers deserve a safe, stable, domestic food supply. American citizens and taxpayers deserve secure borders and a government that works.

Last year, we saw millions of dollars' worth of produce rot in the fields for lack of workers. We are beginning to hear talk of farms moving out of the country, moving to the foreign workforce. All Americans face the danger of losing more and more of our safe, domestic food supply to imports.

Time is running out for American agriculture, farm workers, and consumers. What was a problem years ago is a crisis today and will be a catastrophe if we do not act immediately.<sup>8</sup>

Facing a shortage of available U.S. workers, agricultural employers have been left with the untenable choice of either (a) attempting to legally employ temporary foreign workers through an H-2A program that is widely decried as dysfunctional, but risking losing crops if inefficient program administration results in the workers arriving too late for harvest; (b) using illegal workers, and incurring the risk that the workers, and consequently the crops, will be lost to immigration enforcement; or (c) not hiring any workers at all—in effect, ending U.S. farming operations.

It is entirely unacceptable, but perhaps unsurprising, that many agricultural employers have chosen in recent years to take their chances with undocumented workers—if for no other

reason than a lack of viable alternatives. The willingness of agricultural employers to hire illegal workers has created a continuing economic magnet encouraging illegal workers to enter the U.S., resulting in attendant problems for national security and the rule of law, as well as additional costs associated with an underground economy, crime, and social services.

This increasing reliance on undocumented workers has left the agricultural workforce increasingly vulnerable to exploitation because illegal workers fear deportation if they complain about substandard wages or working conditions. As the U.S. Supreme Court has noted, "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens. \* \* \*" *Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984) (citing *De Canas v. Bica*, 424 U.S. 351, 356–57, 96 S.Ct. 933, 936–37 (1976)). And it is not only wages that are depressed, as Senator Kennedy stated in May 2007:

[W]e have, unfortunately, employers who are prepared to exploit the current condition of undocumented workers in this country—potentially, close to 12 [and] 1/2 million are undocumented. Because they are undocumented, employers can have them in these kinds of conditions. If they don't like it, they tell them they will be reported to the immigration service and be deported. That is what is happening today.

I yield to no one in terms of my commitment to working conditions or for fairness and decency in the workplace. That is happening today. The fact that we have those undocumented workers and they are being exploited and paid low wages has what kind of impact in terms of American workers? It depresses their wages. That should not be too hard to grasp. Those are the facts.<sup>9</sup>

The U.S. has an estimated 3 million agricultural job opportunities filled by about 1.2 million hired agricultural workers each year.<sup>10</sup> As noted above, more than 50 percent and perhaps in excess of 70 percent of these workers are in the country illegally. This means there are at least 600,000 and perhaps more than 800,000 illegal workers employed on America's 2 million farms.

The H-2A program is woefully underutilized by agricultural employers. Unlike other temporary worker programs with annual visa caps that are routinely reached on the first day on

<sup>7</sup> 153 Cong. Rec. S6590 (2007).

<sup>10</sup> Dr. James S. Holt, Testimony Before the Committee on Education and Labor, U.S. House of Representatives, June 7, 2007. <http://edworkforce.house.gov/testimony/060707JamesHoltTestimony.pdf>.

<sup>7</sup> 152 Cong. Rec. S9773 (2006).

<sup>8</sup> 153 Cong. Rec. S441-S442 (2007).

which visas are available, the H-2A program has no annual limit on the number of visas that can be issued. Yet despite the vast need for agricultural labor, and the availability of H-2A visas, only about 7,700 agriculture employers used the H-2A program last year, and only 75,000 workers were hired—less than 6 percent of the hired agricultural workforce. This situation clearly demonstrates that the vast majority of agricultural employers in the U.S. find the H-2A program so plagued with problems that they avoid using it altogether. The Department seeks to remedy this problem and render the H-2A program functional so that if and when agricultural employers are unable to locate sufficient numbers of U.S. workers, they will turn to the program to provide them with a fully legal workforce. A functional H-2A program will change the incentives for agricultural employers, thereby assisting in eradicating the underground economy created by the widespread use of unauthorized workers and better protecting the wages and working conditions of U.S. workers who are currently harmed by the employment of workers illegally present in the U.S.

On August 10, 2007, the Administration announced a series of actions the Administration would pursue to address border security and immigration-related processes. As part of that effort, the President directed the Department to review the H-2A program:

No sector of the American economy requires a legal flow of foreign workers more than agriculture, which has begun to experience severe labor shortages as our Southern border has tightened. The President has therefore directed DOL to review the regulations implementing the H-2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers.<sup>11</sup>

Pursuant to this directive, the Department conducted a “top to bottom” review of the H-2A program, its statutory basis, and current implementing regulations. This analysis identified a number of practices not required by the statute that have made administration of the program unwieldy and parts of the program difficult to use, particularly for an industry that needs its workforce at specific times and cannot afford delays. This NPRM enhances many protections for workers

while seeking to eliminate unnecessarily cumbersome regulatory practices that interfere with or inhibit use of the program, provide little or no benefit for U.S. workers, and indirectly contribute to the employment of illegal workers.

The process for obtaining a temporary labor certification for H-2A nonimmigrant agricultural temporary workers has been criticized as complicated, time-consuming, and requiring the considerable expenditure of resources by employers, SWAs, and the Federal Government. The current requirement that applications for temporary labor certifications be filed simultaneously at the SWA and the applicable ETA NPC has resulted in burdensome, costly, and unnecessarily duplicative Government review, with little associated benefit to workers. In addition, the compressed time frame for supervised recruitment has burdened employers and made it difficult for U.S. workers to access and pursue these opportunities. The supervised recruitment requirements and process have also been inconsistently applied, leading to further administrative burdens for both employers and workers. While the consolidation of the Regional Office oversight of applications into two NPCs has, to a certain extent, lessened the administrative burden and made application processing more consistent at the Federal level, it has not lessened the burden faced by employers, eliminated delays in application processing, or increased the Department's ability to ensure worker protections. Consequently, the program continues to be regarded with trepidation by many agricultural employers who continue to make the unacceptable choice to employ an undocumented workforce rather than face the program's many complexities.

### 3. Overview of the Proposed Redesign of the System

In light of its extensive experience in both the processing of applications and the enforcement of worker protections, the Department has re-examined its program administration and is consequently proposing several significant measures to re-engineer the H-2A program processing. These proposals will simplify the process by which employers obtain a labor certification while maintaining, and even enhancing, the Department's substantial role in ensuring that U.S. workers have access to agricultural job opportunities before H-2A workers are hired. These proposals will also increase employer accountability through newly applied penalties to

further protect against violations of program and worker standards, including substantially increased civil monetary penalties for non-compliance with program requirements and enhanced provisions for denying non-compliant employers access to the program.

The Department expects that the resulting efficiencies in program administration will significantly encourage increased program participation, resulting in an increased legal farm worker labor supply with the attendant legal rights and protections for workers. The Department further expects that U.S. workers will be better protected from adverse effects when they are competing with workers who are legally present in the U.S. and who are subject to all of the requirements of the H-2A program. See *Sure-Tan v. NLRB*, 467 U.S. at 883 (1984).

The Department is proposing to implement an attestation-based process by which employers, as part of their application, would attest, under threat of penalties, including perjury and debarment from the program, they have complied with all applicable program requirements. In addition, employers would be required to maintain all supporting documentation for their application for a period of 5 years in order to support the Department's enforcement of program requirements. The Department would also institute a new auditing process to verify that employers have, in fact, met their responsibilities under the H-2A program.

In the Department's experience, delays by SWAs in conducting housing inspections have frequently caused the Department to miss mandatory statutory deadlines for processing H-2A labor certification applications. By statute, the Department has only 15 days to process H-2A labor certifications; the Department cannot require that applications be filed more than 45 days before the first date of need, 8 U.S.C. 1188(c)(1), and is required to make a determination on applications no fewer than 30 days before the first date of need, 8 U.S.C. 1188(c)(3)(A). Housing determinations are similarly required by statute to be completed no fewer than 30 days before the first date of need—a mandate designed to ensure that housing inspections do not interfere with the specified timeframes for certifying labor applications. 8 U.S.C. 1188(c)(4). The Department's program experience indicates, however, that housing inspections are frequently delayed well past 30 days before the first date of need, causing the Department to make late certification

<sup>11</sup> Fact Sheet: Improving Border Security and Immigration Within Existing Law, Office of the Press Secretary, The White House (August 10, 2007); see also Statement on Improving Border Security and Immigration Within Existing Law, 43 Weekly Comp. Pres. Doc. 1067 (Aug. 13, 2007).

decisions thus violating the statutory timeframe specified. To bring the program back into compliance with the law and ensure that determinations are made no fewer than 30 days prior to the first date of need, the proposed rule would alter the current H-2A housing inspection procedures by adopting procedures that are currently used to inspect housing for U.S. workers under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). These procedures are explained in greater detail below.

Consistent with the Department's statutory obligations under the INA to process H-2A applications under strict time constraints, and the experience we have had in not being able on a regular basis to achieve these obligations with respect to employer-provided housing, it is necessary in this proposed rule to separate the INA procedure from the procedures for inspections not under the H-2A program in 20 CFR 654.400 and 654.403. While this INA rule would apply to H-2A related housing inspections in the future, the housing standards themselves, that is, 20 CFR 654.404-654.417 and 29 CFR 1910.142, whichever are applicable, continue to apply to such housing.

Employer applications would be submitted directly to an NPC, streamlining the intake process and reducing the time required to render a determination on the application. SWAs would continue to post job orders, circulate them through the Interstate Employment Service System, and refer potential U.S. workers to employers. SWAs would no longer directly oversee the employer's recruitment efforts. Instead, as described above, employers will attest to their compliance with the program requirements and those attestations will be audited by the Department to ensure compliance.

Upon submission of the application, the applicable NPC would review the job offer and the attestations to ensure compliance with all the criteria for certification relative to the date of need. As necessary, the NPC may issue a notice of application deficiency to enable the employer to amend or modify the application or job offer. The employer would also submit a preliminary recruitment report to the NPC as part of the filing process, documenting its recruitment efforts (and their outcome) for the period from the initiation of the recruitment efforts to the time of the submission of the application. In addition, the employer would be required to create and retain a supplemental written recruitment report for 5 years from the date of

certification for use in a Department audit or other investigation.

Employers would be required to retain for 5 years all supporting documentation for their application including documents supporting recruitment efforts, a copy of the housing certification, any relevant certificate of occupancy used to demonstrate compliance, as well as any written requests submitted to a SWA or other State agency for pre-occupancy inspection of housing, and any other documentation required to demonstrate compliance with a program obligation.

The introduction of audits serves as both a quality control measure and a means of evaluating applications. Audits would be conducted for quality control and fraud detection purposes on adjudicated applications as well as randomly-selected applications being processed. The criteria used for selecting applications for audits would be drawn from the Department's program experience and be based in part on information received from the Department's Employment Standards Administration (ESA), which is charged with enforcing the provisions of the H-2A program through its Wage and Hour Division (WHD). During an audit, employers would be required to provide information supporting the attestations in their application. Failure to meet the required program standards or to provide information in response to an audit would result in an adverse finding that could lead to penalties, such as revocation of an approved labor certification or debarment from the program. These penalties may be in addition to penalties separately assessed by ESA.

Finally, the Department's proposal creates an additional process for penalizing employers or their attorneys or agents who have failed to perform obligations required under the H-2A program. The Department will continue to debar employers who have engaged in prohibited activities or who have failed to comply with the obligations and assurances required by the program, and we have added a process to revoke an approved labor certification, which may in turn provide a basis for the DHS to revoke an approved visa petition.

The re-engineering of the H-2A program to include pre-filing recruitment, submission of applications directly to an NPC, modernized processing of applications, reduction of duplication in the application process, and focusing of SWAs on referral of U.S. workers should yield improvements in the time needed to process labor certification applications and help ensure the Department meets its

obligation to protect U.S. workers and process applications within the statutory timeframe mandated by Congress.

#### *B. Proposed Redesign To Achieve a Modernized Attestation-Based Program*

##### 1. Enhanced Recruitment Requirements

The recruitment process fulfills the Department's statutory mandate to certify that there are not sufficient U.S. workers who are available, able, willing, and qualified to perform the agricultural labor or services and that the employment of the temporary foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. 1188(a)(1). The Department currently ensures that these standards are met by requiring a combination of SWA-supervised recruitment by employers, the posting of job orders in the Interstate Employment Service System, and the independent contacting of other sources of potential labor. These activities must take place in a very narrow 15-day window, as under the statute the Department cannot require that applications be filed more than 45 days prior to date of need for the worker and the Department must approve or deny labor certifications no later than 30 days before the employer's date of need.

The Department is now proposing to require employers to conduct recruitment of U.S. workers for temporary agricultural job opportunities for a substantially longer period of time before the job begins by requiring that recruitment be started well in advance of the employer filing the application. The Department's experience in other programs, such as its permanent labor certification program, has demonstrated that recruitment in advance of filing an application benefits the potential U.S. worker population by providing a maximum opportunity for consideration of the job opportunity. Employers would continue to engage in so-called "positive recruitment" and post a job clearance order for both interstate and intrastate clearance with the SWA having jurisdiction over the place of employment in advance of the application being filed with the Department. The Department believes that advance recruitment in the H-2A program would help maximize the ability of employees and organizations representing their interests to identify available jobs with sufficient time to apprise all interested workers of the potential opportunity well in advance of the job's start date.

Under the new recruitment system, which is discussed in more detail below, U.S. workers' ability to identify job opportunities would be further enhanced by requiring employers to place three advertisements, instead of the currently required two, in a newspaper of general circulation most appropriate for the agricultural occupation and most likely to reach the U.S. workers who will apply for the job opportunity. In addition, the Department would require that one of the three newspaper advertisements appear in a Sunday edition. If a newspaper of general circulation with a Sunday edition is not available (as may be the case in many rural areas where such jobs are located), the employer would instead use the edition with the widest circulation in the area of intended employment that is most appropriate to the occupation and most likely to be read by the U.S. workers most likely to apply for the job opportunity. In addition, if the use of a professional, trade or ethnic publication is more appropriate to the occupation, and if that publication is the most likely source to bring responses from qualified and available U.S. workers, the employer may use such publication instead of a newspaper in place of the two required daily (but not Sunday) advertisements. This advertising option will allow recruitment for agricultural jobs to be appropriately tailored in those areas where such jobs are traditionally advertised in ethnic or trade publications. Employers would also be required to contact former employees to determine their willingness to accept the employer's job opportunity.

In addition to recruiting in the area of intended employment, employers would be required, based on an annual determination made by the Secretary, to recruit in any State designated as a State of traditional or expected labor supply for the place the employer's work is to be performed. This additional recruitment would consist of a single newspaper advertisement in the area or areas within the States that are outlined in the Secretary's designation, and must be placed at the same time as the three local newspaper advertisements discussed above. SWAs will also place job orders into those designated states as required.

As required by the current regulations, all advertising must include all of the details required in the job offer, including the name and geographic location of the employer. If the employer is an association, the advertisement may, as is current practice, list only the name of the association, but the Department

proposes to require that the advertisement inform the reader that the SWA will have on file and will make available upon request the name and location of every member of the association seeking workers through the advertisement. Ads must identify in all cases the wage being offered. In the event an association is serving as the employer and the wage is a range throughout the area of intended employment, the range of wages must be included in the advertisement, and the advertisement must indicate that the SWA will have on file, and will make available upon request, the wage rate applicable to each member of the association. These requirements will help ensure that potential applicants are afforded the opportunity to make fully informed decisions about job opportunities.

Employers would begin advertising job opportunities no earlier than 120 calendar days and no later than 75 calendar days before the date on which the foreign worker would begin work (i.e., the date of need). This will permit sufficient time for an advertisement to be placed and responded to by potential U.S. workers most likely to apply for the job opportunities, and for workers who apply to be evaluated by the employer before the H-2A application is filed. The Department believes that the expanded recruitment window appropriately balances the need to maximize the notice of available job opportunities to U.S. workers with the need to ensure that recruitment is not conducted so far in advance of the growing season that employers do not yet know when or how many workers will be needed.

Employers filing the labor certification applications would be required to attest under penalty of perjury that (1) they did, in fact, attempt to recruit U.S. workers in the manner prescribed by the regulations, and (2) any potentially qualified U.S. workers that applied were rejected for lawful, job-related reasons. Employers would submit with their application a preliminary recruitment report, documenting their efforts to date in attempting to find eligible U.S. workers, including the outcome of the evaluation of U.S. worker applicants. Employers would also be required to prepare a supplemental report after filing that documents subsequent recruitment efforts and the results, including results from SWA recruitment and referrals, to be retained with the other documentation supporting the application.

The proposed rule expands the period in which the employer must conduct

recruitment and consider potential U.S. workers, so that U.S. workers will be given notice well in advance of the actual openings. To account for the fact that the date and extent of need is always flexible in the agriculture industry, the Department has retained current provisions permitting employers to reasonably adjust the numbers of workers needed without engaging in additional recruitment.

The INA also requires employers to engage in recruitment through the Employment Service SWA job clearance system. See 8 U.S.C. 1188(b)(4); see also 29 U.S.C. 49, *et seq.*, and 20 CFR part 653, subpart F. The proposed recruitment model requires employers to submit job orders to the SWA having jurisdiction over the area of intended employment. When the job order is for a work opportunity in more than one State, the SWA to which the job order is submitted will in turn forward the job order to all States listed in the application as anticipated worksites. In circumstances where the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State, the SWA must, to maximize the recruitment of eligible U.S. workers, transmit a copy of its job order to no fewer than three States, which must include any State designated by the Secretary as a State of traditional or expected labor supply for the area of intended employment. This recruitment takes place in tandem with the employer's own recruitment within a multi-state region of traditional labor or expected labor supply, as discussed above. INA § 218(b)(4).

The Department is proposing that SWA job orders also be posted until the time the H-2A worker departs for the place of employment (or 3 days prior to the start date of the employment, whichever is later). Because referrals of U.S. workers resulting from newspaper advertisements and intrastate/interstate job orders will all come from the SWA, this proposal will better synchronize efforts to recruit U.S. workers and ensure that such efforts operate in parallel.

Employers should retain several types of documents reflecting their compliance with the program's recruitment requirements.

Documentation relating to newspaper advertisements will be satisfied by copies of pages from the newspapers (or other publication) in which the job opportunity appeared. Documentation of an SWA job order will be satisfied by maintaining copies of the job order printed from the SWA's Internet job listing Web site on the first day of posting, a copy of the job order provided

by the SWA with the start date of posting, or other proof of publication from the SWA containing the text of the job order on the first day of posting. Contact with previous employees, another required positive recruitment element, will be documented by maintaining copies of correspondence with such employees (or records of attempts to contact former employees). Such documentation should also contain a description of the outcome of those contacts, including the lawful, job-related reasons for not rehiring a former employee. In sum, these proposed changes in the recruitment process will increase the likelihood that U.S. workers will receive advance notice of available job opportunities, as well as provide them with additional information on available positions. In addition, the proposed changes will help avoid recruitment-related processing delays.

## 2. Use of Attestations of Compliance With Assurances and Obligations

The Department is proposing to require employers to submit their application directly to the NPC having jurisdiction over the employer's place of employment. The application under the re-engineered process will differ not only in the manner of its submission, but also in its form. Based on the Department's experience administering the attestation-based Permanent Labor Certification (PERM) program, the Department is proposing instituting an application that would require employers to attest to their adherence to the articulated obligations under the H-2A program. An employer would be required to attest, under penalty of perjury, that it will abide by all of the obligations imposed on employers under the statutory and regulatory framework. The employer would have to attest, for example, that it has begun to conduct and either completed or will complete the required recruitment (and document the recruitment efforts). The employer would also have to attest that it has provided or secured required housing and, where applicable, applied to the SWA and requested or received a satisfactory inspection. The employer would also need to attest its compliance with securing workers' compensation insurance; the so-called "three-fourths guarantee;" and the provision of tools and transportation. In addition, the employer would have to attest that it is in compliance with and will continue to comply with all applicable Federal, State and local employment-related laws. In short, all of the obligations of employers to comply with H-2A program requirements would continue

and would be documented through these formal attestations.

As part of the application process, employers would attest that they have conducted expanded recruitment in advance of filing an application with the Department. Employers would attest to their compliance with the required elements of the H-2A job offer, including offering the applicable legally required wage, which would be obtained in advance through a request to the NPC. Employers would attest that they have provided the obligatory workers' compensation insurance and met the required working conditions. Employers would further attest to their adherence to requirements regarding the recruitment of qualified U.S. workers through both their own positive recruitment efforts and by requesting the posting of job orders through SWAs, as well as confirming that any U.S. workers who have applied or been referred and were not hired were referred only for lawful, job-related reasons.

Employers would attest to having obtained worker housing comporting with all applicable safety and health standards. Employers would identify the housing to be provided by location and, if public or rental accommodation, by name, and attest that the housing meets the applicable standards. And, if the housing is of a sort that must by statute be inspected, the employer would attest that such housing has either satisfactorily passed a preoccupancy SWA inspection, or that the employer has made a timely request for such an inspection that has not occurred through no fault of the employer. As part of its recruitment prior to filing its application, the employer would be required to place a job order with the appropriate SWA, which would in turn post it through the interstate/intrastate job clearance system.

The Department anticipates the shift to an attestation-based process with pre-filing recruitment would help to bring the program into compliance with longstanding statutorily required processing timelines and better harmonize the program with the unique needs of the agricultural sector, thereby enabling more employers to utilize the program and better protecting U.S. workers from the adverse effects resulting from the employment of illegal workers. Employers would still be required to comply with all the requirements and obligations of the program, and indeed penalties for noncompliance would increase. Employers would retain supporting documentation evidencing their

compliance with the program requirements, while the Department would retain for itself the right to request such documentation to ensure program integrity.

The revised attestation process will dramatically reduce the number of incomplete applications that currently consume valuable processing time only to then have to be returned to the applicant for the inclusion of missing information. The majority of the information on the application form would consist of attestations that will elicit information similar to that required by the current H-2A labor certification process reflecting that the employer has performed the necessary activities to establish eligibility for certification. These proposed attestations lend themselves to a more efficient processing of applications.

The Department anticipates that, with an expected increase in use of the program, it will see a marked increase in participants unfamiliar with the obligations that are integral to the H-2A program. The movement to an attestation system would be accompanied by outreach to potential users as well as those currently utilizing the program. Such education efforts will of necessity focus on employers' obligations and the mechanisms by which compliance will be judged. The Department invites comment on a timeline for its anticipated training and educational outreach initiatives.

## 3. Form Submission

The Department proposes initially to require employers to submit applications on paper, through an information collection form that will be modified significantly from the current form to reflect an attestation-based process. The use of a redesigned form would provide the necessary assurances of an expeditious paper application review process. The Department ultimately envisions implementing an electronic submission system similar to that employed in other programs administered by the Department's OFLC, such as the electronic submission system in the PERM program.

The Department is proposing to eventually require electronic submission in explicit recognition of the fact that such a process will significantly further improve the application process. An electronic submission process will also improve the collection of key program data and better allow the Department to anticipate trends, investigate areas of concern, and focus on areas of needed program improvement. Improved data collection will also enable the

Department to capture information regarding noncompliance and potential fraud that may lead to future administrative, civil, or criminal enforcement actions against unscrupulous or non-performing employers.

