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Temporary Employment of H–2A Aliens in the United States; Final Rule; Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States: 2009 Adverse Effect Wage Rates, Allowable Charges for Agricultural and Logging Workers' Meals, and Maximum Travel Subsistence Reimbursement; Notice

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 Employment of H–2A Aliens in the United States

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

ACTION: Final rule; suspension of rule.

SUMMARY: The Department of Labor (DOL or the Department) is suspending the H–2A Final Rule published on December 18, 2008 and in effect as of January 17, 2009. That Final Rule amended the regulations governing the certification for temporary employment of nonimmigrant workers in agricultural occupations on a temporary or seasonal basis, and the enforcement of contractual obligations applicable to employers of such nonimmigrant workers. To ensure continued functioning of the H–2A program, the Department is republishing and reinstating the regulations in place on January 16, 2009 for a period of 9 months, after which the Department will either have engaged in further rulemaking or lift the suspension.

DATES: Effective June 29, 2009.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR part 655, contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, Employment and Training Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339. For further information regarding 29 CFR parts 501, 780 and 788, contact James Kessler, Branch Chief, Farm Labor Enforcement, 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. Background and Overview

The H–2A 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) (8 U.S.C. 1101(a)(15)(H)(ii)(a)) 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. Section 214(c)(1) of the INA (8 U.S.C. 1184(c)(1)) mandates that the Secretary of the Department of Homeland Security (DHS) consult with the Secretary of the Department of Labor (the Secretary) with respect to the adjudication of H–2A petitions, and, by cross-referencing Section 218 of the INA (8 U.S.C. 1188), with respect to determining the availability of U.S. workers and the effect on wages and working conditions. Section 218 also provides further details of the H–2A application process and the requirements to be met by the agricultural employer.

The Department's regulations at 20 CFR part 655, subpart B—''Labor Certification Process for Temporary Agricultural Employment Occupations in the United States (H–2A Workers),'' govern the H–2A labor certification process. The Department's regulations at 29 CFR part 501 implement its enforcement responsibilities under the H–2A program. The Department's regulations on Fair Labor Standards Act (FLSA) exemptions applicable to agriculture, processing of agricultural commodities, and related subjects under the FLSA at 29 CFR part 780, and the Department's regulations on FLSA exemptions applicable to forestry and logging operations at 29 CFR part 788, set forth the Department's interpretation of the FLSA provisions relating to agriculture, forestry, and logging.

On December 18, 2008, the Department published a Final Rule revising title 20 of the Code of Federal Regulations (20 CFR) part 655 and title 29 of the Code of Federal Regulations (29 CFR) parts 501, 780, and 788 (the December 2008 Rule or Final Rule). See 73 FR 77110, Dec. 18, 2008. The December 2008 Rule replaced the previous versions of 20 CFR part 655 (2008) and 29 CFR part 501 (2008) that, for the most part, were first published at 52 FR 20507, Jun. 1, 1987. With respect to the provisions under 29 CFR parts 780 and 788 that were amended by