The Department recognizes that H-2A employers may be concerned about their ability to comply with the application requirements through use of an Internet-based submission process and is accordingly not requiring it at this time. The Department is committed to reviewing its ability to transition the H-2A filing process to such a method and is reviewing specifically its ability to provide, based upon its previous experience, user-friendly electronic registration and filing processes that would enable use by any employer with computer and Internet access. The Department's experience with agricultural employers in other contexts (program requirements under the Migrant and Seasonal Agricultural Worker Protection Act, for example) support its determination that such access is common enough among agricultural employers to justify eventually requiring its use in this context. The Department invites comments, in particular from H-2A employers, on the concept of an electronic filing process.

#### 4. Elimination of Unnecessary Duplication in the SWAs' Role

The Department's focus on providing employers a more efficient process has taken into consideration the total time an employer must spend before all Federal agencies to obtain permission to employ an H-2A worker and ensure that workers are available when needed. Employers must by statute apply to DOL, DHS and DOS to obtain H-2A workers. Reducing the time it takes an employer to secure H-2A workers after filing their application, and after their unsuccessful search for U.S. workers, is critical to the program's success given the time sensitive nature of many agricultural employers' labor needs.

Congress has signaled its awareness of the incredible importance to the agricultural sector of timely application processing by building tight mandatory timeframes into the statutes governing the H-2A program. For example, the Secretary is required to make certification decisions "not later than 30 days before the date such labor or services are first required to be performed," 8 U.S.C. 1188(c)(3)(A), and SWAs are required to complete housing inspections by that date as well, 8 U.S.C. 1188(c)(4). Actual practice has shown, however, that the procedures

established by the current regulations are cumbersome, slow, unwieldy, and have resulted in both SWAs and the Department regularly failing to meet the required statutory timeframes.

Consequently, the Department's efforts have focused on how to develop a smoother and more expeditious H-2A process while ensuring protections for workers. Among our proposals in this rulemaking is the elimination of duplicate filing of applications with the SWA and the Department's NPC. By focusing the SWAs' role in the initial stages of the application process (placing job orders, managing referrals of eligible U.S. workers, and conducting housing inspections), the Department can more effectively oversee the adjudication and consistent processing of all applications. As a result of this modernized application review procedure, the Department can reduce and equalize the average processing time of applications regardless of the area of the country where the application originated.

We expect that the time savings gained by using a more efficient labor certification process will reduce the total time an employer spends obtaining permission from the Federal Government to employ an H-2A worker and getting that worker from his or her country of origin to the place of employment. Moreover, the Department's consolidation of the review of applications in its NPCs will permit greater consistency of adjudication. Two centers, as opposed to the fifty State agencies, will be charged with all major aspects of application adjudication, ensuring consistency in the application of program requirements and policy. Indeed, the Department is considering consolidating all H-2A applications into one NPC rather than two, to further enhance consistency of adjudication and processing.

The SWA will continue to play its traditional role in the recruitment process by posting and processing an appropriate job order to notify available and qualified U.S. workers of the opportunity. The employer would need to contact the SWA to initiate placement of the job order, rather than relying on the SWA to place it in the course of processing the H-2A application, as is the case now. The job order would be required to provide the same information as the newspaper advertisements contemplated by this proposal. This is an expansion of the information previously required to be included with the job order, and will significantly enhance the transparency of the recruitment process for

prospective workers. Employers whose applications involve worksites in multiple SWA jurisdictions would place the job order with the SWA in which the majority of the proposed work assignment will take place. The SWA will arrange to have it posted with other SWAs, as appropriate.

To strengthen the integrity of the Secretary's determination of whether there are available U.S. workers for the position, and to help build employers' confidence in their local SWAs and the H-2A program, the proposed rule at § 655.102(j) clarifies the SWAs' obligation to verify the employment eligibility of prospective U.S. workers before referring them to an employer under a job order in support of a H-2A application. The failure of many SWAs to verify the employment eligibility of referred workers, despite existing statutory requirements that only eligible workers be counted as valid referrals and existing regulatory requirements that no ineligible workers be referred, has created a situation in which it is all too easy for illegal workers, rather than U.S. workers, to be referred to employers. For many years, agricultural employers have complained to this Department that SWA-referred workers are often undocumented, generating substantial additional legal risks and administrative burdens for employers. Collectively, agricultural employers appear to have little confidence in their local employment service or the H-2A program, and consequently rarely utilize either.

The INA provisions governing admission of foreign workers under the H-2A program make employment eligibility of U.S. workers a core element of a worker's "availability;" a U.S. worker has long been characterized as being "available" for employment when authorized to legally undertake that employment. An employer will not be penalized for turning away applicants who are not authorized to work, and referred workers who are refused employment on the basis of not having work authorization will not be counted as available for purposes of H-2A labor certification. By statute, the Secretary must certify the job opportunity if the employer: (1) "Has complied with the criteria for certification (including criteria for the recruitment of *eligible* individuals as prescribed by the Secretary)," and (2) "does not actually have, or has not been provided with referrals of, qualified *eligible* individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary." 8 U.S.C.

1188(c)(3)(A) (emphasis added); see also definition of “agricultural worker,” 20 CFR 651.10 (applicable to referrals under the Employment Service System regulations at 20 CFR parts 651–658). For purposes of employment, the INA defines an “eligible individual” as one “who is not an unauthorized alien \* \* \* with respect to that employment.” 8 U.S.C. 1188(i)(1).

SWAs receiving ETA Alien Labor Certification (ALC) grant funding to support H–2A activities are required to verify the employment eligibility of applicants seeking referral under a job order in support of an H–2A application pursuant to current regulations and agency guidance; this proposed regulation provides additional clarification of this requirement. The Department notes that DHS regulations at 8 CFR 274a.6 provide additional verification authority and procedures for SWAs. To confirm its continued eligibility to receive ALC grant funding, each State agency will be asked to submit proof of these procedures to the Department prior to the beginning of the 2009 fiscal year (FY). In the event a SWA refers a worker who is not eligible, current H–2A employer responsibilities will not change; an employer is not required to hire such worker and can include ineligibility as a reason for rejection in its recruitment report.

We strongly caution that the SWA’s responsibility to perform threshold, pre-referral verification exists separate from each employer’s independent obligation under Immigration Reform Control Act of 1986 (IRCA) to verify the employment eligibility of every worker to whom it has extended a job offer. The INA does provide, however, that employers who accept referrals from SWAs that verify employment eligibility in compliance with the DHS process and provide referred employees with appropriate documentation certifying that verification has taken place are entitled to “safe harbor” in the event it is later discovered a referred worker was not authorized to work in the U.S. 8 U.S.C. 1324a(a)(5). To simplify the recruiting process and avoid unnecessary duplication of functions, SWAs are directed to provide all referred employees with adequate documentation that verification of their employment eligibility has taken place. Employers can rely on INA § 274A(a)(5) only where the documentation complies with all statutory and regulatory requirements, including 8 CFR 274a.6. SWAs are strongly encouraged to provide this documentation to employers. The Department is not insensitive to the resource and time constraints facing SWAs in their

administration of H–2A program requirements and the difficulties inherent in making informed referrals from a population of workers that is frequently itinerant and often difficult to contact. However, we do not believe that this requirement has resulted or will result in a significant workload increase or administrative burden. Further, the mechanisms available for verification, including the E-Verify Web-based system operated by DHS, allow SWA staff to perform this function relatively quickly after training.

E-Verify is a program administered by the United States Citizenship and Immigration Services (USCIS) within DHS. E-Verify electronically confirms a person’s employment eligibility after the Employment Eligibility Verification Form (Form I–9) has been completed. SWAs that choose to use E-Verify refer a job seeker to an H–2A-related job opportunity only after completing a Form I–9 and submitting the required information via E-Verify. The SWA will be required to follow the terms and conditions in the Memorandum of Understanding that must be signed by the SWA and USCIS in order to gain access to E-Verify. The SWA may not refuse to make a referral and the employer may not refuse to accept a referral because of an E-Verify tentative nonconfirmation (TNC), unless the job seeker decides not to contest the TNC. SWAs and employers may not take any adverse action, such as delaying a referral or start date, against a job seeker or referred worker based on the fact that E-Verify may not have yet generated a final confirmation of employment eligibility. The SWA will be required to advise the employer when E-Verify generates a final confirmation or nonconfirmation.

The requirement that SWAs verify employment eligibility prior to referral is designed to strengthen the integrity of the temporary labor certification process, afford employers a legal pool of U.S. worker applicants, and improve confidence in and use of the H–2A labor certification program.

#### 5. Retention of Supporting Documentation

Employers would be required to retain the documentation outlined in the proposed regulations in hard copy for 5 years from the date of adjudication, and to provide all documentation to demonstrate compliance with the requirements of the program in response to an audit or other investigative matter, whether conducted by the Department or another Federal agency, such as DHS. As described above, the documents to

be retained include proof of recruitment efforts, including advertising, contact made with applicants and former employees, and a written recruitment report with results of efforts and reasons for not hiring U.S. workers.

Finally, the Department recognizes that there is always a risk that less-than-scrupulous H–2A program participants will try to secure workers through fraud or misrepresentation. Long-standing practice and coordination with SWAs in the H–2A program, as well as experience with the attestation-based PERM system, have provided us substantial insight regarding the mechanisms by which employers may seek to take advantage of the re-engineered attestation-based system. The Department proposes to employ various measures to address potential fraud or abuse in the attestation-based process and the H–2A program generally. These will include audits, a combination of increased deterrent penalties, including [0]fines, revocation of approved applications, and debarment from future participation in the H–2A program, all of which are discussed below, as well as other mechanisms for detecting fraud. In addition, employers and their agents and attorneys are reminded that submission of any materially false, fictitious, or fraudulent statements to any Federal Government agency constitutes a criminal violation (18 U.S.C. 1001 and 1546), subjecting anyone convicted of a violation to fines and/or imprisonment for not more than 5 years.

#### C. Maintaining and Enhancing Program Integrity

The shift to an attestation-based temporary H–2A agricultural labor certification system will be accompanied by the Department’s vigorous enforcement of employer obligations under this program. Consequently, the Department is proposing certain actions in this rulemaking, consistent with its statutory authority, to examine and enforce compliance with the enumerated obligations and responsibilities of employers that seek approval of labor certifications pursuant to the H–2A program.

##### 1. Prohibition on Cost-Shifting

Under proposed new § 655.105(n), an employer must attest that it has not shifted and will not shift to the H–2A worker the costs of preparing or filing the application, including the costs of recruitment or attorneys’ fees, and that it has not utilized a foreign recruiter without contractually prohibiting that

foreign recruiter from passing on such costs. The recruitment, legal, and other costs associated with filing a temporary labor certification application are business expenses necessary for, or in the case of legal fees, desired by, the employer to complete the labor market test and to prepare and submit the labor certification application. The employer's responsibility to pay the costs of preparing an application exists separate and apart from any potential benefit that may accrue to the foreign worker as a result of the employer filing the application. Prohibiting the employer, including a Farm Labor Contractor (FLC), from passing these costs on to its H-2A worker(s) allows the Department to better protect the integrity of the process, as well as protect the wages of the H-2A worker from deterioration by disallowable deductions. Disallowable deductions taken from an H-2A worker's wages cause those workers to be paid less than the required wage, which results in an adverse effect on U.S. workers.

## 2. The Use of Audits

Pursuant to proposed new § 655.112, after a labor certification application has been adjudicated, the Department would, based upon various selection criteria, identify certain applications for audit review. Investigations performed by the Department's WHD and the Department of Justice's Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) would provide another potential source of information triggering audits. In addition, some applications would be randomly selected for audit as part of the Department's quality control processes. This authority would enable the Department to perform its directed and random audits on any application that has been adjudicated, regardless of whether the application was approved or denied.

If an application is selected for an audit, the employer will be notified in writing of the selection. The employer would then be required to submit, within 30 days, the documentation specified in the audit request to verify the information stated in or attested to on the selected application. Upon timely receipt of an employer's audit documentation, and after any further investigation that may be warranted, the audit information would be reviewed by the Department's Certifying Officer (CO). The Department would then determine whether the employer complied with its obligations and would notify the employer in writing of its findings.

The Department will take firm action when it discovers non-compliance by employers. The Department is invoking all available statutory authorities to bolster its enforcement capabilities. If, at the conclusion of an audit, there is evidence of non-compliance with required attestations and/or other program requirements, or if an employer refuses to participate in the audit process, the proposed rule would enable the CO to order a variety of remedies. The CO may initiate debarment proceedings against the employer, agent and/or attorney in order to prohibit participation in the H-2A program for a period of up to 3 years at the Department's discretion and depending on the nature and severity of the violations. If the audit reveals that employer's documentation is incomplete, is inconsistent with the employer's statements and/or attestations contained in the application, or if the application and supporting documentation is otherwise deficient in some material respect, the employer may, in addition to debarment, also experience revocation of the approved H-2A certification, as described below. The proposed rule also adds a provision explaining that the Department of Justice's OSC will refer to the CO pertinent information gained in the course of OSC's investigations. Likewise, the proposed rule would require the Department and Department-funded entities to share pertinent information with OSC.

## 3. Revocation of Existing Labor Certifications

Section 218(e)(1) of the INA authorizes the Department to revoke a temporary agricultural labor certification in appropriate instances. When the Department initiated rulemaking in 1987 to implement IRCA, it considered implementing this provision, but determined that the SWA's supervision of the employer's activities during the labor certification application process, together with WHD's post-certification enforcement role, vitiated the need for such a sanction. 52 FR 20524, 20525, Jun. 1, 1987.

Along with the modernized approach to the application and certification processes proposed in this rule, we also include proposed measures, consistent with the provisions of INA § 218(e)(1), to ensure compliance. This includes the possibility of revocation of an approved certification if it is subsequently determined that an employer has not complied with a material term or condition of the certification, or upon recommendation of WHD for egregious

program violations or interference with or failure to cooperate with an investigation. DHS, in a separate rulemaking, is proposing to revoke approved visa petitions that were approved on the basis of the revoked H-2A labor certifications.

## 4. Debarment

Proposed § 655.118 seeks to modernize and enhance the statutory process relating to the debarment of employers who substantially violate the terms of a labor certification. Over the past two decades, effective policing of the program has been hampered by an unnecessarily narrow definition of employer actions warranting debarment. In particular, the current regulation does not authorize debarment for actions that occurred during the recruitment process, including the rejection of domestic workers for other than lawful job-related reasons. Under the proposed rule, however, where certification would be granted based on employer attestations that recruitment of U.S. workers was unsuccessful, the availability of debarment as a sanction would be a powerful tool to encourage compliance.

Accordingly, if the OFLC Administrator finds that an employer or an employer's agent or attorney has misrepresented a material fact or made fraudulent statements in its attestations, materially failed to comply with the terms of the attestations, or committed an act(s) of commission or omission that reflects a willful failure to comply with an obligation, attestation or other activity listed in proposed § 656.118, the OFLC Administrator may order debarment of the employer, agent and/or attorney from the H-2A program for a period of up to 3 years. In addition, other Federal agencies will be notified, as appropriate, of the audit findings.

The current regulation provides debarment authority solely to ETA and requires the WHD to report findings of violations to ETA and make recommendations to deny future certifications. Under the proposal, debarment authority for issues identified by WHD investigations would reside with the Wage and Hour Administrator, while debarment authority for violations of program requirements committed during the application and attestation process would remain with ETA. This change will allow administrative hearings and appeals for civil money penalties assessed by the WHD to be consolidated with debarment actions arising from the same facts. It will also eliminate the need for ETA to review Wage and Hour investigations, allowing for more

expeditious proceedings and efficient enforcement.

#### D. Other Significant Changes

##### 1. Wages and the Adverse Effect Wage Rate (AEWR)

Section 218(a)(1)(B) of the INA requires as a condition for approval of H-2A petitions that the Secretary has certified that “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.” To ensure that the wages of similarly employed U.S. workers are not adversely affected, agricultural employers wishing to utilize the H-2A program have traditionally been required to offer and pay their covered U.S. workers and H-2A workers the higher of the applicable hourly “Adverse Effect Wage Rate” (AEWR), as determined by the Federal government; the applicable prevailing wage, as determined by the States; or the Federal or State statutory minimum wage.

Over the last 20 years, it has become clear that perhaps the biggest threat to the wages and working conditions of U.S. workers is direct competition from a large undocumented workforce that is often underpaid and taken advantage of yet is afraid to assert its rights. Senators from both political parties remarked upon this phenomenon during the recent immigration debates in Congress,<sup>12</sup> and the U.S. Supreme Court has also noted the threat that undocumented workers pose to the wages and working conditions of U.S. workers. See *Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984).

Thus, based on data collected during more than 20 years of experience in administering the H-2A program, the Department has concluded that one of the most significant actions it can take to protect the wages and working conditions of U.S. workers is to render the H-2A program sufficiently functional such that, rather than resorting to the employment of workers illegally present in the U.S. to make up for shortages in the number of U.S. workers who are willing and available to perform agricultural work, agricultural employers will instead use the H-2A program, with all of its accompanying legal requirements and protections.

One of the most important things the Department must do to ensure that the

H-2A program is fully functional and protective of the wages and working conditions of U.S. workers is to set AEWRs that appropriately reflect market realities and labor costs. Two decades of experience with the H-2A program have shown that, in light of the prevailing conditions in the agricultural labor market, an AEWR that is set too low or too high is likely to harm U.S. workers. It is no secret that foreign workers may be willing to work for wages that are lower, and often substantially lower, than wages that are typically paid to U.S. workers. Allowing foreign workers to work at substandard wages would likely harm U.S. agricultural workers by causing them to be displaced or by forcing them to accept substandard wages in order to compete with the foreign workers. Direct harm effects of a too-low AEWR may also include increased levels of unemployment among U.S. workers. Indirect effects of a too-low AEWR could include worsening working conditions.

Conversely, an AEWR that is artificially set too high can also result in harm to U.S. workers. If the AEWR is set so high that it is seen as not reflective of actual market conditions, agricultural employers may hire undocumented foreign workers instead of participating in the H-2A program, and the resulting influx of undocumented foreign workers erodes the earnings and employment opportunities of U.S. workers in agricultural occupations. U.S. workers cannot fairly compete against undocumented workers, who may accept work at below-market wages, and who are also cheaper to employ than H-2A workers because they do not require the additional payment of other H-2A program requirements, including transportation, and housing. Although the threat of legal sanctions and attendant risks of work disruption will constrain some employers from employing undocumented workers, the greater total cost to employers of the AEWR plus all other attendant H-2A program costs as compared to the market rate for labor, the greater the likelihood is that employers will risk hiring undocumented foreign labor.

Indeed, according to the USDA, there are an estimated 1.2 million hired agriculture workers in the United States. Recent survey data from the Department indicate that more than 50 percent of agriculture workers in the U.S. admit to being here illegally, and some farm worker advocacy groups have estimated that 70 percent of the agricultural labor

force is undocumented.<sup>13</sup> That means there are currently more than 600,000 and perhaps more than 800,000 illegal agricultural workers on U.S. farms, a strong indication of the failures of the current system.

These system failures have contributed to the large number of undocumented workers in agricultural positions in the U.S., which has in turn adversely impacted U.S. workers by eroding agricultural employment opportunities and wages. The effect on U.S. workers of an AEWR that is set too high is ultimately similar to the effect of an AEWR that is set too low: Loss of family income, increased duration of job searches, and increased levels of unemployment. The undocumented workers whose hiring is incentivized when AEWRs are artificially set too high lack the legally enforced protections and benefits that the H-2A program provides, further threatening to degrade U.S. workers' working conditions.

The Supreme Court expressly recognized in its decision in *Sure-Tan*, 467 U.S. at 892, that “acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens \* \* \*.” This is still the case today. As Senator Kennedy stated in May 2007,

We have, unfortunately, employers who are prepared to exploit the current condition of undocumented workers in this country—potentially, close to 12 [and] 1/2 million are undocumented. Because they are undocumented, employers can have them in these kinds of conditions. If they don't like it, they tell them they will be reported to the immigration service and be deported. That is what is happening today.”<sup>14</sup>

Because illegal aliens may be willing to work for substandard wages, may be reluctant to report violations of the labor and employment laws, and in some instances may even accept illegally low wages that are paid off the books, the prevalence of illegal aliens in the agricultural sector today represents a substantial threat to the wages and working conditions of U.S. workers.

As noted above, there is demand for hundreds of thousands of agricultural workers beyond what the domestic labor market is able to supply. Replacing the hundreds of thousands of undocumented agricultural workers currently employed in the U.S. with U.S. workers or with H-2A program workers paid at a legally required wage

<sup>12</sup> See e.g., 152 Cong. Rec. S9773 (2006) (statement of Senator Dianne Feinstein); 153 Cong. Rec. S441–S442 (2007) (statement of Senator Larry Craig); and 153 Cong. Rec. S6590 (2007) (statement of Senator Edward Kennedy).

<sup>13</sup> See Julia Preston, “Farmers Call Crackdown on Illegal Workers Unfair,” *The New York Times*, August 11, 2007.

<sup>14</sup> 153 Cong. Rec. S6590 (2007).

that will not undermine agricultural wages will substantially counteract these adverse effects.

Wages vary across the U.S. by geographic location, by specific agricultural occupation, and by level of skill. An AEW that does not take into account these variables will inevitably disrupt program functionality and adversely affect U.S. workers. For example, a single national AEW applicable to all agricultural jobs in all geographic locations would prove to be below market rates in some areas and above market rates in other areas, resulting in all of the associated adverse effects that have been previously discussed. AEWs covering large multi-state regions suffer from similar flaws. In an agricultural sector where prevailing labor conditions make the need for precision in AEW determinations paramount, it is essential that a methodology be adopted that allows for as great a degree of geographic refinement as possible.

It is therefore critical that the AEW be accurate and reflect market conditions for each locality across the country. If the AEW does not reflect market wages and is too low or too high in any given area, it will harm U.S. workers directly by artificially lowering wages or it will harm U.S. workers indirectly by providing an incentive for employers to hire undocumented workers. Improving the geographic precision of the AEW is essential to ensuring that the AEW meets its statutory objective.

Another important element in determining an appropriate AEW that reflects market realities and labor costs is including wage data relating to the specific occupation and level of skill or experience required for a position. Farm labor comprises a number of occupations and skills, and both the demand for and supply of farm workers with a particular skill level or experience varies significantly across geographic areas. The farm labor market is not a monolithic entity, but rather is a matrix of markets across a spectrum of occupations, skill or experience levels, and local areas. Effectively protecting U.S. workers from unfair foreign competition by setting an AEW that is neither too low nor too high requires that the AEW be specifically applicable to the labor market affected in terms of specific occupation, skill or experience, and geographic location.

The present AEW calculation method is based on a 1989 final rule, 29 CFR part 655, that calculates regional AEWs based on the previous year's annual combined average hourly wage rate for field and livestock workers in

each of 15 multi-state regions and 3 stand-alone States, as compiled by the USDA quarterly Farm Labor Survey Reports. In 1989, the Department determined that the USDA survey was the best available "barometer" for measuring farm wages on a nationwide basis. In the succeeding years, however, the Department has gained vast knowledge and experience in applying wage data that simply did not exist in 1989.

The Department's reliance on USDA Farm Labor Survey data creates several problems for functional program administration. The USDA quarterly Farm Labor Survey does not provide refined data by skill level or experience, occupations, or geographic locales of workers typically sought by agriculture employers in the H-2A program. The USDA Farm Labor Survey population includes not only the lower-skilled crop field workers typically sought by agriculture employers who turn to the H-2A program for labor resources, but also inspectors, animal breeding technicians, and trained animal handlers—all occupations that provide a poor basis for determining H-2A wages because they are rarely, if ever, filled by H-2A workers. Additionally, the USDA Farm Labor Survey does not account at all for different skill levels required by agriculture occupations.

The accuracy of AEWs based on the USDA Farm Labor Survey is further diminished because the Farm Labor Survey is not based on reported hourly wage rates. Instead, USDA's Farm Labor Survey asks employers to report total gross wages and total hours worked for all hired workers for the two reference weeks of the survey. Based on this limited information, the survey constructs annual average wages for the broad general categories of field workers and livestock workers. The AEW is then calculated by combining the average of the annual wage for field workers and the average annual wage for livestock workers into one annual wage rate covering both of those general occupational categories. The survey thus determines the hourly AEW based not on reported hourly wages, but rather on the basis of the numerator (total gross wages for the combined occupations) and denominator (total hours for the combined occupations) derived from the information supplied by employers.

In addition, the Farm Labor Survey estimates hired labor use and costs at the aggregation of 15 multi-state regions (along with 3 stand-alone states). The aggregation of a widely diverse national agricultural landscape into just 15 regions (and 3 stand-alone states) results in extremely broad generalizations that

fail to account for specific market conditions at the local level. Wage data collected at each individual State and even substate level would be more appropriate for purposes of computing an accurate, sub-regional AEW that reflects local market conditions. Indeed, market-based wage survey data at the state or substate level is the standard for calculating comparison wages in other temporary worker programs administered by the Department, including the H-2B program that is the non-agricultural counterpart of H-2A and the H-1B specialty occupation worker program.<sup>15</sup>

Moreover, the USDA Farm Labor Survey is administered and funded through USDA, giving the Department no direct control over its design and implementation. USDA could terminate the survey at any time and leave the Department without the basic data, problematic as it is, used to calculate the AEW. In fact, just this past year, USDA announced that it would suspend the survey in February 2007 due to budget constraints. Ultimately, USDA resumed the Survey in May 2007. The possibility that USDA may suspend the survey at some point in the future adds a measure of instability and uncertainty for AEW determinations in future years.

Therefore, this NPRM proposes to institute an alternative methodology for determining the AEW that will more accurately measure market-based wages by occupation, skill level, and geographic location. A more accurate and refined AEW methodology will produce an AEW that more closely approximates actual market conditions, which will, in turn, help protect the wages and working conditions of U.S. workers.

The Department invites comment on an alternative AEW methodology that achieves the goals described above. Under this proposed rule, the Department suggests a revised AEW methodology that would achieve those goals by utilizing the Bureau of Labor Statistics (BLS) Occupational Employment Survey (OES) data instead of USDA Farm Labor Survey data. The OES program in BLS collects data on wage and salary workers and produces employment and wage estimates for about 800 occupations covering over 70 percent of the employment in the U.S. See 67 FR at 30479, May 6, 2002.

The wage component of the OES survey is, with the exception of the

<sup>15</sup> Calculation of the applicable wage by a SWA using the OES survey is, in fact, a "safe harbor" providing presumption of correctness in the H-1B labor condition application. 20 CFR 655.730.(a)(2)(ii)(A)(3).

Decennial Census, the most comprehensive survey conducted by any agency of the Federal Government. The OES program surveys approximately 200,000 establishments every 6 months, and over 3 years collects the full sample of 1.2 million establishments. The OES program collects occupational employment and wage data in every State in the U.S. and the data are published annually. The OES wage data is already utilized by the Department for determining comparison wages in other temporary worker programs and has proven to be an accurate and successful wage reference. In 1989, when the Department established the current AEWR methodology, the OES program was not well developed and thus was not an effective alternative for the USDA Labor Survey. In the intervening 18 years the OES program has surpassed the USDA Labor Survey as a source for comprehensive agricultural wage data in several respects.

First, the OES program produces occupational estimates by geographic area and by industry. Estimates based on geographic areas are available at the national, State, and metropolitan area levels. Industry estimates are available for over 450 industry classifications at the national level. The industry classifications correspond to the sector, 3, 4, and 5-digit North American Industry Classification System (NAICS) industrial groups.

Second, the OES program provides data at the substate level in addition to the State level. Data is compiled for each metropolitan statistical area (MSA) and for additional non-MSA areas that completely cover the balance of each State. Data is available for 573 distinct areas comprehensively covering the U.S. This level of detail will enable AEWRs to be defined for H-2A applicant occupations that are specific to a relevant substate labor market area, greatly improving the ability of the Department to tailor certification decisions and parameters to relevant local labor market conditions. By contrast, the current AEWR provides wage data for just 15 multi-state regions and 3 stand-alone States across the U.S.

Another advantage of OES is that it offers the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty variations within each occupation. The four skill levels for each occupation afford the employer and the Department the opportunity to more closely associate the level of skill required for the job opportunity to the relevant OES occupational category and skill level.

This is another important advantage over the USDA Farm Labor Survey, which makes absolutely no skill distinctions.

There are five OES categories of occupations that would most likely be identified with H-2A job classifications. The Department expects that the "farm workers and laborers, crop, nursery and greenhouse" occupational category would encompass the majority of the jobs that employers would seek to fill under the H-2A program. The survey does, however, contain other categories, such as "sorters and graders" and "farmworkers, farm and ranch animals," that will enable employers and the Department to more closely match the job opportunity to the relevant OES job category and, in turn, the appropriate AEWR. This is a significant advantage over the USDA Farm Labor Survey, which awkwardly provides just a single wage that purports to cover the entire spectrum of agricultural occupations.

Importantly, the OES survey is conducted by the Department's Bureau of Labor Statistics, which will enable continuity and coordination between those who gather the wage data and those who utilize it. This will help ensure the data needs of the H-2A program and AEWR calculation are consistently met.

The Department recognizes that the proposed new methodology utilizing the OES survey data to determine the AEWR is subject to some limitations. For example, the OES survey presently determines agricultural wages by surveying establishments that provide support activities for crop production, such as farm labor contractors, who provide workers and laborers to farm owners and operators. The survey does not include farm establishments that are directly engaged in the business of crop production. Nonetheless, the survey is broad enough to provide accurate and statistically valid wage rates: The latest OES data covers agricultural establishments accounting for the employment of 451,770 hired agricultural workers of all types or more than one-third of the 1.2 million hired farm workers in the U.S., according to the USDA. Moreover, employees of farm labor contractors and other similar businesses generally perform the same type of work as H-2A workers, and thus provide a good general basis for wage comparison. In the Department's estimation, taking these factors into account, the OES survey data is substantially more complete, detailed, and accurate—considering geography, occupation, and skill level—than is the USDA Farm Labor Survey.

The Department's examination of data from the Census Bureau's Current Population Survey (CPS), which includes agricultural workers from both farm and nonfarm establishments, confirms that the OES data covering wages paid by nonfarm agricultural establishments provides an effective and appropriate proxy for the wages paid directly to workers by farm operators. The CPS, a monthly survey of 60,000 households, collects information on the employment and unemployment experience of workers in the U.S. Estimates based on CPS data for 2006 show little difference in the mean or median earnings of agricultural workers employed by farm establishments and those employed by nonfarm establishments (the establishments within the scope of OES).<sup>16</sup> Agricultural workers in nonfarm establishments had mean hourly earnings of \$8.86 and median hourly earnings were \$8.20. In the farm establishments, mean hourly earnings were \$8.55 and median hourly earnings were \$7.80. Because of the small size of the CPS survey, the difference in wages reported by agricultural workers in farm establishments and nonfarm establishments is not statistically significant. Comparable OES estimates place mean hourly earnings at \$8.94 for agricultural workers in nonfarm establishments and are very similar to the CPS estimate of \$8.86.<sup>17</sup>

In looking at the CPS as a possible source of wage data for this purpose, the Department determined that while that survey may provide a reasonable basis for making national level estimates and comparisons, the sample size is too small to provide the type of detailed State and substate-level estimates that can be gleaned from the OES data. And for that reason, the Department

<sup>16</sup> As noted above, although an OES-surveyed employer may technically be a nonfarm establishment, the employer's workers may work on farms in agricultural occupations as reflected in the OES agricultural worker categories.

<sup>17</sup> The CPS estimates were for miscellaneous agricultural workers (occupation code 45-2090). The OES estimates were done for four more specific occupations: Agricultural equipment operators (occupation code 45-2091); farmworkers and laborers, crop, nursery, and greenhouse (45-2092); farmworkers, farm and ranch animals (45-2093); and agricultural workers, all other (45-2099). Average hourly earnings for these four occupations ranged from \$8.48 to \$12.05 (see [www.bls.gov/oes/current/oes\\_nat.htm#b45-0000](http://www.bls.gov/oes/current/oes_nat.htm#b45-0000)) and the weighed average across the four occupations was \$8.94. Median hourly earnings range from \$7.95 to \$10.80. The vast majority of the workers in these occupations are in the "farmworkers and laborers, crop, nursery, and greenhouse" category, which has median earnings of \$7.95, and so it is likely that the median across all four occupational categories differs little from \$7.95 or from the CPS estimate of \$7.80.

determined that the CPS program would not be able to provide sufficiently accurate comprehensive data on agricultural wages to compute a precise and reliable AEW. R.

The Department is aware that shifting from regional AEW. R.s derived from USDA Farm Labor Survey data to more geographically and occupationally refined AEW. R.s derived from OES data may raise the legally required wage rates in some areas while lowering them in others. Although these changes in wage rates presumably will make local AEW. R.s more reflective of actual local labor market conditions, the Department proposes, and asks for comment on, adding an additional protection for workers against potential short-term wage reductions resulting from the change in AEW. R. methodology. To counteract potential wage reductions in some areas, the Department proposes to use the future (effective July 24, 2009) Fair Labor Standards Act (FLSA) minimum wage of \$7.25 as the floor for any AEW. R., regardless of the methodology ultimately selected for calculating the AEW. R. This basic wage floor will provide a fundamental protection to both foreign temporary workers and U.S. workers that will ensure that AEW. R.s cannot be lower than new federal minimum wage even though that wage will not be legally required until 2009.

An additional frame of reference on appropriate wage rates is the proposed "AgJOBS" legislation, which has been widely endorsed by groups representing both agricultural businesses and agricultural workers.<sup>18</sup> Many AgJOBS provisions implicate important Governmental interests that may not

<sup>18</sup>The *Agricultural Job Opportunities, Benefits, and Security Act (AgJOBS)* builds upon years of discussion and ideas from growers, farm worker advocates, and various groups and organizations, including several Latino groups, focused on the issue of immigration." Senator Larry Craig, AgJOBS Issue Briefing, [http://craig.senate.gov/~craig/i\\_agjobs.cfm#faq](http://craig.senate.gov/~craig/i_agjobs.cfm#faq). Myriad advocacy groups have supported the AgJOBS legislation, including for example, the United Farm Workers, Farmworker Justice, National Council of LaRaza, AFL-CIO, Change to Win, Farm Labor Organizing Committee, Int'l Brotherhood of Teamsters, Laborers' Int'l Union of North America, Service Employees Int'l Union, United Food and Commercial Workers, UNITE HERE, National Council of Agricultural Employers, American Farm Bureau Federation, Western Growers Assn, Florida Fruit and Vegetable Assn, Agricultural Coalition for Immigration Reform, U.S. Chamber of Commerce, National Cattlemen's Beef Assn, American Nursery and Landscape Assn, United Egg Producers, United Fresh Fruit and Vegetable Assn, and New England Apple Council. See letter signed by more than 850 organizations supporting AgJOBS legislation that was sent to every member of the U.S. Senate, available at <http://fj.nclr.org/Public/webpage/October2007edits/InformationAboutAgJOBS/110thAgJOBSsignonApril2007Final.pdf>.

have been adequately taken into account when business and worker groups worked out their proposed compromise legislation, but the wage provisions are at the heart of the direct economic interests of both groups, and the bargain they have struck with respect to wages presumably reflects a comfortable middle ground from their point of view. At a minimum, the Department believes that the many worker advocacy groups and congressional sponsors who have endorsed the legislation would never agree to wage rates that they believe would hurt the interests of U.S. workers.

As a comparison of the OES hourly wage rate at the national average or median rates for the occupational category "Farmworkers and Laborers, Crop, Nursery and Greenhouse" and the national average for the AEW. R. included in the "AgJOBS" legislation shows that on average, these workers would receive higher wages if paid an AEW. R. based on the OES data (\$8.39) rather than the AEW. R. prescribed in AgJOBS (\$7.50), thus demonstrating that use of the OES data provides additional wage protection to similarly employed U.S. workers. Even at the 25th percentile OES wage rate, workers in several States will receive higher AEW. R. wages on average than the AEW. R. rates proposed in AgJOBS. Further, when considering the proposed addition of the 2009 FLSA minimum wage floor to the OES data, that average AEW. R. turns out to be almost exactly the same as the average AEW. R. prescribed in AgJOBS.

Even in those instances where the use of OES data may result in lower AEW. R.s for H-2A workers in the short term, the Department is confident that the wages and working conditions of U.S. workers will be protected because the total costs of hiring H-2A workers are higher than the hourly AEW. R. alone reflects, and employers focus not only on wages when making hiring decisions, but on a workers' total cost. The program requirement that employers pay for H-2A workers' transportation and lodging, as well as the administrative expense of filing H-2A applications with several different Government agencies, add substantial additional costs to the employment of H-2A workers. The additional costs beyond wages (administrative expense, transportation and lodging) associated with utilization of foreign labor under the H-2A program are an important consideration that provides significant protection for U.S. workers. It is expected that U.S. workers in similar occupations, with similar skills and working in the same locality would likely be able to command higher hourly wages than H-2A workers and at least equivalent

benefits because the additional cost considerations associated with utilization of the H-2A program provide an economic incentive for employers to seek out and hire U.S. workers instead of H-2A workers.<sup>19</sup> And of course, U.S. workers also have the protection of the rule requiring agricultural employers to first attempt to recruit U.S. workers before they can employ H-2A workers. This proposed rule also includes added protection for U.S. workers by requiring employers to recruit U.S. workers for an expanded period of time.

In conclusion, the Department seeks comment on alternative methodologies for calculating AEW. R.s for the H-2A program, including the use of OES data. The Department believes that to achieve a more accurate AEW. R., the proposed methodology must include data concerning occupational category, skill level, and geographical distinctions, at a state or substate level. The Department's proposals have been made after careful consideration of the statutory requirements of the program and with the full knowledge of the administrative record developed in earlier rulemaking activities regarding AEW. R.s, as published in the *Federal Register*. The Department has reviewed the current methodology in light of the limitations of the USDA data sources, as well as improvements in alternative data collection instruments. The Department invites specific comments on the current AEW. R. methodology as well as its proposals to improve it, including reasonable alternatives that both provide adequate protections for U.S. workers and avoid introducing undesirable inflexibilities in agricultural labor markets.

## 2. The 50 Percent Rule

The 50 percent rule, which requires employers of H-2A workers to hire any qualified U.S. worker who applies to the employer during the first 50 percent of the period of the H-2A work contract, was originally created by regulation as part of the predecessor H-2 agricultural worker program in 1978. 20 CFR 655.203(e); 43 FR 10316, Mar. 10, 1978. In 1986, IRCA added the 50 percent rule to the INA as a temporary 3 year statutory requirement, pending the findings of a study that the Department was required to conduct "and other relevant materials including evidence of benefits to U.S. workers and costs to employers addressing the advisability of continuing a policy which requires an

<sup>19</sup>U.S. workers hired in response to recruitment required by the H-2A program are entitled to at least the same benefits received as those received by H-2A workers.

employer as a condition for certification under this section, to continue to accept qualified, eligible U.S. workers for employment after the date the H-2A workers depart for work with the employer." *Id.*; Public Law 99-603. In the absence of the enactment of Federal legislation prior to the end of the 3 year period, the Secretary was instructed to immediately publish the findings and promulgate an interim or final regulation based on the findings.

The Secretary hired a research firm to analyze the cost-benefit impact of the 50 percent rule on U.S. workers, growers, and the general public. The research firm studied the impact of the 50 percent rule in just Virginia and Idaho, the two States that were determined to have had the highest number of 50 percent rule workers. The number of growers interviewed was small, as the firm interviewed only those growers that actually hired U.S. workers because of the 50 percent rule—just 66 growers (0.1 percent) in all of Virginia and Idaho's total 64,346 farms (according to the USDA). The study did not take into consideration the 131 growers in the two States who received referrals under the 50 percent rule but did not hire any of the referred workers. The study also did not investigate why so few growers were using the H-2A program, and therefore did not take into account the overwhelming number of growers who were not using the program. The study sought only to determine the costs to employers that hire referred 50 percent rule workers and the concomitant benefits to the U.S. workers hired under the rule.

Even with this narrow focus, the study made it clear that the H-2A program was not regarded as desirable by growers. Of those questioned, 6 percent said they were dropping out of the H-2A program because of the 50 percent rule. Forty percent wanted the rule eliminated entirely and 33 percent wanted to alter the requirement by, for example, requiring the 50 percent rule workers to finish the season or modifying substantially the 50 percent rule by requiring the hiring of U.S. workers only up to a certain point before the date of need. In fact, 16 years later, only one of the agriculture employers surveyed in 1990 is still using the H-2A program.

In 1990, pursuant to what is now INA § 218(c)(3)(B)(iii), ETA published an interim final rule to continue the 50 percent requirement. 55 FR 29356, July 19, 1990. Since the 1990 publication of the interim final rule continuing the 50 percent rule, the Department has gained experience and additional perspective that calls into question whether the

Department's decision to continue the 50 percent rule was, at the time, supported by the data in the 1990 study; and whether the rule is in fact a necessary, efficient and effective means of protecting U.S. workers from the adverse impact resulting from the employment of foreign workers. No other temporary foreign labor program administered by the Department includes such a requirement, which may be yet another reason the H-2A program is viewed by many as containing burdensome requirements that do not provide a corresponding benefit to U.S. workers.

The Department has heard complaints that the 50 percent rule creates substantial uncertainty for the employer in terms of managing their labor supply and labor costs during the life of the contract. In many situations, it appears the employer does not substitute the U.S. worker arriving under the 50 percent rule for the existing H-2A worker, but rather retains both workers and incurs the added expense in order to prevent further disruption to work flow resulting from dismissing an H-2A worker and sending that worker home. Anecdotally, employers report that the majority of the U.S. workers who are hired under the 50 percent rule remain on the job for less than the term of the H-2A contract. This means that if an employer immediately dismisses an H-2A worker when a U.S. worker is hired under the 50 percent rule, that action could result in the employer being short of labor if and when the U.S. worker leaves the job early. In any case, the concern that new workers may arrive well into the harvest cycle and create the type of disruption described above can serve as a serious disincentive for employers to participate in the H-2A program. Given the ready availability of jobs in the agricultural sector to authorized workers, there is also reason to believe that U.S. workers would generally be best served by referrals to jobs that have not yet begun, rather than being thrust into job opportunities that have already partly elapsed.

With the newly redesigned process being proposed, employers will be required to conduct additional recruitment in advance of their application. Employers will begin advertising for job opportunities no earlier than 120 days and no later than 75 days before the date on which the foreign worker will begin. This is a significant expansion of the period of required recruitment in the current rule and would enable more U.S. workers to be apprised of the job opportunities in a timely manner before the job begins. Additionally, under the redesigned

process, the SWA will post the job orders until the date of departure of the foreign workers for the place of employment. These expanded time frames for recruitment will ensure that U.S. workers have substantially better and more effective notice about opportunities to obtain full term employment than is currently afforded by the 50 percent rule. Substituting these expanded recruitment requirements for the current 50 percent rule would provide employers substantially greater certainty regarding required recruitment, expected labor costs, and the available workforce, and would help lend greater stability to a program that has been rendered unattractive to many agricultural employers because of the many administratively imposed uncertainties.

For the above reasons, the Department is inclined to replace the 50 percent rule with expanded up-front recruitment requirements that will enhance the ability of U.S. workers to identify and apply for agricultural job openings before the jobs begin. The Department would like more information about the impact of the 50 percent rule before it makes a final decision, however, and requests comment on and information regarding the costs and benefits of the 50 percent rule in the current labor market. The Department requests comments from employers, workers and their representatives on the merits of retaining or eliminating the rule, as well as possible alternatives, such as reducing the applicable time period for mandatory hiring to the first 25 percent of the H-2A worker's contract, that might be effective in protecting U.S. worker access to job opportunities without creating uncertainty and competitive disadvantage for employers.

### 3. Housing

Section 218(c)(4) of the INA requires employers to provide housing in accordance with specific regulations. Employer-provided housing, depending on when it was built, must meet either the Department's Occupational Safety and Health Administration (OSHA) standards set forth under 29 CFR 1910.142 (standards for temporary labor camps), or the ETA standards at 20 CFR 654.404-654.417 (standards for H-2A housing). In circumstances where rental, public accommodation, or another substantially similar class of habitation is used, the housing must first meet any local standards for such housing or, in the absence of applicable local standards, any applicable State standards. In the absence of both local and State standards, the housing must

meet the OSHA standards for temporary labor camps.

The Department is proposing to require that employers attest to having secured the necessary housing and having requested or obtained the necessary inspection. The requirement that housing be inspected in a timely fashion is often problematic for SWAs, whose staff must travel to the site of the housing, sometimes over great distances to remote areas; perform the inspection; and issue a final determination, all within the current 15-day processing window (i.e., between 45 days and 30 days prior to the date of need). The Department is accordingly proposing that employers who have commenced recruitment request a housing inspection no earlier than 75 days and no later than 60 days before the date of need, well in advance of the statutory deadline requiring the Department to issue a labor certification determination no later than 30 days before the date of need.

The Department is not proposing to alter the discretion currently afforded to SWAs in the method by which inspections are conducted. The ability to perform inspections earlier than the date of filing will, however, provide SWAs with more time and more flexibility in executing this charge. This change is essential to address the frequent failure of SWAs to comply with the statutory mandate that housing inspections be completed "prior to the date \* \* \* by which the Secretary of Labor is required to make a certification," INA § 218(d), which has in turn resulted in labor certifications being issued outside of the statutorily required timeframes. Absent an expansion in the timeframe for inspections, the expected increase in program participation would likely lead to ever greater strains on the resources of SWAs to keep up with requested inspections, and ever greater delays beyond the legally required deadline for completion of inspections.

To ensure efficient and legally sufficient processing of applications, the Department is proposing to use the same basic model that applies to housing inspections for U.S. workers under the Migrant and Seasonal Workers Protection Act (MSPA). Employers would be required to request housing inspections no later than 60 days prior to the anticipated date of need. If an employer has not received or does not receive a housing inspection prior to the statutory deadline of 30 days prior to date of need, and the SWA failed to conduct the inspection for reasons beyond the employer's control, the Department will make a conditional

determination on the application in the absence of a physical inspection. This conditional determination would only be granted in situations in which an employer has made a timely request and housing has not been inspected; employers who have been informed of deficiencies by SWAs and have failed to act to correct these deficiencies will not be conditionally certified, nor will those who have made untimely requests or who have not otherwise met all other criteria for certification. Moreover, the issuance of a conditional determination would not in any way prevent SWAs from later conducting housing inspections and ensuring that appropriate penalties are imposed if housing fails to meet standards. This proposed system closely parallels MSPA and ensures that foreign workers receive every protection to which U.S. workers are entitled while avoiding punishing employers for the Government's failure to meet its statutory deadlines with respect to housing.

The Department appreciates the obstacles faced by employers when looking to build housing for farm workers, including zoning restrictions, resistance from the community, cost and the Federal housing standards to which the housing must be built. Therefore, the Department is proposing to allow H-2A employers to provide a housing voucher as an additional option by which H-2A certified employers may meet the requirement to provide housing to H-2A and U.S. workers who are not reasonably able to return to their residences within the same day.

To ensure that workers receive the benefit to which they are entitled, the Department has proposed a number of safeguards when housing is provided via the voucher method. These safeguards include the requirement that the voucher method may not be used in an area where the Governor of the State has certified that there is inadequate housing available in the area of intended employment for farm workers; the voucher is not transferable and is not redeemable for cash by the employee, it may only be redeemed for cash paid by the employer to a party providing appropriate housing; and the voucher may not be used to secure housing located outside the reasonable commuting distance of the place of employment. Workers may "pool" the housing vouchers to secure housing (e.g., to secure a house instead of a motel room), but such pooling may not result in a violation of the applicable safety and health standards. The proposed voucher is one way an employer may meet his obligation to provide housing. However, if acceptable

housing cannot be obtained via the voucher, the employer is not relieved of his obligation to provide housing meeting the applicable safety and health standards and must either provide or secure housing for the H-2A workers. The Department invites comments on whether this proposal appropriately balances the needs of employers and workers.

In addition, the Department proposes to clarify and codify additional limited flexibility in the matter of post-certification changes in housing. Currently, under policy clarified by the Training and Employment Guidance Letter 11-07, Change 1 (November 14, 2007) if the employer-provided housing becomes unexpectedly unavailable, an employer is required to (1) notify the SWA in writing of the housing change, and (2) provide to the SWA evidence from the appropriate local or State agency responsible for determining compliance with the applicable safety and health standards and licensing such rental or public accommodations, which may include a certificate of occupancy where such a certificate demonstrates current compliance with applicable safety and health standards. This NPRM further clarifies and codifies this policy. Only if the employer takes these steps will a housing certification continue to be considered valid. The SWA may then, in its discretion, inspect the housing to ensure that it complies with the applicable safety and health standards. The SWA shall notify the appropriate CO of all housing changes and of the results of any housing inspections. This process will enable employers to avoid the delays associated with amending certifications and beginning the process anew when previously arranged and inspected housing becomes unavailable or uninhabitable for reasons outside their control (i.e., fire, natural disaster).

#### 4. Transportation

The NPRM at § 655.104(h) proposes to continue the Department's policy of requiring employers to provide or pay for the worker's daily subsistence and transportation from the worker's home or place of employment, provided the worker works for 50 percent or more of the contract period. This proposal also retains the requirement that employers advance transportation and subsistence costs (or otherwise provide them) if it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so. The Department recognizes, however, that these requirements are unique to the H-2A program, and invites comments providing information on the costs and

benefits to employers and workers of continuing to require employers to pay for the inbound and outbound transportation and subsistence costs of H-2A workers.

#### 5. Treatment of Logging

The Department has long held logging employment to the same or similar standards as those found in the H-2A regulations, even though logging has not been included in the statutory definitions of agricultural employment. In 1978, the Department included logging in its final H-2 regulations for temporary labor certifications for "agricultural and logging workers," encompassing most of the same obligations found today in the current H-2A program. 43 FR 10306 Mar. 10, 1978. This continued a Departmental policy going back to 1965. See 20 CFR 602.10 and 602.10a (1971), 35 FR 12393, Aug. 4, 1970; 20 CFR 602.10 (1966), 30 FR 12292, Sept. 25, 1965.

In 1986, when IRCA separated the H-2 visa category into agricultural work under the H-2A visa and nonagricultural work under the H-2B visa, Congress provided the Secretary explicit authority in administering the H-2A program to expand the definition of "agriculture" through regulation beyond IRCA's required minimum definition, which includes all agricultural labor as defined in the Federal Insurance Contributions Act (FICA) (the social security tax in section 3121(g) of the Internal Revenue Code) and in § 3(f) of the FLSA. IRCA § 301(a), Public Law 99-603, Title III, 100 Stat. 3359, November 6, 1986. The Department chose at that time not to expand the definition of agriculture beyond the statutory minimum.

Nevertheless, the Department simultaneously continued the existing regulatory H-2A-like standards for logging workers who were admitted under the H-2B program. Those pre-IRCA standards for agricultural and logging applications continue to apply to logging today (20 CFR part 655, subpart C), and are the model from which the H-2A agricultural regulatory processing framework derived. 52 FR 20496, Jun. 1, 1987. Logging employers, therefore, have been subject to a substantially similar set of obligations and processes as H-2A employers, but their nonimmigrant employees must enter on H-2B, rather than H-2A, visas.

The Department no longer sees any reason to maintain two substantially similar yet slightly divergent processes for agriculture and logging, and intends to return to our 1965-1986 practice of treating both activities alike. The types of activities in which the employers in

both fields engage—i.e., harvesting of agricultural and horticultural products—and the labor certification requirements to which they are subject, are essentially the same.

Accordingly, the Department proposes to include logging employment in its definition of "agricultural activity" for purposes of H-2A labor certification. By doing so, the Department is exercising its legislative authority under § 101(a)(15)(H)(ii)(a) of the INA to expand the definition of agriculture beyond the definitions in FICA and FLSA to include logging. Conforming amendments are being made to reflect this change, including the removal of the current regulations specific to logging employment. This change will result in loggers being eligible for H-2A visas rather than H-2B.

The Department seeks comments as to whether there are other businesses that should be similarly included within the definition of agriculture under this program.

#### 6. Definitions

The Department is proposing to include the definition of employee and to modify the definition of employer to conform these definitions to those used in other Department-administered programs. The definition of employee conforms to the Supreme Court's holding in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322-324 (1992). The Department is proposing these clarifications to remove any confusion that may exist for agricultural employers who have compliance obligations under FLSA, MSPA and the H-2A program.

In defining an H-2A worker, the INA gives the Secretary of Labor the authority to define in regulations the term "agricultural labor or services," with the requirement that the definition include agricultural labor or services as defined in the IRC, the FLSA, and the pressing of apples for cider on a farm. The work must also be of a temporary or seasonal nature. 8 U.S.C. 1101(a)(15)(h)(ii)(A). The activity of "pressing of apples for cider on a farm" was added to the statute by Public Law 109-90, dated October 18, 2005. The Department proposes to change the regulatory definition to reflect the 2005 amendment.

The Department is also proposing changes to the regulatory definition of "agricultural labor or services" to clarify that an activity that meets either the IRC or the FLSA definitions of agriculture is considered agricultural labor or services for H-2A program purposes and to remove limitations on the performance

of traditional agricultural activities which, when performed for more than one farmer, are not considered agricultural labor or services under the IRC or the FLSA. The Department is also proposing clarifications to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H-2A labor certification was approved may be performed by an H-2A worker. This clarification will ensure that H-2A workers can engage in minor amounts of other incidental farm work activity during periods when they are not performing the agricultural labor of services that is the subject of their application. In no case can this work amount to more than an incidental portion of the H-2A worker's total labor or services for which they were admitted.

#### 7. Fees

The proposed rule continues to provide that each employer (except joint employer associations) of H-2A workers must pay to the Department appropriate fees for each temporary agricultural labor certification received. The application fee for each employer receiving a temporary agricultural labor certification is supplemented by an appropriate fee covering each H-2A worker certified under the application. These processing fees, which are authorized by statute and set by regulations originally published in 1988, are required by the current statutory language to be deposited in the Treasury rather than being used to fund program costs at the Department. Nevertheless, the Department is updating the fees to an amount appropriate to comport with the statute's expectation that the fee recover "the reasonable costs of processing" H-2A applications.

## II. Other Proposed Amendments to the Department's Regulations

### A. Changes to Parts 780 and 788

The Department proposes a modification to the FLSA regulations so that the production of trees through the application of agricultural and horticultural techniques to be harvested and sold for seasonal ornamental use as Christmas trees will be recognized as "agriculture" under the FLSA. The Department has determined that this modification is necessary in light of the Fourth Circuit Court of Appeals' decision in *U.S. Department of Labor v. North Carolina Growers Association*, 377 F.3d 345 (4th Cir. 2004), as well as a recognition that modern production of such trees typically involves extensive

care and management. Indeed, Christmas tree production is already an eligible job under the H-2A program.

The FLSA provides that employees who are "employed in agriculture" are exempt from the FLSA's overtime provisions. 29 U.S.C. 213(b)(12). Section 203(f) of the FLSA defines "agriculture" as follows:

Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

In an interpretive bulletin published in 1956, the Department interpreted § 203(f) of the FLSA to exclude Christmas tree farming. See 29 CFR 780.115, 780.200, 780.208. The Court of Appeals for the Fourth Circuit has noted that the exclusion of Christmas tree farming from the definition of "agriculture" is not consistent with the typical manner in which Christmas trees are produced. Indeed, as the *North Carolina Growers Association* court recognized:

Christmas tree farming has evolved since the FLSA was enacted in 1938. Before the 1960's, Christmas tree harvesting was more in the nature of "enterprising individuals who took what nature provided." \* \* \* However, since the mid 1960's, Christmas tree farming has evolved into the current system where growers plant and cultivate the trees for harvest.

*N. Car. Growers Ass'n.*, 377 F.3d at 348 n.2 (internal citation omitted).

Based on the Department's experience, modern Christmas tree production usually involves extensive care and management through the application of agricultural and horticultural techniques to raise such trees as ornamental horticultural products, such as planting seedlings in beds in a nursery; on-going treatment with fertilizer, herbicides, and pesticides as necessary; re-planting in lineout beds; lifting and re-planting the small trees in cultivated soil with continued treatment with fertilizers, herbicides, and pesticides as indicated by testing to see if such applications are necessary; pruning or shearing yearly; and harvesting of the tree for seasonal decorative use typically within 7 to 10 years of planting. The Fourth Circuit

described these activities as "significant changes [from the time of the initial interpretive bulletin] in the industry's cultivation and management techniques."

Thus, the Department proposes to revise those references in 29 CFR part 780 and 29 CFR part 788 stating that planted Christmas trees are within the scope of forestry and lumbering operations and are not agricultural or horticultural commodities for purposes of "agriculture" under the FLSA.

The Department does not intend to change the treatment of Christmas trees that are not produced through the application of agricultural or horticultural techniques as discussed above. Production of such trees will continue to fall outside the scope of "agriculture" under the FLSA. In sections listed below for changes, references to § 13(a)(13) have been updated to make the reference to 13(b)(28). The exemption in 13(a)(13) for forestry and lumbering operations was repealed and a new exemption from overtime only was created in § 13(b)(28) in the 1974 amendments to the FLSA. See § 23(b)(1) and (2), Public Law 93-259, 88 Stat. 69 (Apr. 8, 1974).

#### B. Changes to Part 501

Section 218(g)(2) of the INA authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to ensure employer compliance with terms and conditions of employment under this section of the statute. The Secretary determined that enforcement of the contractual obligations of employers under the H-2A program is the responsibility of the WHD. Regulations at 29 CFR part 501 were issued to implement the WHD's responsibilities under the H-2A program; amendment of these regulations is part of this proposed rulemaking.

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

Changes are proposed for enhanced enforcement to complement the modernized certification process so that workers are appropriately protected when employers fail to meet the requirements of the H-2A program. This notice of proposed rulemaking would make changes to specific sections of the

existing regulations in 29 CFR part 501, as summarized below.

#### 1. Definitions

Section 501.10 of the current regulations sets forth the definitions used in part 501. The proposed rule would update the definition of "work contract" to reflect language used in the proposed changes to 20 CFR part 655, subpart B. As had been done in the current regulations, proposed § 501.10 incorporates the same definitions listed in 20 CFR part 655, subpart B that pertain to 29 CFR part 501.

In addition, language in §§ 501.4, 501.15, and elsewhere has been modified to indicate that "corresponding employment" includes only U.S. workers who are newly hired by the employer in the occupations and during the period of time set forth in the application for labor certification and does not include U.S. workers who were already employed by the H-2A employer at the time the application was filed. The INA requires that U.S. workers hired during the H-2A recruitment period, including workers who respond to job advertisements, must be offered and provided no less than the same wages, benefits, and working conditions that the employer offers, intends to offer, or provides to the H-2A workers. U.S. workers who were already employed by the H-2A employer at the time the labor certification application was filed, however, cannot possibly be adversely affected by the subsequent hiring of H-2A workers who are paid higher wages. This modification to the Department's enforcement policy appropriately ties that policy to the Department's statutory authority to prevent adverse effects to the wages and working conditions of U.S. workers. The Department notes that its experience with the H-2A program indicates that situations where H-2A workers are paid more than similarly employed U.S. workers will arise very rarely, if ever, in practice.

#### 2. Sanctions and Remedies—General

The number of FLCs applying for labor market certifications enabling them to hire and employ H-2A workers has risen in recent years and is expected to continue to increase. The WHD's enforcement statistics reveal that FLCs are generally more likely to be found in violation of applicable requirements than fixed-site agricultural employers. To address this higher violation rate of FLCs and given the transient nature of FLCs, ESA has proposed in 29 CFR part 655, subpart B that FLCs must attest to, obtain, and maintain a surety bond, based on the number of workers

employed, throughout the period the temporary labor certification is in effect, including any extensions thereof. WHD will have authority to make a claim against the surety bond to secure unpaid wages or other benefits due to workers under the labor certification.

### 3. Civil Monetary Penalties

In order to deter significant violations of the H-2A worker protection provisions, § 501.19 would be amended to increase the maximum civil money penalties. The proposed maximum civil money penalty amount would be increased from \$1,000 to \$5,000 for a willful failure to meet a condition of the work contract, or for discrimination against a U.S. or H-2A worker who in connection with the INA or these regulations has filed a complaint, has testified or is about to testify, has exercised or asserted a protected right. Additionally, the fine amount would be increased to up to \$15,000 for a willful failure to meet a condition of the work contract that results in displacing a U.S. worker employed by the employer during the period of employment on the employer's application, or during the period of 75 days preceding such period of employment.

The proposed penalties for violators who willfully disregard their obligations under an attestation program would provide the Department with an effective tool to discourage potential abuse of the program. Such penalties will deter willful violations, discrimination and interference with investigations, and strengthen necessary enforcement of laws that protect workers who may be unlikely to approach Government agencies to intercede on their behalf.

Further, if a violation of an applicable housing or transportation safety and health provision of the work contract causes the death or serious injury of any worker, the Department proposes a new penalty of up to \$50,000 per worker. The Department also proposes a new penalty of up to \$100,000 per worker where the violation of a safety and health provision involving death or serious injury is repeated or willful.

In an attestation-based program the proposed penalties for such violations of applicable safety and health provisions would provide a meaningful assurance that participants meet their obligation to see that housing and/or transportation provided to the workers meets all applicable safety and health requirements and that housing and/or vehicles used in connection with employment do not endanger workers. The proposed penalty for repeat or willful violations that involve a fatality

or serious injury will provide a significant deterrent to ensure that such violations do not occur. The Department's experience in enforcing safety and health standards shows that penalties are an important tool in reducing fatalities and injuries. Increased penalties will induce employers to be more proactive in their approach to complying with the applicable safety and health standards.

The assessment of the maximum penalty under proposed § 501.19 would not be mandatory, but rather would be based on regulatory guidelines and the facts of each individual case.

### 4. Debarment by the WHD

The current regulations provide ETA the authority to deny certification (i.e., debarment) and require the WHD to report findings to make a recommendation to ETA to deny future certifications. Under proposed § 501.20, debarment authority for issues arising from WHD investigations would reside with the WHD Administrator, while debarment authority for issues arising out of the attestation process would remain with ETA. This proposal is in keeping with recommendations made as far back as 1997 in a General Accounting Office (GAO) report to Congress in which GAO proposed that authority to suspend employers with serious labor standard or H-2A contract violations be extended to the WHD. *See* U.S. Gen. Accounting Office: Report to Congressional Committees: H-2A Agricultural Guestworker Program, Changes Could Improve Services to Employers and Better Protect Workers, 68, 70 (1997)). Both agencies will coordinate their activities whenever debarment is considered. The proposed standards for debarment within WHD's purview are identical to those proposed by ETA for debarment actions under 20 CFR part 655, thus ensuring consistency in application. This change will allow administrative trials and appeals for civil money penalties assessed by the WHD to be consolidated with the debarment actions that arise from the same facts. This change will remove the requirement that ETA review WHD investigations, eliminating a step in the administrative process and allowing for more expeditious proceedings and efficient enforcement. This will not affect ETA's ability to institute its own debarment proceedings regarding issues that arise from the application or attestations or ETA's proposed audits. Conforming changes are proposed to other sections in part 501 to reflect the proposed WHD debarment authority.

### 5. Referrals of Revocations to ETA

Section 501.21 is proposed to conform to the proposed changes in 20 CFR part 655, which provides ETA the authority to revoke an existing certification, by allowing the WHD to recommend revocation to ETA based upon the WHD's investigative determinations.

### 6. Exhaustion of Administrative Remedies

Sections 501.33 and 501.42 would be revised to include language that clarifies and assures that the exhaustion of all administrative remedies is required before an appeal of a final agency action may be taken to the Federal courts pursuant to the Administrative Procedures Act.

### 7. Nomenclature Changes

The proposed rule would also make a number of non-substantive nomenclature changes and technical corrections to 29 CFR part 501. These include: Reflecting that the INA was amended in 1988 while the current regulations were published in June 1987 and H-2A provisions that were in § 216 are now codified in § 218 of the INA; changing references from the State Employment Service offices to the SWA; and reflecting that appeals from administrative law judge decisions are made to the Department's Administrative Review Board.

## III. Administrative Information

### A. Executive Order 12866—Regulatory Planning and Review

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

The Department has determined that this proposed rule is not an “economically significant regulatory action” under § 3(f)(1) of E.O. 12866. The procedures for filing an *Application for Temporary Employment Certification* under the H-2A visa category on behalf of nonimmigrant temporary agricultural workers, as proposed under this regulation, will not have an economic impact of \$100 million or more. The regulation will not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, nor public health or safety in a material way. In fact, this proposed rule is intended to provide relief to the affected employers both directly, by streamlining the process by which they can apply for H-2A labor certification, and indirectly, by increasing the available legal workforce. The Department, however, has determined that this proposed rule is a “significant regulatory action” under § 3(f)(4) of the E.O.

#### Summary of Impacts

The changes being proposed are expected to have little or no direct cost impact, above and beyond the baseline of the current costs required by the program as it is currently implemented, with the exception of increased fees for filing. The re-engineering of the program requirements, including attestation-based applications and pre-application recruitment, will have the effect of reducing employer application costs in time and resources and introduce processing efficiencies that will reduce costs for employers, particularly costs associated with loss of labor due to delayed certifications. The Department is specifically requesting comment on what costs these policies introduce and what efficiencies may be gained from adopting these new proposed procedures, toward the goal of ensuring a thorough consideration and discussion of the costs and benefits at the final rule stage.

The additional filing fees will offset these reductions to a certain extent, but the Department believes that the increased filing fees represent the actual cost of processing and will have a net benefit to employers in the increased access to the program and the benefit of having a workforce in place when and where needed. The additional record retention costs for employers are minimal. The new record retention requirements will require a burden of approximately 10 minutes per year per application to retain the application and supporting documents above and beyond the 1 year of retention required by regulations of the Equal Employment

Opportunity Commission (EEOC) at 29 CFR 1602.14, promulgated pursuant to Title VII of the Civil Rights Act and the American With Disabilities Act, and 29 CFR 1627.3(b)(3), promulgated pursuant to the Age Discrimination in Employment Act. In FY 2007, 7,725 employers filed requests for 80,294 workers. Using standard administrative wage rates, including benefits, of \$60.42<sup>20</sup> per hour, this additional burden for each of the 4 years following the mandated year above is approximately \$77,791 total per year (or approximately \$10 per applicant per year) if the current number of requests remains constant. Any increase in the use of the program would result in the same ultimate burden to applicants.

Employers will experience efficiencies as a result of the reengineering of the process. These savings are expected to be found in the simplified attestation-based application. While the Department cannot precisely estimate the cost savings as a result of this time saved, it believes that employers will experience economic benefits as a result of this reengineering of the application process to an attestation-based submission, including lower advertising costs and fewer labor costs from overlapping or duplicative workforces. These savings may be impacted by increased usage of the program by employers; while at this time it is impossible to tell exactly what that increased usage will be, the savings to employers will be universal to new users as well as current participants.

#### B. Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires that a regulatory flexibility analysis be prepared and made available for public comment. The RFA must describe the impact of the proposed rule on small entities. (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have significant economic impact on a substantial number of small entities. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and certifies under the RFA at 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities. The rule does not substantively change

existing obligations for employers who choose to participate in the H-2A temporary agricultural worker program.

The factual basis for such a certification is that even though this proposed rule can and does affect small entities, there are not a substantial number of small entities that will be affected, nor is there a significant economic impact upon those small entities that are. In FY 2007, 7,725 employers filed requests for 80,294 workers. Of the total 2,089,790 farms, 98 percent have sales of less than \$750,000 per year and fall within SBA's definition of small entities. However, the Department does not expect that there will be a substantial number of small businesses that will utilize the H-2A program in light of its prior history. In FY 2007, 7,725 employers filed requests for 80,294 workers. Even if all of the 7,725 employers who filed applications under H-2A in FY 2007 were small entities, the percentage of small entities applying for temporary foreign worker certification would be only 3 percent of the total number of small farms.

The Department contends the costs incurred to employers under this proposed rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H-2A program must continue to establish to the Secretary's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers and that their hiring of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Similar to the current process, employers under this proposed H-2A process will file a standardized application for temporary labor certification and will retain recruitment documentation, a recruitment report, and any supporting evidence or documentation justifying the temporary need for the services or labor to be performed.

To estimate the cost of this reformed H-2A process on employers, the Department calculated each employer will likely pay in the range of \$500 to \$1,850 to meet the advertising and recruitment requirements for a job opportunity, and spend approximately 3 hours of staff time preparing the standardized applications for the required offered wage rate and for temporary labor certification, final recruitment report, and retaining all other required documentation (e.g., newspaper ads, job orders, business necessity) in a file for audit purposes

<sup>20</sup> Derived by utilizing the Bureau of Labor Statistics 2006 median wage for Human Resources Manager wage of \$42.55 and a 1.42 factor for the cost of benefits and taxes.

that is not otherwise required to be retained in the normal course of business. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager (\$42.55), as published by the Department's OES survey, O\*Net OnLine,<sup>21</sup> and increased it by a factor of 1.42 to account for employee benefits and other compensation for a total staff time cost of \$181.00 per applicant.

The Department acknowledges that there might be some extremely small businesses that may incur additional costs to file their application on-line if and when the Department moves to an electronic processing model. However, neither these additional costs nor the advertising and human resource staff time, if any, will eliminate more than 10 percent of the businesses' profits; exceed 1 percent of the gross revenue of the entities in a particular sector; nor exceed 5 percent of the labor costs of the entities in the sector.

The total costs for the small entities affected by this program will be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H-2A labor certification applications are considered to be small businesses, the net economic effect is not significant.

The Department invites comments from members of the public who believe there will be a significant impact on a substantial number of small entities or who disagree with the size standard used by the Department in certifying that this proposed rule will not have a significant impact on a substantial number of small entities.

### C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This proposed rule has no "Federal mandate," which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H-2A worker is purely voluntary and is, therefore, excluded

from any reporting requirement under the Act.

The SWAs are mandated to perform certain activities for the Federal Government under this program, and are compensated for the resources used in performing these activities. Under the current regulations, employers file applications for H-2A labor certifications concurrently with the Department and the SWA having jurisdiction over the area of intended employment. The SWA and the Department through the NPCs of the OFLC both receive the application and review the terms of the job offer. The SWA then places the job order to initiate local recruitment. The SWA directly supervises and assists employer recruitment, and makes referrals of U.S. workers. The NPC directs the SWA to place job orders into intrastate/interstate clearance ensuring employers meet advertising and recruitment requirements. The SWA is responsible for processing the employer's certification request for H-2A labor certification, overseeing the recruitment and directing referrals to the employer. SWAs coordinate all activities regarding the processing of H-2A applications directly with the appropriate NPC for their jurisdiction, including transmittal to the NPC of housing inspection results, prevailing wage surveys, prevailing practice surveys or any other material bearing on the application. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA then sends the complete application to the appropriate NPC for final certification or denial.

Under the re-engineered process in the NPRM, the SWAs will still play a role in the clearance of job orders, the referral of eligible U.S. workers to employers, and conducting housing inspections, but will no longer be responsible for the receipt and substantive review of H-2A applications. SWA activities under the H-2A program are currently funded by the Department pursuant to grants provided under the Wagner-Peyser Act. 29 U.S.C. 49, *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this NPRM and the publication of a final regulation, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.

### D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department determined that this rulemaking did not impose a significant impact on a substantial number of small

entities under the RFA; therefore, the Department is not required to produce any Compliance Guides for Small Entities as mandated by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801) (SBREFA). The Department has similarly concluded that this proposed rule is not a "major rule" requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

### E. Executive Order 13132, Federalism

The Department has reviewed this proposed rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have "federalism implications." The proposed rule does not "have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government" as described by E.O. 13132. Therefore, the Department has determined that this proposed rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

### F. Executive Order 13175, Indian Tribal Governments

This rule was reviewed under the terms of E.O. 13175 and determined not to have "tribal implications." The rule does not have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." As a result, no tribal summary impact statement has been prepared.

### G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681) requires the Department to assess the impact of this proposed rule on family well-being. A rule that is determined to have a negative effect on families must

<sup>21</sup> Source: Bureau of Labor Statistics 2006 wage data.

be supported with an adequate rationale.

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

#### H. Executive Order 12630

This proposed rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

#### I. Executive Order 12988

This regulation has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

#### J. Plain Language

The Department drafted this Notice of Proposed Rulemaking in plain language.

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

This rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

#### L. Paperwork Reduction Act

This NPRM contains revised paperwork requirements at §§ 655.100(a), 655.101, 655.102(c), 655.104(d)(5), 655.105, 655.106, 655.107, 655.108, and 655.109 of Title 20 in the Code of Federal Regulations. This NPRM proposes to significantly change the method of collecting information for the H-2A program for which the current collection instruments do not suffice. Employers are currently required to file a Form ETA 750 (OMB Control Number 1205-0015) and Form ETA 790 (OMB Control Number 1205-0134) when requesting a labor certification for temporary agricultural workers. Additionally, each SWA has its own form for its offered wage rate determinations. This proposed rule revises the current process for applying by requiring petitioners to attest to certain terms, conditions, and obligations. These attestations are made to the U.S. Government in accordance with these proposed regulations in order to modernize processing. To streamline the process, the proposed rule mandates the offered wage rate determination requests be filed with the Department instead of

the individual SWAs. Under the Paperwork Reduction Act of 1995 (PRA), OMB considers the attestations and the wage rate determination requests an information collection requirement subject to review. Accordingly, this information collection in this proposed rule has been submitted to OMB for review under § 3507(d) of the PRA. Copies of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice or at this Web site: <http://www.doleta.gov/OMB/OMBControlNumber.cfm> or <http://www.reginfo.gov/public/dol/pramain>. Written comments are encouraged and will be accepted until April 14, 2008.

When submitting comments on the information collection, your comments should address one or more of the following four points.

*Review Focus:* The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize 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.

#### I. Overview of Information Collection Form 1

*Type of Review:* New.  
*Agency:* Employment and Training Administration.  
*Title:* *Application for Temporary Employment Certification.*  
*OMB Number:* 1205-NEW1.  
*Agency Number(s):* (Proposed) Form ETA-9142.  
*Recordkeeping:* On occasion.  
*Affected Public:* Individuals, households, businesses, farms, Federal, State, local and tribal governments.  
*Total Respondents:* 7,725.  
*Estimated Total Burden Hours:* 16,738.  
*Total Burden Cost (capital/startup):* \$9,573,400.

*Total Burden Cost (operating/maintaining):* 0.

#### II. Overview of Information Collection Form 2

*Type of Review:* New.  
*Agency:* Employment and Training Administration.  
*Title:* *Job Offer and Required Wage Request Form.*  
*OMB Number:* 1205-NEW2.  
*Agency Number(s):* (Proposed) Form ETA-9141.  
*Recordkeeping:* On occasion.  
*Affected Public:* Individuals, households, businesses, farms, Federal, State, local and tribal governments.  
*Total Respondents:* 7,725.  
*Estimated Total Burden Hours:* 5,794.  
*Total Burden Cost (capital/startup):* 0.  
*Total Burden Cost (operating/maintaining):* 0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record. All comments and suggestions or questions regarding additional information should be directed to the *Federal e-Rulemaking Portal* at: [www.regulations.gov](http://www.regulations.gov) or mailed to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for Employment & Training Administration. The information collection aspects of the proposed rulemaking will not take effect until published in a final rule and approved by OMB. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(k)(1).

#### M. Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17-273, "Temporary Labor Certification for Foreign Workers."

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

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

#### List of Subjects in 29 CFR Part 501

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

**List of Subjects in 29 CFR Part 780**

Agricultural commodities, Agriculture, Employment, Forests and forest products, Labor, Minimum wages, Nursery stock, Overtime pay, Wages.

**List of Subjects in 29 CFR Part 788**

Employment, Forests and forest products, Labor, Overtime pay, Wages.

For reason stated in the preamble, the Department of Labor proposes that 20 CFR part 655 and 29 CFR parts 501, 780, and 788 be amended as follows:

**Title 20—Employees' Benefits****PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES**

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

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); § 3(c)(1), Public Law 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); § 221(a), Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); § 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 323(c), Public Law 103–206, 107 Stat. 2428; § 412(e), Public Law 105–277, 112 Stat. 2681; and 8 CFR 214.2(h)(4)(i).

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

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

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

Subparts D and E authority repealed. Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and § 323(c), Public Law 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); § 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 412(e), Public Law 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K issued under § 221(a), Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

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

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

3. Revise § 655.1 to read as follows:

**§ 655.1 Purpose of scope of subpart A.**

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

4. Revise subpart B to read as follows:

**Subpart B—Labor Certification Process for Temporary Agricultural**

Sec.

- 655.90 Purpose and scope of subpart B.
- 655.92 Authority of ETA–OFLC.
- 655.93 Special procedures
- 655.100 Overview of subpart B and definition of terms.
- 655.101 Applications for temporary employment certification in agriculture.
- 655.102 Required pre-filing recruitment.
- 655.103 Advertising requirements.
- 655.104 Contents of job offers.
- 655.105 Assurances and obligations of H–2A employers.
- 655.106 Assurances and obligations of Farm Labor Contractors.
- 655.107 Receipt and processing of applications.
- 655.108 Offered Wage Rate.
- 655.109 Labor certification determinations.
- 655.110 Validity and scope of temporary labor certifications.
- 655.111 Required departure.
- 655.112 Audits.
- 655.113 H–2A applications involving fraud or willful misrepresentation.
- 655.114 Petition for higher meal charges.
- 655.115 Administrative review and de novo hearing before an administrative law judge.
- 655.116 Job Service Complaint System; enforcement of work contracts.
- 655.117 Revocation of H–2A certification approval.
- 655.118 Debarment.

**§ 655.90 Purpose and scope of subpart B.**

*General.* This subpart sets out the procedures established by the Secretary of Labor (the Secretary) to acquire information sufficient to make factual determinations of:

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

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

**§ 655.92 Authority of ETA–OFLC.**

Under this subpart, the accepting for consideration and the making of temporary agricultural labor certification determinations are ordinarily performed by the Administrator, Office of Foreign Labor Certification (OFLC), who, in turn, may delegate this responsibility to a designated staff member, e.g., a Certifying Officer (CO).

**§ 655.93 Special procedures.**

(a) *Systematic process.* This subpart provides systematic and accessible procedures for the processing of applications from agricultural

employers and associations of employers for the certification of employment of nonimmigrant workers, usually in relation to the production or harvesting of a particular agricultural crop or the raising of livestock for market.

(b) *Establishment of special procedures.* To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the OFLC Administrator has the authority to establish or to revise special procedures in the form of variances for processing certain H–2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Administrator has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates for those occupations, for a Statewide or other geographical area, other than the rates established pursuant to § 655.108, provided that the Administrator uses a methodology to establish adverse effect wage rates that are consistent with the methodology in § 655.108. Prior to making determinations under this paragraph (b), the Administrator may consult with employer and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the OFLC Administrator, where the OFLC Administrator deems appropriate, to devise, continue, revise, or revoke special procedures where circumstances warrant. These include procedures previously in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), for custom combine crews, and others on an as-needed basis.

**§ 655.100 Overview of subpart B and definition of terms.**

(a) *Overview—(1) Filing application process.* (i) This subpart provides guidance to an employer that desires to apply for temporary agricultural labor certification for the employment of H–2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employer shall file an H–2A application, including a job offer, on forms prescribed by the Employment

and Training Administration (ETA), that describes the material terms and conditions of employment to be offered and afforded to U.S. and H-2A workers, with the OFLC Administrator. The entire application shall be filed with the OFLC Administrator at least 45 calendar days before the first date the employer requires the services of the H-2A workers. The application will contain attestations of the employer's compliance or promise to comply with program requirements regarding recruitment of eligible U.S. workers, including the payment of an appropriate wage, and terms and conditions of employment.

(ii) No earlier than 120 calendar days and no later than 75 calendar days before the first date the employer requires the services of the H-2A workers, the employer shall initiate positive recruitment of eligible U.S. workers and cooperate with the local office of the State Workforce Agency (SWA) which serves the area of intended employment to place a job order into intrastate and interstate recruitment. To comply with the regulation and as part of its positive recruitment, an employer will: Obtain the appropriate agricultural wage directly from the ETA National Processing Center (NPC); place a job order with the SWA; place advertisements meeting the requirements of this regulation; contact former U.S. workers; and engage in recruitment in traditional labor supply States, when required, based on an annual determination from the Secretary, where such determination results in a finding of a multistate region of traditional or expected labor supply with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. The SWA will post a job order locally, as well as in all States listed in the application as anticipated work sites and in any States in which the Secretary finds that a multistate region of traditional or expected labor supply exists with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. No more than 60 days prior to the first date the employer requires the services of the H-2A workers, the employer will prepare an initial written recruitment report that it must submit with its application. The employer will cease any recruitment and acceptance of referrals of eligible U.S. workers no earlier than the actual date on which the H-2A workers depart for the place of work, or no earlier than

three days prior to the first date the employer requires the services of the H-2A workers, whichever is later.

(iii) The application for H-2A temporary labor certification may be filed by mail; in addition, the Department may require the application to be filed electronically. Applications that meet threshold requirements for completeness and accuracy will be forwarded for processing to NPC staff, who will review each application for compliance with the criteria for certification. Each application must meet requirements for timeliness, temporary need, and the provision of assurances and other safeguards against adverse impact, and must be free of technical errors. Employers receiving a labor certification must continue to cooperate with the SWA by accepting referrals—and have the obligation to accept eligible U.S. workers who apply—until the date on which the H-2A workers depart for the place of work, or 3 days prior to the first date the employer requires the services of the H-2A workers, whichever is later.

(2) *Deficient applications.* Under this subpart, the CO will promptly review the application and notify the applicant in writing if there are deficiencies that render the application not acceptable for certification, and afford the applicant a 5 business day period for resubmission of an amended application or an appeal of the CO's refusal to approve the application as acceptable for consideration. Amended applications that fail to cure deficiencies in a way that would make them certifiable will be denied. In addition, when an initial application contains a deficiency related to recruitment or some other element of adverse effect, the CO will deny the application, instruct the employer to file a new application, and include guidance on how to correct the deficiency during the new recruitment period. In these cases, the application must contain a new, later date of need and demonstrate compliance with pre-filing recruitment requirements.

(3) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the CO's certification determination, to increase the number of workers requested in the initial application; and/or change the period of employment. In circumstances where the recruitment was not materially altered by such amendments, such amendments may not require an additional recruitment period for eligible U.S. workers.

(4) *Recruitment of U.S. workers; determinations—(i) Recruitment.* If the employer has complied with the criteria for certification, including recruitment

of eligible U.S. workers, the CO shall make a determination no later than 30 calendar days before the first date the employer requires the services of the H-2A workers to grant or deny, in whole or in part, the application for certification. Failure to comply with any of the certification criteria, and efforts to cure deficiencies identified by the CO, may lengthen the time required for processing, resulting in a final determination issued later than 30 days prior to date of need.

(ii) *Granted applications.* This subpart provides that an application for temporary agricultural labor certification shall be granted if the CO finds that the employer has not offered and does not intend to offer foreign workers higher wages or better working conditions (or has imposed less restrictions on foreign workers) than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, qualified, and eligible, will not be available at the time and place needed to perform the work for which H-2A workers are being requested; and that the employment of such nonimmigrants will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees. (A) Amount.* This subpart provides that each employer (except joint employer associations) of H-2A workers shall pay to the appropriate CO fees for each temporary agricultural labor certification received. The application fee for each employer receiving a temporary agricultural labor certification is \$200 plus \$100 for each H-2A worker certified under the *Application for Temporary Employment Certification*. In the case of a joint employer association receiving a temporary agricultural labor certification, each employer-member receiving a temporary agricultural labor certification shall pay an application fee of \$200 plus \$100 for each H-2A worker certified for that employer-member. The joint employer association will not be charged a separate fee. Any amendments requested pursuant to § 655.107(a)(6) by the employer to a temporary agricultural labor certification, which are received, accepted, and processed by the appropriate CO, will be subject to an additional processing fee of \$100. In circumstances where the CO grants an amendment to increase the number of H-2A workers requested on the initial certified application, the employer shall be subject to a fee of \$100 for each additional H-2A worker certified on the amended temporary agricultural labor certification.

(B) *Timeliness of payment.* The fee must be received by the appropriate CO no later than 30 calendar days after the granting of each temporary agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial program violation which may result in the denial of future temporary agricultural labor certifications and program debarment.

(iv) *Denied applications.* This subpart provides that if the application for temporary agricultural labor certification is denied, in whole or in part, the employer may seek review of the denial, or a *de novo* hearing, by an administrative law judge as provided in this subpart.

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

*Administrative law judge* means a person within the DOL Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105; or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide appeals as set forth in § 655.115. "Chief Administrative Law Judge" means the chief official of the DOL Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

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

*Adverse effect wage rate (AEWR)* means the minimum wage rate that the Administrator has determined must be offered and paid to every H-2A worker employed in a particular occupation and/or area to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

*Agent* means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, which:

- (1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and
- (2) Is not itself an employer, or a joint employer, as defined in this paragraph (b).

*Agricultural association* means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any H-2A worker. An agricultural association may act as the agent of an employer for purposes of

filing an H-2A temporary labor certification application.

*Agricultural employer* means any person who owns or operates a farm or ranch, or otherwise engages in agriculture as defined in this subpart, and who either recruits, solicits, hires, employs, furnishes, or transports any H-2A worker. Agricultural employers may file H-2A applications either directly or through their agents or other legal representatives.

*Application for Temporary Employment Certification* means the form submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

*Area of intended employment* means the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

*Attorney* means any person who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States, or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the United States Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an agent, representative, or attorney for an employer and/or foreign worker under this part.

*Certifying Officer (CO)* means the person designated by the Administrator, OFLC with making programmatic determinations on employer-filed applications under the H-2A program.

*Date of need* means the first date the employer requires services of the H-2A workers.

*Department of Homeland Security (DHS), through the United States Citizenship and Immigration Services (USCIS),* means the Federal agency

making the determination under the INA whether to grant petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the U.S.

*DOL or Department* means the U.S. Department of Labor.

*Eligible worker* means, with respect to employment, an individual who is not an unauthorized alien (as defined in section 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), or in this paragraph (b)) with respect to that employment.

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

*Employer* means a person, firm, corporation or other association or organization:

- (1) Which has a location within the U.S. to which U.S. workers may be referred for employment, or qualifies as a farm labor contractor (FLC) under this subpart;
- (2) Which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and
- (3) Which possesses a valid Federal Employer Identification Number (FEIN).
- (4) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers shall be considered to jointly employ that employee.

(5) FLCs, for purposes of this subpart, shall be considered to be employers.

*Employment Service (ES)* means the system of Federal and State entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the State Workforce Agencies (SWAs) and the OFLC, including the NPCs.

*Employment Standards Administration (ESA)* means the agency within the Department of Labor (DOL) that includes the Wage and Hour Division, and which is charged with carrying out certain investigative and

enforcement functions of the Secretary under the INA.

*Employment and Training Administration (ETA)* means the agency within the Department that includes the OFLC.

*Federal holiday* means a legal public holiday as defined at 5 U.S.C. 6103.

*Farm labor contracting activity* means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant and seasonal agricultural worker as those terms are used in 29 U.S.C. 1801 *et seq.* and 29 CFR part 500, with the intent to contract those workers to fixed-site employers.

*Farm Labor Contractor (FLC)* means any person—other than an agricultural association, or an employee of an agricultural association—who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

*H-2A worker* means any nonimmigrant who shall perform agricultural labor or services of a temporary or seasonal nature under INA § 101(a)(15)(H)(ii)(a), as amended, 8 U.S.C. 1101(a)(15)(H)(ii)(a).

*INA* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

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

*Job opportunity* means a job opening for temporary, full-time employment at a place in the U.S. to which a U.S. worker can be referred.

*Office of Foreign Labor Certification (OFLC)* means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning the admission of foreign workers to the U.S. to perform work described in INA § 101(a)(15)(H)(ii)(a), as amended.

*Occupational Safety and Health Administration (OSHA)* means the organizational component of DOL that assures the safety and health of America's workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health under the Occupational Safety and Health Act, as amended.

*Positive recruitment* means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible

individuals in the area where the employer's establishment is located and any other area designated by the Secretary as a multistate area of traditional or expected labor supply with respect to the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

*Prevailing* means, with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H-2A and non-H-2A employers) for the occupation in the area of intended employment.

*Representative* means the official employed by or duly authorized to act on behalf of the employer with respect to activities entered into for and/or attestations made with respect to the *Application for Temporary Employment Certification*. In the case of an attorney who acts as an employer's representative and who interviews and/or considers U.S. workers for the job offered to the foreign worker(s), such individual must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

*Secretary* means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

*Secretary of Homeland Security* means the chief official of the U.S. Department of Homeland Security (DHS) or the Secretary of Homeland Security's designee.

*Secretary of State* means the chief official of the U.S. Department of State (DOS) or the Secretary of State's designee.

*State Workforce Agency (SWA)*, formerly known as State Employment Security Agency (SESA), means the State Government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's one-stop delivery system in accordance with the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* Separately, SWAs receive ETA grants, administered by the OFLC, to assist them in performing certain activities related to foreign labor certification—including conducting housing inspections.

*Temporary agricultural labor certification* means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ a foreign national as an H-2A worker, pursuant to

§§ 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

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

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed, 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1188.

*Temporary agricultural labor certification determination* means the written determination made by the CO to approve or deny, in whole or in part, an application for temporary agricultural labor certification to employ a foreign worker(s).

*Unauthorized alien* means, with respect to employment, an alien who is not at that time either (a) a foreign national lawfully admitted for permanent residence or (b) otherwise authorized to be so employed.

*United States (U.S.)*, when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, and the Virgin Islands of the United States.

*United States worker (U.S. worker)* means a worker who is either

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

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under § 207 of the INA, is granted asylum under § 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

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

(c) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this subpart, "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) "Agricultural labor or services." Pursuant to § 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), "agricultural labor or services" is defined for the purposes of this subpart as:

(i) "Agricultural labor" as defined and applied in § 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g));

(ii) "Agriculture" as defined and applied in § 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm; or

(vi) Other work typically performed on a farm that is incidental to the agricultural labor or services for which the worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (c)(1)(i) and (ii) of this section shall be "agricultural labor or services", notwithstanding the exclusion of that occupation from the other statutory definition.

(i) "Agricultural labor" for purposes of paragraph (c)(1)(i) of this section means all services performed:

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

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

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

(D)(1) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(2) In the employ of a group of operators of farms (other than a cooperative organization) in the

performance of service described in paragraph (c)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(2)(i)(D)(2), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(3) The provisions of paragraphs (c)(1) and (2) of this section shall not be deemed to be applicable with respect to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

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

(E) As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. (See § 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g).)

(ii) "Agriculture." For purposes of paragraph (c)(1)(ii) of this section agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (See 29 U.S.C. 203(f) (§ 3(f) of the FLSA of 1938, as amended.).

(iii) "Agricultural commodity". For purposes of paragraph (c)(1)(ii), of this section "agricultural commodity" includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. "Gum spirits of turpentine" means spirits of turpentine made from

gum (oleoresin) from a living tree and "gum rosin" means rosin remaining after the distillation of gum spirits of turpentine. (See 12 U.S.C. 1141j(g) (§ 15(g) of the Agricultural Marketing Act, as amended, and 7 U.S.C. 92.)

(3) "Of a temporary or seasonal nature."

(i) "On a seasonal or other temporary basis". For the purposes of this subpart, "of a temporary or seasonal nature" means "on a seasonal or other temporary basis", as defined in the ESA's WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* The definition of "on a seasonal or other temporary basis" found in MSPA, summarized as follows, is:

(A) Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(B) A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) "On a seasonal or other temporary basis" does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(D) "On a seasonal or other temporary basis" does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) "Temporary". For the purposes of this subpart, the definition of "temporary" in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position for a limited period of time, which shall be for less than 1 year, unless the original temporary agricultural labor

certification is extended based on unforeseen circumstances, pursuant to § 655.110 of this part.

**§ 655.101 Applications for temporary employment certification in agriculture.**

(a) *Application Filing Requirements.*

(1) An employer that desires to apply for certification of temporary employment of one or more nonimmigrant foreign workers must file a completed DOL *Application for Temporary Employment Certification* form, including a job offer. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one NPC, the application, if filed by mail, shall be filed with the NPC having jurisdiction over the place where the work is contemplated to begin. The employer's application will contain information related to the job opportunity, which shall comply with the requirements of §§ 655.104 and 653.501 of this chapter and the assurances required by § 655.105.

(2) If an association of agricultural producers, which uses agricultural labor or services, files the application, the association shall identify whether it is either the sole employer, a joint employer with its employer-member employers, or the agent of its employer-members. The association shall identify on the *Application for Temporary Employment Certification*, by name and address, each member that will be an employer of H-2A workers. The association shall retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation to the CO in the event of an audit examination.

(3) If an employer intends to be represented by an agent, the employer shall sign the appropriate statement on the *Application for Temporary Employment Certification* that the agent is representing the employer and the employer assumes full responsibility for the accuracy of any representations made by the agent. The agent may accept for interview workers being referred to the job and make hiring commitments on behalf of the employer.

(4) If an FLC intends to file the application, he/she must meet all of the requirements of the definition of "employer" in § 655.100(b), and comply with all the assurances, guarantees, and other requirements contained in this part and in part 653, subpart F, of this chapter. The FLC must have a place of business (physical location) in the United States to which U.S. workers may be referred. If an FLC files an application, H-2A workers employed by the FLC may not perform services for an

agricultural employer unless the FLC has filed a confirmation of the agricultural employer's compliance with the housing and transportation obligations, as outlined in § 655.106, with the OFLC, for each agricultural employer listed on the application. The FLC shall retain a copy of the compliance certificate.

(b) *Filing.* The employer may complete the *Application for Temporary Employment Certification* and send it by U.S. Mail or private mail courier to the appropriate NPC. The Department shall publish a Notice in the **Federal Register** identifying the address(es), and any future address changes, to which paper applications must be mailed, and shall also post these addresses on the DOL Internet Web site at <http://www.foreignlaborcert.doleta.gov/>. The form must bear the original signature of the employer (or that of the employer's authorized agent or representative) at the time it is submitted.

(c) *Timeliness.* A completed *Application for Temporary Employment Certification* is not required to be filed with the appropriate NPC more than forty-five (45) calendar days before the date of need.

**§ 655.102 Required pre-filing recruitment.**

(a) *Time of Filing of Application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied. An employer may file earlier than 45 days prior to the date of need, but is not required to do so.

(b) *General Attestation Obligation.* An employer must document recruitment efforts on the application form and attest to performing all necessary steps of the recruitment process as specified in this section and having rejected any eligible U.S. workers who have applied only for lawful reasons. In addition, the employer shall attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the H-2A workers depart for the place of work, or 3 days prior to the first date the employer requires the services of the H-2A workers, whichever is later, and then preparing a written recruitment report for submission to the CO in the event of an audit examination.

(c) *Retention of documentation.* An employer filing an *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared

to submit this documentation in response to a Notice of Deficiency from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section to be retained by the employer must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied, no less than 5 years from the date of notification from the Department of such denial.

(d) *Positive Recruitment Steps.* An employer filing an application must:

(1) Post a job order with the SWA serving the area of intended employment,

(2) Run three print advertisements (one of which must be on a Sunday, except as outlined in paragraph (g) of this section);

(3) Contact former U.S. employees who were employed within the last year (except those who were dismissed for cause or who abandoned the worksite); and

(4) Based on an annual determination made by the Secretary, as described in paragraph (i) of this section, recruit in any States currently designated as States of traditional or expected labor supply with respect to the State in which the employer's work is to be performed.

(e) *Job Order.* (1) The employer shall place an active job order, consistent with part 653, subpart F, of this chapter, with the SWA serving the area of intended employment no earlier than 120 calendar days and no later than 75 calendar days before the date of need for intrastate and interstate clearance and begin recruitment of U.S. workers. For an application filed by an association of agricultural employers, the SWA shall prepare a single job order in the name of the association on behalf of all employer-members named in the application. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work is contemplated to begin. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site on the first day of posting, a copy of the job order provided by the SWA with the start date of posting, or other proof of publication from the SWA containing the text of the job order on the first day of posting.

(2) The job order contents submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.103 and the adverse effect

requirements set forth at § 655.104. In the job order, the SWA shall disclose that only eligible workers shall be referred and list the name of the employer and location(s) of work, or in the event that an association is serving as the employer, a statement indicating that the name and location of each member of the association can be obtained through the SWA.

(3) Unless otherwise directed by the CO, the SWA shall keep the job order on its active file for intrastate clearance until the date the H-2A worker(s) depart for the place of work, or upon 3 days prior to the date the employer requires the services of the H-2A workers, whichever is later.

(f) *Intrastate/Interstate Recruitment.*  
(1) Upon placing a job order for intrastate clearance, the SWA receiving the job offer under paragraph (e) of this section shall promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites. If the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State, the SWA shall transmit a copy of its active job order to no fewer than 3 States, which must include those States designated as traditional or expected labor supply States ("out-of-state recruitment States") for the State in which the employer's work is to be performed as defined in paragraph (i) of this section. Upon receipt of the active job order, each SWA shall promptly prepare a job order for intrastate clearance within its respective State and begin recruitment of eligible U.S. workers. For applications filed by an association of agricultural producers, each SWA shall prepare a single job order in the name of the association on behalf of all employer-members duly named in the application.

(2) The job order contents must satisfy all the requirements for newspaper advertisements contained in § 655.103 and the adverse effect requirements set forth at § 655.104. In the job order, the SWA shall disclose that only eligible U.S. workers shall be referred and list the name of the employer and location(s) of work, or in the event that an association is serving as the employer, a statement indicating that the name and location of each member of the association can be obtained from the SWA to which the job offer was originally submitted under paragraph (e) of this section.

(3) Unless otherwise directed by the CO, the SWA shall keep the job order on its active file for intrastate clearance until and only until the date the H-2A worker(s) depart for the place of work,

or 3 days prior to the date the employer requires the services of the H-2A workers, whichever is later. Each of the SWAs to which the job order was referred shall refer back to the SWA to which the job offer was originally submitted under paragraph (e) of this section each eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(g) *Newspaper Advertisements.* (1) Within the same period of time as the job order is being circulated by the SWA(s) for interstate clearance under paragraph (f) of this section, the employer shall place an advertisement on 3 separate days, which may be consecutive, one of which is to be a Sunday advertisement (except as provided in paragraph (g)(2) of this section), in a newspaper of general circulation serving the area of intended employment, which may be a daily local newspaper, that is most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, available, qualified, and eligible U.S. workers. The first newspaper advertisement must be printed no earlier than 120 calendar days and no later than 75 calendar days before the date of need.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer shall use, in place of a Sunday edition advertisement, the regularly published edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements under § 655.103 and the adverse effect requirements set forth at § 655.104. Documentation of this step shall be satisfied by maintaining copies of newspaper pages (with date of publication and full copy of ad), tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If the use of a professional, trade or ethnic publication is more appropriate to the occupation and the workers likely to apply for the job opportunity than the use of a general circulation newspaper and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, the employer may use a professional, trade or ethnic publication in place of two newspaper advertisements, but shall not replace the

Sunday advertisement, or the substitute outlined in (g)(2), as appropriate.

(h) *Contact with former U.S. workers.* Within the same period of time as the job offer is being circulated by the SWA(s) for intrastate/interstate clearance under paragraph (f) of this part, the employer must contact by mail former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. Such contact can be documented by providing copies of official correspondence signed and dated by the employer demonstrating that the workers were contacted and either unable or unwilling to return to the job or non-responsive to the employer's request.

(i) *Additional positive recruitment.* (1) Each year, the Secretary shall make a determination with respect to each State whether there are other States in which there are located a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State. Such determination shall be based on information provided by State agencies or by other sources within the 120 days preceding the determination, and shall take into account the success of recent efforts by out-of-state employers to recruit in that State. The Secretary shall not designate a State as a State of traditional or expected labor supply with respect for any other State if the State has a significant number of local employers that are recruiting for U.S. workers for the same types of occupations. The Secretary's annual determination as to which other States, if any, applicants from each State must recruit in shall be published in the **Federal Register** and made available through the ETA Web site.

(2) Each employer shall be required to engage in positive multistate recruitment efforts in those States, if any, that the Secretary has designated as out-of-state recruitment States for the State in which the employer's work is to be performed. Such recruitment shall consist of one newspaper advertisement in each State so designated, published within the same period of time as the newspaper advertisements under paragraph (g) of this section, which must satisfy the requirements under § 655.103 and the adverse effect requirements set forth at § 655.104.

(3) The obligation to engage in such positive recruitment shall terminate on the date H-2A workers depart for the employer's place of work.

(j) *Referrals of U.S. workers.* SWAs shall refer for employment only those individuals whom they have verified are eligible U.S. workers.

(k) *Recruitment Report.* No earlier than 60 calendar days before the date of need the employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted with the *Application for Temporary Labor Certification*. The recruitment report must:

(1) Identify each recruitment source by name;

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

(3) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied for the position.

(4) The employer shall retain resumes of (if available), and evidence of contact with, each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact shall be retained as part of the recruitment report for a period of no less than 5 years and must be provided in response to a Notice of Deficiency from the CO prior to rendering a Final Determination or in the event of an audit.

(5) The employer shall update the recruitment report within 48 hours of the date the H-2A workers depart for the place of work, or 3 days prior to the date the employer requires the services of the H-2A workers, whichever is later. This supplement to the recruitment report shall list the name(s) and contact information of any additional U.S. workers who applied or were referred to the job opportunity, and list the disposition of each U.S. worker who applied or was referred to the job opportunity; explaining, if applicable, the lawful job-related reason(s) for not hiring any U.S. workers who applied or who were referred. The employer must sign and date this supplement to the recruitment report and retain it for a period of no less than 5 years. The supplement to the recruitment report must be provided in the event of an audit.

#### **§ 655.103 Advertising requirements.**

All advertising conducted to satisfy the required recruitment steps under § 655.102 before filing the *Application for Temporary Employment Certification* must meet the adverse

effect requirements set forth at § 655.104 and disclose the following information:

(a) Identify the employer's name and location(s) of work, or in the event that an association is serving as the employer, a statement indicating that the name and location of each member of the association can be obtained from the SWA;

(b) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements or where applicants will likely have to reside to perform the services or labor;

(c) Describe the job opportunity with particularity to apprise U.S. workers of services or labor to be performed for which certification is sought and the duration of the job opportunity;

(d) Identify the wage offer, or in the event that an association is serving as the employer, the range of applicable wage offers and a statement indicating that the rate applicable to each member can be obtained from the SWA;

(e) Give the three-fourths guarantee described in § 655.104(h)(3)(i);

(f) If applicable, state that work tools, supplies, and equipment will be provided without cost to the worker;

(g) State that housing will be made available at no cost to workers who cannot reasonably return to their permanent residence at the end of the day;

(h) If applicable, state that transportation and subsistence expenses to the worksite will be provided by the employer;

(i) Indicate the position is temporary and the total number of job openings the employer intends to fill;

(j) Contain terms and conditions of employment which are not less favorable than those subsequently offered to the foreign worker(s); and

(k) Direct applicants to report or send resumes to the SWA for referral to the employer; and

(l) Contact information for the SWA and the job order number.

#### **§ 655.104 Contents of job offers.**

(a) *Preferential treatment of aliens prohibited.* The employer's job offer shall offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Except where otherwise permitted under this section, no job offer may impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers.

(b) *No less than minimum offered.* The job duties and requirements specified in the job offer shall be consistent with the normal and accepted

duties and requirements of non-H-2A employers in the same or comparable occupations and crops in the area of intended employment and shall not require a combination of duties not normal to the occupation. The employer cannot offer less than the minimum wages, benefits and working conditions that are required by paragraph (a) of this section.

(c) *Minimum benefits, wages, and working conditions.* Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, every job offer accompanying an H-2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (i) of this section.

(d) *Housing.* (1) *Obligation To Provide Housing.* The employer shall provide housing to those workers who are not reasonably able to return to their permanent residence within the same day through one of the following means:

(i) *Employer-owned housing.* Employer-owned housing that meets the full set of DOL OSHA standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable pursuant to § 654.401.

(ii) *Rental and/or public accommodations.* Rental and/or public accommodations or other substantially similar class of habitation which meets applicable local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the CO that the housing complies with the applicable Federal housing standards.

(iii) *Housing voucher.* Except where the Governor of the State has certified that there is inadequate housing available in the area of intended employment for migrant farm workers and H-2A workers seeking temporary housing while employed in agricultural work, the employer may satisfy the requirement to provide housing by furnishing the worker a housing voucher provided that:

(A) The employer has verified that housing meeting applicable standards is available for the period during which the work is to be performed, within a reasonable commuting distance of the place of employment, for the amount of

the voucher provided, and that the voucher is useable for that housing;

(B) Upon the request of a worker seeking assistance in locating housing for which the voucher will be accepted, the employer shall make a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment; and

(C) Payment for the housing shall be made with a housing voucher, or such other means, that is not redeemable for cash by the employee to a third party.

(D) The Governor's certification will be valid for a period of 3 years from the date of the certification.

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

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

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

(5) *Housing inspection.* In order to ensure that the housing provided by an employer pursuant to this section meets the relevant standard:

(i) An employer must make the required attestation at the time of filing the *Application for Temporary Employment Certification* pursuant to § 655.105(e)(2).

(ii) The employer must make a request to the SWA for a housing inspection no more than 75 days and no fewer than 60 days before the date of need.

(iii) The determination that the housing meets the statutory criteria applicable to the type of housing provided must take place prior to certification as outlined in § 218(c)(4) of the INA. If the employer has attested and met all other criteria for certification, and the employer has made a timely request for a housing inspection pursuant to this paragraph (d)(5), and the housing inspection has not taken place by the statutory

deadline of 30 days prior to date of need, the certification shall not be withheld. The SWA shall in such cases inspect the housing prior to or during occupation to ensure it meets applicable housing standards. If, upon inspection, the SWA determines the supplied housing does not meet the applicable housing standards, the SWA shall promptly provide written notification to the NPC for appropriate action, which may include, but need not be limited to, referral to the ESA and where the violations is more than de minimis, revocation of the temporary labor certification, and/or debarment.

(6) *Certified Housing that Becomes Unavailable.* For situations in which housing certified by the SWA later becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with applicable housing standards and for which the employer is able to submit evidence of such compliance. The employer must notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance from the appropriate local or State agency responsible for determining compliance with applicable local, State or Federal safety and health standards. The SWA should make every effort to inspect such accommodations prior to occupation but may also conduct inspections during occupation, to ensure that they meet applicable housing standards. The SWA will notify the appropriate CO of all housing changes and of the results of any housing inspections

(e) *Workers' compensation.* The employer shall provide, at no cost to the worker and for the entire time of the worker's employment, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall retain for the full period of record retention required (5 years from the date of adjudication of the application) the name of the insurance carrier, the insurance policy number, and proof of insurance, or, if appropriate, proof of State law coverage.

(f) *Employer-provided items.* Except as provided below, the employer shall provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may charge the worker for reasonable costs related to the worker's refusal or

negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement will be permitted.

(g) *Meals.* The employer either shall provide each worker with three meals a day or shall furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. Until a new amount is set pursuant to this paragraph (g), the charge shall not be more than \$9.52 per day unless the CO has approved a higher charge pursuant to § 655.114. Each year the charge allowed by this paragraph (g) will be changed by the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Department as a Notice in the **Federal Register**.

(h) *Transportation; daily subsistence.*

(1) *Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H-2A workers, the employer shall advance the required transportation and subsistence costs (or otherwise provide them) to workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment, but in no event less than

the amount permitted under paragraph (g) of this section.

(2) *Transportation from place of employment.* If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay in advance for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses.

(3) *Transportation between living quarters and worksite.* The employer shall provide transportation between the worker's living quarters (i.e., housing provided or secured by the employer directly or through a voucher pursuant to paragraph (d) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with all applicable Federal, State or local laws and regulations, and shall provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500. If workers' compensation is used to cover such transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation. This paragraph (h) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (d) of this section.

(i) *Three-fourths guarantee.* (1) *Offer to worker.* The employer shall guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. For purposes of this paragraph (i)(1), a workday shall mean the number of hours in a workday as stated in the job order and shall exclude the worker's Sabbath and Federal holidays. The employer shall offer a total number of hours to ensure the provision of sufficient work to reach the three-

fourths guarantee. The work hours must be offered during the work period specified in the work contract during or any modified work contract period of at least the same duration to which the worker and employer have mutually agreed and has been approved by ETA. The work contract period can be shortened only with the approval of the Department. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect. Therefore, if, for example a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks  $\times$  48 hours/week = 480-hours  $\times$  75 percent = 360). A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker shall not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If the employer affords the U.S. or H-2A worker during the total work contract period less employment than that required under this paragraph (i)(1), the employer shall pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

(2) *Guarantee for piece-rate paid worker.* If the worker will be paid on a piece rate basis, the employer shall use the worker's average hourly piece rate earnings or the AEW, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so in accordance with paragraph (i)(1) of this section may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(4) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide subsistence and, where appropriate, transportation for each day

of the contract period up until the day the H-2A workers depart for other H-2A employment or depart to their place of permanent residence.

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

(2) To assist in determining whether the three-fourths guarantee at paragraph (i)(3) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job opportunity for a work day, the records shall state the reason or reasons therefor.

(3) Upon reasonable notice, the employer shall make the records available, including field tally records and supporting summary payroll records, for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker; and

(4) The employer shall retain the records for not less than 5 years after the completion of the work contract.

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

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

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

(3) The hours of employment offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(4) The hours actually worked by the worker;

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

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

(l) *Rates of Pay.* (1) If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect

wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(2)(i) If the worker will be paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay shall be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate for each hour worked; and the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment; and

(ii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards shall be specified in the job offer and be no more than those normally required by other employers for the activity in the area of intended employment.

(m) *Frequency of Pay.* The employer shall state the frequency with which the worker will be paid, which must be in accordance with the prevailing practice in the area of intended employment, or at least twice monthly, whichever is more frequent.

(n) *Abandonment of employment or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the Department and DHS in writing or any other method specified not later than 48 hours of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under paragraph (h) of this section, and that worker is not entitled to the "three-fourths guarantee" (see paragraph (i) of this section).

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, hurricane, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the Department. In the event of such termination of a contract, the employer

shall fulfill the three-fourths guarantee at paragraph (i)(1) of this section for the time that has elapsed from the start of the work contract to its termination. The employer shall:

(1) Offer to return the worker, at the employer's expense, to the place from which the worker came to work for the employer,

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

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence shall be computed as set forth in paragraph (h) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* The employer shall make those deductions from the worker's paycheck required by law. The job offer shall specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions shall be reasonable.

(q) *Copy of work contract.* The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) through (p) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the *Application for Temporary Employment Certification*, including the job offer, shall be the work contract.

#### **§ 655.105 Assurances and obligations of H-2A employers.**

An employer seeking to employ H-2A foreign workers shall attest that it will abide by the following conditions of this subpart. By so attesting, the employer makes each of the following assurances:

(a) The job opportunity is open to any U.S. worker regardless of race, creed, color, national origin, age, sex, religion, handicap, or citizenship, and the employer conducted or will conduct the required recruitment, in accordance with regulations, prior to filing the labor certification application and was unsuccessful in locating qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied for the job were rejected only for lawful, job-related reasons;

(b) The employer is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are not less favorable than those offered to the H-2A worker(s) and are not less than the minimum terms and conditions required by this subpart;

(c) There is not, at the time the labor certification application is filed, a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment;

(d) The employer will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the H-2A workers depart for the place of work, or three days prior to the first date on which the employer requires the services of the H-2A workers, whichever is later;

(e) During the period of employment that is the subject of the labor certification application, the employer will:

(1) Comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;

(2) Provide housing to those workers who are not reasonably able to return to their permanent residence within the same day, without charge to the worker, that complies with the applicable local, State, or Federal standards and guidelines for housing; and, where applicable, has requested a preoccupancy inspection of the housing and, if one has been conducted, received certification;

(3) Provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements set forth at § 655.104(e).

(4) Provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer pursuant to § 655.104(d)) and the employer's worksite without cost to the worker.

(f) Upon the separation from employment of H-2A worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than 48 hours after such separation is effective.

(g) The offered wage rate is the highest of the adverse effect wage rate, the prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage, and the employer will pay the offered wage during the entire valid period of the approved labor certification.

(h) The offered wage is not based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the adverse effect wage rate, prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage, whichever is highest.

(i) The job opportunity is a full-time temporary position, whose qualifications are consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops in that they shall not require a combination of duties not normal to the occupation,

(j) The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 75 days before the date of need, except that such layoff shall be permitted where the employer also attests that it offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

(k) The employer shall not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to § 218 of the INA (8 U.S.C. 1188), or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to § 218 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA;

(3) Testified or is about to testify in any proceeding under or related to § 218 of the INA or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to § 218 of the INA or this subpart or any other DOL

regulation promulgated pursuant to § 218 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 218 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA.

(l) The employer shall not discharge any person for the sole reason of that person's taking any action listed in paragraphs (k)(1) through (k)(5) of this section.

(m) All fees associated with processing the temporary labor certification will be paid in a timely manner.

(n) The employer will inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.111, unless the H-2A is being sponsored by another employer and that employer has already filed and received a certified *Application for Temporary Employment Certification* and has filed that certification in support of a petition to employ that worker with DHS.

(o) The employer has not sought or received payment of any kind for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees or domestic recruitment costs, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing the application or securing the H-2A workers, from the employee or any other party, except when work to be performed by the H-2A worker in connection with the job opportunity will benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. In connection with this attestation, the employer is required to contractually forbid any foreign labor contractor whom they engage in international recruitment of H-2A workers to seek or receive payments from prospective employees. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, or tributes, in kind payments, and free labor.

(p) The applicant shall attest to whether it is a fixed-site employer, an agent or recruiter, an FLC as defined by MSPA, or an association, and—in cases in which the filer is someone other than a fixed-site employer—whether it is an employer as defined by these regulations with respect to the H-2A workers sought.

#### **§ 655.106 Assurances and obligations of Farm Labor Contractors.**

In addition to all the assurances and obligations listed in § 655.105, FLC applicants shall also be required to:

(a) Provide the MSPA certificate of registration number and expiration date;

(b) Identify the farm labor contracting activities the FLC is authorized to perform;

(c) Provide for each fixed-site agricultural business to whom the FLC will provide workers, the name and location of the fixed-site agricultural business, the approximate beginning and ending dates of when the FLC will be providing the workers, and a description of the crops and activities the workers will perform;

(d) Provide proof of its ability to discharge financial obligations under the H-2A program by attesting that it has obtained a surety bond as required by 29 CFR 501.8, stating on the application the name, address, phone number, and contact person for the surety, and providing the amount of the bond and any identifying designation utilized by the surety for the bond;

(e) Attest that it has engaged in, or will engage in within the timeframes required by § 102, positive recruitment efforts in each location in which it has listed a fixed-site agricultural business; and

(f) Attest that it has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a certificate of compliance regarding the following:

(1) All housing utilized by H-2A workers and owned and/or operated by the fixed-site agricultural business complies with the applicable local, State or Federal standards and guidelines for such housing and

(2) All transportation between the H-2A workers' living quarters and the worksite that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and shall provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500.

#### **§ 655.107 Receipt and processing of applications.**

(a) *Processing.* (1) *Receipt.* Upon receipt of the application, the CO will promptly review the application for completeness and compliance with the requirements of the program as outlined under paragraph (a)(2) of this section.

(2) *Review.* Each *Application for Temporary Employment Certification* will be substantively reviewed for compliance with the criteria for

certification, and the CO will make a determination to certify, deny, or issue a Notice of Deficiency prior to making a Final Determination on the application. "Criteria for Certification," as used in this part, shall include, but not be limited to, the nature of the employer's need for the agricultural services or labor to be performed is temporary; all assurances and obligations outlined in § 655.105 in this part; compliance with the timeliness requirements as outlined in § 655.102 of this part; and a lack of errors in completing the application prior to submission, which would make the application otherwise non-certifiable.

(3) *Notice of Deficiencies.* If the CO determines the employer has made all necessary attestations and assurances sufficient to reflect compliance with the assurances and obligations related to the recruitment of U.S. workers, but the application still fails to comply with one or more of the criteria for certification as outlined under paragraph (a)(2) of this section, the CO will promptly notify the employer (by means normally assuring next day delivery) within 7 calendar days with a copy to the SWA serving the area of intended employment of any deficiencies.

(4) The notice shall:

(i) State the reason(s) why the application is unacceptable for temporary labor certification, citing the relevant regulatory standard(s);

(ii) Offer the applicant an opportunity for submitting a modified application within 5 business days, stating the modification is needed for the CO to accept the application for consideration;

(iii) State that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the application within 5 business days and in a manner specified by the CO.

(iv) Offer the employer an opportunity to request an expedited administrative review of or a *de novo* administrative hearing before an administrative law judge of the non-acceptance. The notice shall state that in order to obtain such a review or hearing, the employer, within five business days of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of the DOL (giving the address) and simultaneously serve a copy to the CO. The notice shall also state that the employer may submit any legal arguments that the employer

believes will rebut the basis of the CO's action; and

(v) State that if the employer does not request an expedited administrative judicial review or a *de novo* hearing before an administrative law judge within the 5 business days no further consideration of the employer's application for temporary employment certification under the H-2A classification will be made by a Department official.

(5) *Submission of Modified Applications.*

(i) Provided that the CO notifies the employer of any deficiencies within the 7 calendar day timeframe set forth under paragraph (a)(3) of this section, the date by which the CO's Final Determination is required by statute to be made will be postponed by 1 day for each day that passes beyond the 5 business day period allowed under paragraph (a)(4)(ii) before an amended or modified application is filed.

(ii) In circumstances where the employer submits an amended or modified application as required by the CO, and the CO approves the amended or modified application, the CO shall not deny the application based solely on the fact that it now does not meet the timeliness requirements for filing applications.

(iii) If the amended or modified application is not approved, the CO shall deny the application in accordance with the labor certification determination provisions set forth at § 655.109.

(6) *Amendments to Applications.* (i) Applications may be amended to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(ii) Applications may be amended to make minor changes in the period of employment, as stated in the application, including the job offer, only when a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO shall review the reason(s) for the request, determine whether each reason is justified, and take into account the effect(s) of a decision to approve on the adequacy of

the underlying test of the domestic labor market for the job opportunity. If a request for a change in the start date of the period of employment is made after workers have departed for the employer's place of work, the CO may only approve the change if the request is accompanied by a written assurance signed and dated by the employer that all such U.S. workers will be provided housing and subsistence, without cost to the U.S. workers, until work becomes available.

(iii) Other minor technical amendments to the application, including the job offer, may be requested if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under § 655.109.

(7) *Appeal procedures.* With respect to either a notice of deficiency issued pursuant to paragraph (a)(6) of this section or a notice of final determination issued pursuant to paragraph (a)(2) of this section, if the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge, the procedures set forth at § 655.115 shall be followed.

(b) [Reserved]

**§ 655.108 Offered Wage Rate.**

(a) *Highest wage.* To comply with its obligation under § 655.105(g), an employer must provide an offered wage rate that is the highest of the adverse effect wage rate, the prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage.

(b) *Wage rate request.* The employer shall request an offered wage rate from the NPC having jurisdiction over the proposed area of intended employment before commencing any recruitment under this subpart. If the job opportunity involves multiple work sites within the same area of intended employment over which more than one NPC has jurisdiction, the employer shall request an offered wage rate from the NPC having jurisdiction over the area where the work is scheduled to begin.

(c) *Validity of wage rate.* The employer must obtain an offered wage rate that is valid either on the date recruitment begins or the date of filing the *Application for Temporary Employment Certification* with the Department.

(d) *Wage offer.* The employer must offer and advertise in its positive recruitment, as outlined in § 655.103, for the position to all potential workers

at a wage at least equal to the wage rate obtained from the NPC.

(e) *Adverse effect wage rate.* The adverse effect wage rate (AEWR) shall be based on published wage data for the occupation, skill level, and geographical area from the BLS, Occupational Employment Statistics (OES) survey. The NPC shall obtain wage information on the AEWR using the Agricultural On-line Wage Library (AOWL) found on the Foreign Labor Certification Data Center Web site (<http://www.flcdatcenter.com/>). This wage shall not be less than the 2009 Federal minimum wage of \$7.25.

(f) *Wage determination.* The NPC must enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer. The employer must offer this wage (or higher) to both its U.S. and H-2A workers.

#### **§ 655.109 Labor certification determinations.**

(a) *COs.* The Administrator, OFLC, is the DOL National CO. The Administrator and the CO(s) in the NPC(s), by virtue of delegation from the Administrator, have the authority to certify or deny applications for temporary employment certification under the H-2A nonimmigrant classification. If the Administrator has directed that certain types of temporary labor certification applications or specific applications under the H-2A nonimmigrant classification be handled by the National OFLC, the Director(s) of the ETA NPC(s) shall refer such applications to the Administrator.

(b) *Determination.* No later than 30 calendar days before the date of need, as identified in the *Application for Temporary Employment Certification*, except as provided for under § 655.107(a)(7) of this part for amended or modified applications, or applications not otherwise meeting certification criteria by that date, the CO makes a determination either to grant or deny the *Application for Temporary Employment Certification*, and will grant the application if and only if:

(1) The employer has properly attested that it has met the requirements of this subpart.

(2) The nature of the employer's need is temporary or seasonal.

(3) The application was timely filed with the Department.

(4) The job opportunity does not contain duties, requirements or other conditions that preclude consideration of U.S. workers or that otherwise inhibit their effective recruitment for the temporary job opportunity. In making

this determination, the following requirements shall apply:

(i) The job opportunity is not vacant because the former occupant(s) is or are on strike or locked out in the course of a labor dispute involving a work stoppage;

(ii) The job is not at issue in a labor dispute involving a work stoppage;

(iii) The job opportunity's terms, conditions, and/or occupational environment are not contrary to Federal, State, or local law(s);

(iv) The employer has a location within the U.S. to which domestic workers can be referred and hired for employment;

(v) The employer is paying the highest of the adverse effect wage rate, the prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage for the job to be performed; and

(vi) The requirements of the job opportunity are not unduly restrictive and do not represent a combination of duties not normal to the occupation being requested for certification.

(5) The employment of the H-2A worker(s) will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

(c) *Notification.* The CO shall notify the employer in writing (either electronically or by mail) of the labor certification determination.

(d) *Approved certification.* If temporary labor certification is granted, the CO must send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney, with a copy to the SWA serving the area of intended employment. The Final Determination letter shall notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office and to continue to cooperate with the SWA by accepting all referrals of eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the H-2A worker(s) depart for the place of work, or three days prior to the first date the employer requires the services of the H-2A workers, whichever is later.

(e) *Denied certification.* If temporary labor certification is denied, the Final Determination letter will:

(1) State the reasons the application is not accepted for consideration, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing benefits, wages, and working conditions

of similarly employed U.S. workers in the occupation and/or any applicable special procedures.

(f) *Partial Certification.* The CO may, in his/her discretion, and to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise.

(g) *Payment of Processing Fees.* A determination by the CO to grant an *Application for Temporary Employment Certification* or grant amendments to a certified application pursuant to § 655.107(a)(6) shall include a bill for the required fees. Each employer (except joint employer associations) of H-2A workers under the *Application for Temporary Employment Certification* shall pay in a timely manner a non-refundable fee upon issuance of the certification granting the application (in whole or in part), as follows:

(1) *Amount.* The application fee for each employer receiving a temporary agricultural labor certification is \$200 plus \$100 for each H-2A worker certified under the *Application for Temporary Employment Certification*. In the case of a joint employer association receiving a temporary agricultural labor certification, each employer-member receiving a temporary agricultural labor certification shall pay an application fee of \$200 plus \$100 for each H-2A worker certified. Any amendments requested pursuant to § 655.107(a)(6) by the employer to a temporary agricultural labor certification, which are received and processed by the appropriate CO will be subject to an additional processing fee of \$100. In circumstances where the CO grants an amendment to increase the number of H-2A workers requested on the initial certified application, the employer shall be subject to a fee of \$100 for each additional H-2A worker certified on the amended temporary agricultural labor certification. The fees shall be paid by check or money order made payable to "United States DOL." In the case of H-2A employers that are members of a joint-employer association applying on their behalf, the aggregate fees for all employers of H-2A workers under the application must be paid by one check or money order.

(2) *Timeliness.* Fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely. Non-payment of fees shall be considered a substantial program violation.

**§ 655.110 Validity and scope of temporary labor certifications.**

(a) *Validity Period.* A temporary labor certification shall be valid for the duration of the job opportunity for which certification is being requested by the employer. Except as provided for under paragraph (c) of this section, the validity period shall be the beginning and ending dates of certified employment, as listed on the *Application for Temporary Employment Certification*. The beginning date of certified employment cannot be earlier than the date certification was granted by the CO. The certification expires on the last day of authorized employment.

(b) *Scope of Validity.* Except as provided for under paragraphs (c) and (d) of this section, a temporary labor certification is valid only for the number of H-2A workers, the area of intended employment, the specific occupation and duties, the beginning and ending dates of employment, and the employer(s) specified on the *Application for Temporary Employment Certification* and may not be transferred from one employer to another.

(c) *Scope of Validity—Associations.*

(1) *Certified Applications.* If an association is requesting temporary labor certification as a joint employer, the certified *Application for Temporary Employment Certification* shall be granted jointly to the association and to each of its employer members named on the application. Such workers may be transferred among its certified employer members to perform work for which the temporary labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary agricultural labor certifications to associations may be used for the certified job opportunities of any of its employer members named on the application. If an association is requesting temporary labor certification as a sole employer, the certified *Application for Temporary Employment Certification* shall be granted to the association only.

(2) *Ineligible employer-members.* Workers shall not be transferred or referred to an association's employer member, if that employer member has been debarred.

(d) *Extensions on Period of Employment.* (1) *Short-term extension.* An employer who seeks an extension of 2 weeks or less of the certified *Application for Temporary Employment Certification* shall apply for such extension to DHS. If DHS grants such an extension, the corresponding *Application for Temporary Employment*

*Certification* shall be deemed extended for such period as is approved by DHS.

(2) *Long-term extension.* For extensions beyond the period which may be granted by DHS pursuant to paragraph (d)(1) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the CO for an extension of the period of employment on the certified *Application for Temporary Employment Certification*, for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The CO shall grant or deny the request for extension of the period of employment on the *Application for Temporary Employment Certification* based on available information, and shall notify the employer of the decision on the request in writing. The CO shall not grant an extension where the total work contract period, including past temporary labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The CO shall not grant an extension where the *Application for Temporary Employment Certification* has already been extended by DHS pursuant to paragraph (d)(i) of this section.

**§ 655.111 Required departure.**

(a) *Limit to worker's stay.* As defined further in DHS regulations, a temporary labor certification shall limit the authorized period of stay for any H-2A worker whose admission is based upon it. 8 CFR § 214.2(h). A foreign worker may not remain beyond the validity period of any labor certification under which the H-2A worker is employed nor beyond separation from employment, whichever occurs first, absent an extension or change of such worker's status pursuant to DHS regulations.

(b) *Notice to worker.* Upon establishment of a program by DHS for registration of departure, an employer must notify any H-2A worker starting work at a job opportunity for which the employer has obtained labor certification that the H-2A worker, when departing the United States by land at the conclusion of employment as outlined in paragraph (a) of this section, must register such departure at the place and in the manner prescribed by DHS.

**§ 655.112 Audits and Referrals.**

(a) *Discretion.* The Department shall, in its discretion, conduct audits of temporary labor certification applications, regardless of whether the Department has issued a certification or denial of the application.

(b) *Audit letter.* In circumstances where an application is selected for audit, the CO shall issue an audit letter. The audit letter will:

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

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

(3) Advise that failure to comply with the audit process, including providing documentation within the specified time period, may result in a finding by the CO to

(i) Revoke the labor certification and/or

(ii) Debar the employer from future filings of H-2A temporary labor certification applications as outlined in § 655.118.

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

(d) *Audit violations.* If, as a result of the audit or otherwise, the CO determines the employer failed to produce required documentation, or determines a material misrepresentation was made with respect to the application, or if the CO determines it is appropriate for other reasons, the employer may be referred for revocation pursuant to § 655.117 and/or debarment pursuant to § 655.118. The CO may determine to provide the audit report and underlying documentation to DHS or another appropriate enforcement agency. With respect to any findings that an employer may have discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, the CO shall refer those matters to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

**§ 655.113 H-2A applications involving fraud or willful misrepresentation.**

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* application is discovered by the CO or if the CO and/or Administrator become aware the employer, or its attorney or agent (with

respect to an application) is the subject of a criminal indictment or information filed in a court, the Administrator shall refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) *Continued processing.* If a court finds an employer or agent not guilty of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the CO shall decide each pending temporary labor certification application on its merits related to that employer or agent.

(c) *Terminated processing.* If a court or the DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification*, the application is thereafter invalid, consideration of the application shall be terminated and the Administrator shall return the application to the employer or agent with the reasons therefore stated in writing.

**§ 655.114 Petition for higher meal charges.**

(a) *Filing petitions.* Until a new amount is set pursuant to this paragraph (a), the CO may permit an employer to charge workers up to \$9.52 for providing them with three meals per day, if the employer justifies the charge and submits to the CO the documentation required by paragraph (b) of this section. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal such denial. Such appeals shall be filed with the Chief Administrative Law Judge. Administrative law judges shall hear such appeals according to the procedures in 29 CFR part 18, except that the appeal shall not be considered as a complaint to which an answer is required. The decision of the administrative law judge shall be the final decision of the Secretary. Each year the maximum charge allowed by this paragraph (a) will be changed by the same percentage as the 12 month percent change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Administrator as a Notice in the **Federal Register**. However, an employer may not impose such a charge on a worker prior to the effective date contained in the CO's written confirmation of the amount to be charged.

(b) *Required documentation.* Documentation submitted shall include the cost of goods and services directly related to the preparation and serving of

meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be retained and available for inspection by the CO upon request for a period of one year.

**§ 655.115 Administrative review and de novo hearing before an administrative law judge.**

(a) *Administrative review.* (1) *Consideration.* Whenever an employer has requested an administrative review before an administrative law judge of a decision by the CO not to accept for consideration an *Application for Temporary Employment Certification*, to deny an *Application for Temporary Employment Certification*, or to revoke a certified *Application for Temporary Employment Certification* the CO shall send a certified copy of the ETA case file to the Chief administrative law judge by means normally assuring next-day delivery. The Chief administrative law judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by 20 CFR part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge shall not remand the case and shall not receive additional evidence.

(2) *Decision.* Within 5 business days after receipt of the ETA case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, CO, the Administrator, and DHS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further

review shall be given to the application or the determination by any Department official.

(b) *De novo hearing.* (1) *Request for hearing; conduct of hearing.* Whenever an employer has requested a de novo hearing before an administrative law judge of a decision by the CO not to accept for consideration an *Application for Temporary Employment Certification*, to deny an *Application for Temporary Employment Certification*, or to revoke a certified *Application for Temporary Employment Certification*, the CO shall send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by 20 CFR part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to conduct the de novo hearing. The procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

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

(ii) The administrative law judge shall ensure that, at the request of the employer, the hearing is scheduled to take place within five business days after the administrative law judge's receipt of the ETA case file; and

(iii) The administrative law judge's decision shall be rendered within 10 business days after the hearing.

(2) *Decision.* After a *de novo* hearing, the administrative law judge shall either affirm, reverse, or modify the CO's determination, and the administrative law judge's decision shall be provided immediately to the employer, CO, Administrator, and DHS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the application or the determination by any Department official.

**§ 655.116 Job Service Complaint System; enforcement of work contracts.**

(a) Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E, of this chapter. Complaints which involve worker contracts shall be referred by the SWA to the ESA for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process,

the ESA may report the results of its investigation to the Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, shall be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or an SWA. Likewise, if OSC becomes aware of a violation of these regulations, it shall provide such information to the appropriate SWA and the CO.

**§ 655.117 Revocation of approved labor certifications.**

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

(1) The CO finds that issuance of the temporary agricultural labor certification was not justified based on criteria set forth under the INA and enumerated at 8 CFR 214.2(h)(5);

(2) The CO finds that the employer violated the terms and conditions of the approved temporary agricultural labor certification; or

(3) Upon recommendation of the ESA WHD of the Department.

(b) *DOL procedures for revocation.* (1) The CO shall send to the employer a *Notice of Intent to Revoke* an approved temporary agricultural labor certification, which contains a detailed statement of the grounds for the proposed revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The CO must consider all relevant evidence presented in deciding whether to revoke the temporary agricultural labor certification.

(2) If rebuttal evidence is not timely filed by the employer, the *Notice of Intent to Revoke* shall become the final decision of the Secretary and take effect immediately at the end of the 14-day window.

(3) If, notwithstanding the employer's timely filed rebuttal evidence, and if the CO determines the temporary agricultural labor certification should be revoked, the CO shall promptly notify the employer of this final determination and of the employer's right to appeal. The revocation takes effect immediately

upon issuance of this notice and remains in place pending the outcome of any subsequent appeal proceedings. The employer may file an administrative appeal under § 655.115 within 10 calendar days after the date of revocation.

(4) The CO will inform the employer of the CO's final determination on the revocation within 14 calendar days of receiving timely rebuttal evidence.

(5) If the temporary agricultural labor certification is revoked, the CO will also send a copy of the notification to DHS and DOS.

**§ 655.118 Debarment.**

(a) No later than 2 years after an employer has substantially violated a material term or condition of its temporary agricultural labor certification, the Administrator may on that basis make a determination denying the employer and any successor in interest to the debarred employer future labor certifications under this subpart for a period of up to 3 years from the date of the determination.

(b) For the purposes of this section, a substantial violation includes, but is not limited to:

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

(i) Are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. or H-2A workforce or of a substantial number of U.S. workers similarly employed in the area of intended employment;

(ii) Reflect a significant failure to offer employment to all qualified domestic workers who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons;

(iii) Reflect a willful failure to comply with the employer's obligations to recruit domestic workers as set forth in this subpart;

(iv) Reflect a failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to § 218 of the INA (8 U.S.C. 1188), this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations);

(v) Reflect action(s) impeding an investigation of an employer pursuant to § 218 of the INA (8 U.S.C. 1188), this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(vi) Reflect the employment of an H-2A worker outside the area of intended

employment, or in an activity not listed on the job order, or after the expiration of the job order and any approved extension;

(2) The employer's failure to pay the necessary fee in a timely manner; or

(3) Fraud involving the *Application for Temporary Employment Certification* or the employer making a material misrepresentation of fact during the application process.

(c) The *Notice of Debarment* shall be in writing; shall state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and shall identify administrative appeal rights under § 655.115 and a timeframe under which such rights must be exercised. The debarment shall take effect on the start date identified in the *Notice of Debarment*, unless an administrative appeal request for review is properly filed. The timely filing of an administrative appeal stays the debarment pending the outcome of those appeal proceedings.

(d) *Debarment involving members of associations.* If, after consultation with the Administrator, the CO determines a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the determination to deny future labor certifications under this subpart for a period of up to three years from the date of the determination shall apply only to that member of the association unless the Administrator determines that the association or other association members participated in, had knowledge of, or had reason to know of the violation, in which case the debarment shall be invoked against the complicit association or other association members as well.

(e) *Debarment involving associations acting as joint employers.* If, after consultation with the Administrator, the CO determines a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the determination to deny future labor certifications under this subpart for a period of up to three years from the date of the determination shall apply only to the association, and shall not be applied to any individual producer member of the association unless the Administrator determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the debarment shall be invoked against any complicit association members as well. Associations debarred from the H-2A

temporary labor certification program will not be permitted to continue to file as joint employers with their members.

(f) *Debarment involving associations acting as sole employers.* If the Administrator determines a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, the determination to deny future labor certifications under this subpart for a period of up to 3 years from the date of the determination shall apply only to the association and any successor in interest to the debarred association.

**Subpart C—[Removed]**

5. Subpart C is removed and reserved.

**Title 29—Labor**

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

6. The authority citation for part 501 continues to read as follows:

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

**§§ 501.0, 501.1, 501.3, 501.4, 501.5, 501.10, and 501.15 [Amended]**

7. In part 501 all references to “Section 216” are revised to read “Section 218” in the following places:

- a. Section 501.0;
- b. Section 501.1(a), (b), (c)(1), and (c)(2);
- c. Section 501.3(a), (b), (c), (d), and (e);
- d. Section 501.4;
- e. Section 501.5(a) and (d);
- f. Section 501.10(a) and (s);
- g. Section 501.15.

8. Section 501.0 is amended by revising the second sentence to read as follows:

**§ 501.0 Introduction.**

\* \* \* These regulations are also applicable to the employment of U.S. workers newly hired by employers of H–2A workers in the occupations during the period of time set forth in the labor certification approved by ETA as a condition for granting H–2A certification, including any extension thereof. \* \* \*

9. Section 501.1 is amended by revising paragraphs (b) and (c) to read as follows:

**§ 501.1 Purpose and scope.**

\* \* \* \* \*

(b) *Role of the ETA.* The issuance and denial of labor certification under

section 218 of the INA has been delegated by the Secretary of Labor to the Employment and Training Administration (ETA). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA’s jurisdiction are issues such as whether U.S. workers are available, whether positive recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing adverse effect wage rates, whether workers’ compensation insurance has been provided, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in Title 20 CFR, part 655.

(c) *Role of ESA, Wage and Hour Division.* (1) The Secretary of Labor may take actions that assure compliance with the terms and conditions of employment under the H–2A, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. (see 8 U.S.C. 1188(g)(2).)

(2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of section 218 of the INA have been delegated by the Secretary of Labor to the ESA (ESA), Wage and Hour Division. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and U.S. workers hired in corresponding employment by H–2A employers are enforced by ESA. Included within the enforcement responsibility of ESA, Wage and Hour Division are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The Wage and Hour Division has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s), debar from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an FLC, from the FLC directly or from the insurer who issued the surety bond to the FLC as required by 20 CFR part 655, subpart B).

\* \* \* \* \*

10. Section 501.2 is revised to read as follows:

**§ 501.2 Coordination of intake between DOL agencies.**

Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the employee will be immediately forwarded to the appropriate Wage and Hour Division office for appropriate action under these regulations.

11. Section 501.3 is amended by redesignating the introductory text as paragraph (a) introductory text, existing paragraphs (a) through (e) as paragraphs (a)(1) through (5), revising newly designated paragraph (a)(5), and designating the undesignated paragraph at the end of the section as paragraph (b) and revising it.

The revisions read as follows:

**§ 501.3 Discrimination prohibited.**

\* \* \* \* \*

(a) \* \* \*

(5) Consulted with an employee of a legal assistance program or an attorney on matters related to section 218 of the INA, or to this subpart or any other Department regulation promulgated pursuant to section 218 of the INA.

(b) Allegations of discrimination in employment against any person will be investigated by the Wage and Hour Division. Where the Wage and Hour Division has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The Wage and Hour Division may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may initiate action to debar any such violator from future labor certification. Complaints alleging discrimination against U.S. workers and immigrants based on citizenship or immigration status will be forwarded by the Wage and Hour Division to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

12. Section 501.4 is revised to read as follows:

**§ 501.4 Waiver of rights prohibited.**

No person shall seek to have an H–2A worker, or other U.S. worker hired in corresponding employment by an H–2A employer, waive rights conferred under Section 218 of the INA or under these regulations.

13. Section 501.5 is amended by revising paragraphs (b) and (d) to read as follows:

**§ 501.5 Investigation authority of Secretary.**

\* \* \* \* \*

(b) *Failure to cooperate with an investigation.* Where any employer using the services of an H-2A worker does not cooperate with an investigation concerning the employment of H-2A workers or U.S. workers hired in corresponding employment, the Wage and Hour Division shall report such occurrence to ETA and may recommend that ETA revoke the existing certification, and the Wage and Hour Division may debar the employer from future certification for up to three years. In addition, the Wage and Hour Division may take such action as may be appropriate, including the seeking of an injunction and/or assessing civil money penalties, against any person who has failed to permit the Wage and Hour Division to make an investigation.

\* \* \* \* \*

(d) *Report of Violations.* Any person may report a violation of the work contract obligations of section 218 of the INA or these regulations to the Secretary by advising any local office of the State Workforce Agency, the ETA, the U.S. DOL's Wage and Hour Division, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of the U.S. DOL, Wage and Hour Division for the area in which the reported violation is alleged to have occurred.

14. Section 501.6 is revised to read as follows:

**§ 501.6 Prohibition on interference with DOL officials.**

No person shall interfere with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The Wage and Hour Division will take such action as it deems appropriate, including seeking an injunction to bar any such interference with an investigation and/or assessing a civil money penalty therefor. In addition, the Wage and Hour Division will report the matter to ETA, and the Wage and Hour Division may debar the employer from future certification and/or may make a recommendation that the person's existing labor certification be revoked. (Federal statutes that prohibit persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.)

15. Add new section 501.8 to read as follows:

**§ 501.8 Surety bond.**

(a) Farm Labor Contractors (FLCs) shall obtain a surety bond to assure compliance with the provisions of this

part and 20 CFR part 655 Subpart B for each labor certification being sought. The FLC shall attest on the application for labor certification that such a bond meeting all the requirements of this section has been obtained and shall provide on the labor certification application form information that fully identifies the surety, including the name, address and phone number of the surety, and which identifies the bond by number or other identifying designation.

(b) The bond shall be payable to the Administrator, Wage and Hour Division, U.S. DOL. It shall obligate the surety to pay any sums owed to the Administrator, for wages and benefits owed to H-2A and U.S. workers, based on a final decision finding a violation or violations of this part or 20 CFR part 655 subpart B for the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond shall be written to cover liability incurred during the term of the period listed in the application for labor certification made by the FLC, and shall be amended to cover any extensions of the labor certification requested by the FLC. Surety bonds may not be canceled or terminated unless thirty days' notice is provided by the surety to the Administrator.

(c) The bond shall be in the amount of \$10,000 for a labor certification for which an FLC will employ fewer than 50 employees and \$20,000 for a labor certification for which an FLC will employ 50 or more employees. The amount of the bond may be increased by the Administrator after notice and an opportunity for hearing when it is shown that the amount of the bond is insufficient to meet potential liabilities.

16. Section 501.10 is revised to read as follows:

**§ 501.10 Definitions.**

(a) *Act* and *INA* mean the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), with reference particularly to section 218.

(b) *Administrative Law Judge (ALJ)* means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

(c) *Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under this part.

(d) *Work contract* means all the material terms and conditions of employment relating to wages, hours,

working conditions, and other benefits, including those terms and conditions attested to by the H-2A employer and required by the applicable regulations in subpart B of 20 CFR part 655, Labor Certification for Temporary Agricultural Employment of H-2A Aliens in the United States (H-2A Workers), and those contained in the Application for Temporary Employment Certification and job offer under that subpart, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, entered into between the employer and the worker, the work contract at a minimum shall be the terms of the job order included in the application for temporary labor certification, and shall be enforced in accordance with these regulations.

(e) *Adverse effect wage rate (AEWR)* means the minimum wage rate that the ETA Office of Foreign Labor Certification Administrator has determined must be offered and paid to every H-2A worker employed in a particular occupation and/or area to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

(f) *Agent* means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, that

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

(2) Is not itself an employer, or a joint employer, as defined in this section.

(g) *Agricultural association* means any non-profit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable state law, that recruits, solicits, hires, employs, furnishes, or transports any H-2A worker.

Agricultural associations may act as agents of an employer for purposes of filing an H-2A temporary labor certification application.

(h) *Agricultural employer* means any person who owns or operates a farm or ranch, or otherwise engages in agriculture as defined in this part, and who either recruits, solicits, hires, employs, furnishes, or transports any H-2A worker. Agricultural employers may file H-2A applications either directly or through their agents or other legal representatives.

(i) *Application for Temporary Employment Certification* means the form submitted by an employer to secure a temporary agricultural labor certification determination from the DOL.

(j) *Department of Homeland Security (DHS) through the United States Citizenship and Immigration Services (USCIS)* means the Federal agency making the determination under the INA on whether to grant visa petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the United States.

(k) *DOL* means the United States Department of Labor.

(l) *Eligible worker* means, with respect to employment, an individual who is not an unauthorized alien (as defined in Section 274A(h)(3) of the Immigration and Nationality Act, 8 U.S.C. 1324a(h)(3), or in this part) with respect to that employment.

(m) *Employ* means to suffer or permit to work.

(n) *Employee* means “employee” as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party’s right to control the manner and means by which the work is accomplished; the skill required; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party’s discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

(o) *Employer* means a person, firm, corporation or other association or organization:

(1) Which has a location within the U.S. to which U.S. workers may be referred for employment, or qualifies as a farm labor contractor (FLC) under this part;

(2) Which has an employer relationship with respect to employees under this part as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(3) Which possesses a valid Federal Employer Identification Number (FEIN).

(4) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers shall be considered to jointly employ that employee.

(5) FLCs, for purposes of this part, shall be considered to be employers.

(p) *Employment Service (ES)* refers to the system of Federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the State Workforce Agencies (SWAs) and the Office of Foreign Labor

Certification (OFLC), including the National Processing Centers (NPCs).

(q) *Employment Standards Administration (ESA)* means the agency within the Department of Labor (DOL) that includes the Wage and Hour Division, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

(r) *Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) that includes the Office of Foreign Labor Certification (OFLC).

(s) *Federal holiday* means a legal public holiday as defined at 5 U.S.C. 6103.

(t) *Farm labor contracting activity* means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker as those terms are used in 29 U.S.C. 1801 et seq. and 29 CFR part 500 with the intent to contract those workers to fixed-site employers.

(u) *Farm labor contractor* means any person—other than an agricultural association, or an employee of an agricultural association—who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(v) *H-2A worker* means any nonimmigrant admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

(w) *Job offer* means the offer made by an employer or potential employer of H-2A workers to eligible workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

(x) *Job opportunity* means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

(y) *Office of Foreign Labor Certification (OFLC)* means the organizational component of the Employment and Training Administration that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the Immigration and Nationality Act, as amended, concerning the admission of foreign workers to the United States in order to work under section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, as amended.

(z) *Positive recruitment* means the active participation of an employer or its authorized hiring agent in recruiting

and interviewing qualified and eligible individuals in the area where the employer’s establishment is located and any other area designated by the Secretary as a multistate area of traditional or expected labor supply with respect to the area where the employer’s establishment is located in an effort to fill specific job openings with U.S. workers.

(aa) *Prevailing* means with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H-2A and non H-2A employers) for the occupation in the area of intended employment.

(bb) *Representative* means the official employed by or authorized to act on behalf of the employer with respect to activities entered into for and/or attestations made with respect to the *Application for Temporary Employment Certification*. In the case of an attorney who acts as an employer’s representative and who interviews and/or considers U.S. workers for the job offered to the foreign worker(s), such individual must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

(cc) *Secretary* means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary’s designee.

(dd) *State Workforce Agency (SWA)*, formerly known as the State Employment Security Agency (SESA), means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the state’s one-stop delivery system in accordance with the Wagner-Peyser Act. 29 U.S.C. 49, et seq. Separately, SWAs receive ETA grants, administered by the Office of Foreign Labor Certification, to assist them in performing certain activities related to foreign labor certification—including the conducting housing inspections.

(ee) *Temporary agricultural labor certification* means the certification made by the Secretary of Labor with respect to an employer seeking to file with DHS a visa petition to employ a foreign national as an H-2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that

(1) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the

agricultural labor or services involved in the petition, and

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1188).

(ff) *Temporary agricultural labor certification determination* means the written determination made by the OFLC Administrator to approve or deny, in whole or in part, an application for a temporary agricultural labor certification to import a foreign worker(s).

(gg) *United States, when used in a geographic sense*, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam and the Virgin Islands of the United States.

(hh) *United States worker* means any worker who is:

(1) A citizen or national of the United States, or;

(2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under § 207 of the INA, is granted asylum under § 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the United States.

(ii) *Wages* means all forms of cash remuneration to a worker by an employer in payment for personal services.

(jj) *Definition of agricultural labor or services of a temporary or seasonal nature*. For the purposes of this part, “agricultural labor or services of a temporary or seasonal nature” means the following:

(1) “*Agricultural labor or services*.” Pursuant to § 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), “agricultural labor or services” is defined for the purposes of this part as:

(i) “Agricultural labor” as defined and applied in § 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g));

(ii) “Agriculture” as defined and applied in § 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm; or

(vi) Other work typically performed on a farm that is incidental to the agricultural labor or services for which the worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (jj)(1)(i) and (ii) of this section shall be “agricultural labor or services”, notwithstanding the exclusion of that occupation from the other statutory definition.

(i) “*Agricultural labor*” for purposes of paragraph (jj)(1)(i) of this section means all services performed:

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

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

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

(D)(1) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(2) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (jj)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (jj)(2)(i)(D)(2), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time

during the calendar quarter in which such service is performed;

(3) The provisions of paragraphs (jj)(2)(i)(A) and (B) of this section shall not be deemed to be applicable with respect to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

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

(E) As used in this subsection, the term “farm” includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. (See Section 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g).)

(ii) “*Agriculture*.” For purposes of paragraph (jj)(1)(ii) of this section agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (See Section 203(f) of title 29, U.S.C. (§ 3(f) of the FLSA of 1938, as amended).)

(iii) “*Agricultural commodity*”. For purposes of paragraph (jj)(1)(ii) of this section, “agricultural commodity” includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. “Gum spirits of turpentine” means spirits of turpentine made from gum (oleoresin) from a living tree and “gum rosin” means rosin remaining after the distillation of gum spirits of turpentine. (See Section 1141j(g) of title 12, U.S.C. (§ 15(g) and 7 U.S.C. 92.)

(3) “*Of a temporary or seasonal nature*”

(i) “*On a seasonal or other temporary basis*”. For the purposes of this part, “of

a temporary or seasonal nature” means “on a seasonal or other temporary basis”, as defined in the ESA’s WHD’s regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* The definition of “on a seasonal or other temporary basis” found in MSPA, summarized as follows, is:

(A) Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(B) A worker is employed on “other temporary basis” where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) “On a seasonal or other temporary basis” does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(D) “On a seasonal or other temporary basis” does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) *“Temporary”.* For the purposes of this part, the definition of “temporary” in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this part where the employer needs a worker for a position for a limited period of time, which shall be for less than 1 year, unless the original temporary agricultural labor certification is extended based on unforeseen circumstances, pursuant to 20 CFR 655.110 subpart B.

16. Section 501.15 is amended by revising the first and last sentences of the section to read as follows:

**§ 501.15 Enforcement.**

The investigation, inspections and law enforcement functions to carry out the provisions of section 218 of the INA,

as provided in these regulations for enforcement by the Wage and Hour Division, pertain to the employment of any H–2A worker and any other U.S. worker hired in corresponding employment by an H–2A employer. \* \* \* The work contract enforced includes the employment benefits which must be stated in the job offer, as prescribed in 20 CFR part 655, subpart B.

17. Section 501.16 is amended by revising the section heading and paragraphs (a) and (b) to read as follows:

**§ 501.16 Sanctions and Remedies—General.**

\* \* \* \* \*

(a) Impose denial of labor certification against any person for a violation of the H–2A obligations of the INA or the regulations. ETA shall make all determinations regarding the issuance or denial of a labor certification in connection with the attestation process. The Wage and Hour Division shall make all determinations regarding the enforcement functions listed in paragraphs (b) through (d) of this section.

(b) Institute appropriate administrative proceedings, including the recovery of unpaid wages (whether directly from the employer, or in the case of an FLC by claim against any surety who issued a bond to the farm labor contractor), the enforcement of any other contractual obligations, the assessment of a civil money penalty or denial of future certification(s) for up to three years against any person for a violation of the H–2A work contract obligations of the Act or these regulations. In the event of a denial of future certification, notice is provided to OFLC.

\* \* \* \* \*

18. Section 501.19 is amended by revising paragraph (c) to read as follows:

**§ 501.19 Civil money penalty assessment.**

\* \* \* \* \*

(c) A civil money penalty for violation of the work contract will not exceed \$1,000 for each violation committed against each worker, with the following exceptions:

(1) For a willful failure to meet a condition of the work contract, or for discrimination, the civil money penalty shall not exceed \$5,000 for each worker affected by the violation;

(2) For a violation of a housing or transportation safety and health provision of the work contract that causes the death or serious injury of any worker, the civil money penalty shall not exceed \$50,000 per worker, unless the violation is a repeated or willful

violation, in which case the penalty shall not exceed \$100,000 per worker.

(3) For purposes of paragraph (c)(3) of this section, the term “serious injury” means:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(d) A civil money penalty for interference with a Wage and Hour Division investigation shall not exceed \$5,000 per investigation;

(e) For a willful layoff or displacement of any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 75 days before the date of need, except that such layoff shall be permitted where the employer also attests that it offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons, the civil penalty shall not exceed \$15,000 per violation per worker.

19. Section 501.20 is revised to read as follows:

**§ 501.20 Debarment.**

(a) As a result of the Wage and Hour Division’s authority to conduct investigations, inspections, and law enforcement functions to carry out the provisions of section 218 of the INA, if the Wage and Hour Division determines that an employer has substantially violated a material term or condition of a work contract, the Wage and Hour Division Administrator may debar the employer from future labor certifications for a period of up to three years from the date of the determination.

(b) For the purposes of this section, a substantial violation includes but is not limited to:

(1) Violations that through investigation by the Wage and Hour Division were determined to be significantly injurious to the wages, benefits, or working conditions of 10 percent or more of the employer’s workforce of H–2A and U.S. workers hired in corresponding employment;

(2) Reflect a failure to comply with one or more penalties imposed by the Employment Standards Administration Wage and Hour Division for violation(s) of contractual obligations, or with one or more decisions or orders of the Secretary or a court pursuant to § 218 of the INA (8 U.S.C. 1188), 20 CFR part 655, subpart B, or 29 CFR part 501; or

(3) Employment of an H-2A worker outside the area of intended employment, or in an activity not listed in the job order, or after the expiration of the job order and any approved extension.

(c) The Notice of Debarment shall be in writing, shall state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and shall identify appeal opportunities under 29 CFR part 501.33. The debarment shall take effect on the start date identified in the Notice of Debarment, unless a timely request for review is filed. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal proceedings.

(d) *Debarment involving members of associations.* If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the determination to debar the employer from future labor certifications for a period of up to three years from the date of the determination shall apply only to that member of the association unless the Wage and Hour Division Administrator determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the debarment shall be invoked against the complicit association or other association members as well.

(e) *Debarment involving associations acting as joint employers.* If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the determination to debar the association from future labor certifications for a period of up to three years from the date of the determination shall apply only to the association, and shall not be applied to any individual producer member of the association unless the Wage and Hour Division Administrator determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the debarment

shall be invoked against the complicit association member as well.

(f) *Debarment involving associations acting as sole employers.* If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, the determination to deny future labor certifications under this part for a period of up to three years from the date of the determination shall apply only to the association and any successor in interest to the debarred association.

20. Section 501.21 is revised to read as follows:

**§ 501.21 Referral to ETA of interference with or refusal to permit investigation.**

Sections 501.5 through 501.7 of this part describe the investigation authority conferred by the Secretary upon the Wage and Hour Division for the purpose of enforcing the contractual obligations relating to wages, benefits, and working conditions of employers of H-2A workers and U.S. workers hired in corresponding employment. The following sections describe the actions which may be taken by the Wage and Hour Division when an employer fails to cooperate with an investigation concerning the employment of H-2A workers or U.S. workers hired in corresponding employment. The Wage and Hour Division shall report such occurrence to ETA and may recommend revocation of an existing labor certification. No person shall interfere with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.5, 501.6 and 501.19 of this part, a civil money penalty may be assessed for each failure to permit an investigation or interference therewith, and other appropriate relief may be sought. In addition, the Wage and Hour Division shall report each such occurrence to ETA, and the Wage and Hour Division may debar the employer from future certification and recommend to ETA revocation of existing certification. The taking of any one action shall not bar the taking of any additional action.

21. Section 501.30 is revised to read as follows:

**§ 501.30 Applicability of procedures and rules.**

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to impose an assessment of civil money penalties or debarment, and which may be applied

to the enforcement of contractual obligations, including the collection of unpaid wages due as a result of any violation of the H-2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties or debarment, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

22. Section 501.31 is revised to read as follows:

**§ 501.31 Written notice of determination required.**

Whenever the Administrator determines to assess a civil money penalty, to debar, or to proceed administratively to enforce contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

23. Section 501.32 is amended by revising paragraph (a) to read as follows:

**§ 501.32 Contents of notice.**

\* \* \* \* \*

(a) Set forth the determination of the Administrator including the amount of any unpaid wages due or contractual obligations required, the amount of any civil money penalty assessment, whether to debar and the length of the debarment, and the reason or reasons therefor.

\* \* \* \* \*

24. Section 501.33 is amended by revising paragraph (a) and adding (d) to read as follows:

**§ 501.33 Request for hearing.**

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in § 501.32.

\* \* \* \* \*

(d) The determination shall take effect on the start date identified in the determination, unless an administrative appeal request for review is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

25. Section 501.42 is amended by revising paragraph (a) to read as follows:

**§ 501.42 Procedures for initiating and undertaking review.**

(a) A respondent, the Administrator, or any other party wishing review,

including judicial review, of the decision of an administrative law judge shall, within 30 days of the decision of the administrative law judge, petition the Administrative Review Board (ARB) to review the decision. Copies of the petition shall be served on all parties and on the administrative law judge. If the ARB does not issue a notice accepting a petition for review within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the administrative law judge shall be deemed the final agency action. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the ARB issues an order affirming the decision, or declining review.

\* \* \* \* \*

#### **§§ 501.22, 501.41 through 501.45** **[Amended]**

26. In § 501.22 and §§ 501.41 through 501.45 all references to “Secretary” are revised to read “Administrative Review Board”.

#### **PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT**

27. The authority citation for part 780 continues to read as follows:

**Authority:** Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

28. Section 780.115 is revised to read as follows:

##### **§ 780.115 Forest products.**

Trees grown in forests and the lumber derived therefrom are not “agricultural or horticultural commodities,” for the purpose of the FLSA (See § 780.205 regarding production of Christmas trees.) It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.160 through 780.164 discussing the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute “agriculture.” For a discussion of the exemption in section 13(b)(28) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter

29. Section 780.201 is revised to read as follows:

##### **§ 780.201 Meaning of “forestry or lumbering operations.”**

The term “forestry or lumbering operations” refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild Christmas trees is included. (See the related discussion in §§ 780.205 through 780.209 and in part 788 of this chapter which considers the section 13(b)(28) exemption for forestry or logging operations in which not more than eight employees are employed.) “Wood working” as such is not included in “forestry” or “lumbering” operations. The manufacture of charcoal under modern methods is neither a “forestry” nor “lumbering” operation and cannot be regarded as “agriculture.”

30. Section 780.205 is revised to read as follows:

##### **§ 780.205 Nursery activities generally and Christmas tree production.**

(a) The employees of a nursery who are engaged in the following activities are employed in “agriculture”:

- (1) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees, and shrubs, vines, and flowers;
- (2) Handling such plants from propagating frames to the field;
- (3) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

(b) Trees produced through the application of extensive agricultural or horticulture techniques to be harvested and sold for seasonal ornamental use as Christmas trees are considered to be agricultural or horticultural commodities. Employees engaged in the application of agricultural and horticultural techniques to produce Christmas trees as ornamental horticultural commodities such as the following are employed in “agriculture”:

- (1) Planting seedlings in a nursery; on-going treatment with fertilizer, herbicides, and pesticides as necessary;
- (2) After approximately three years, re-planting in lineout beds;
- (3) After two more seasons, lifting and re-planting the small trees in cultivated soil with continued treatment with fertilizers, herbicides, and pesticides as

indicated by testing to see if such applications are necessary;

- (4) Pruning or shearing yearly;
- (5) Harvesting of the tree for seasonal ornamental use, typically within seven to ten years of planting.

(c) Trees to be used as Christmas trees which are gathered in the wild such as from forests or uncultivated land and not produced through the application of agricultural or horticultural techniques are not agricultural or horticultural commodities for purposes of section 3(f). (See *USDOL v. North Carolina Growers Association, Inc., et al.*, 377 F.3d 345.)

31. Section 780.208 is revised to read as follows:

##### **§ 780.208 Forestry activities.**

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. For such operations to fall within section 3(f), they must qualify under the second part of the definition dealing with incidental practices. (See § 780.201.)

#### **PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED**

32. The authority citation for part 788 continues to read as follows:

**Authority:** Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

33. Section 788.10 is revised to read as follows:

##### **§ 788.10 “Preparing \* \* \* other forestry products.”**

As used in the exemption, “other forestry products” mean plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns, roots, stems, leaves, Spanish moss, wild fruit, and brush. Christmas trees are only included where they are gathered in the wild from forests or from uncultivated land and not produced through the application of extensive agricultural or horticultural techniques. (See 29 CFR 780.205 for further discussion.) Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations that change the natural physical or chemical condition of the products or that amount to extracting (as distinguished from gathering) such as shelling nuts, or that mash berries to obtain juices.

Signed in Washington, DC, this 7th day of  
February, 2008.

**Douglas F. Small,**

*Deputy Assistant Secretary, Employment and  
Training Administration.*

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[FR Doc. E8-2525 Filed 2-12-08; 8:45 am]

**BILLING CODE 4510-FP-P**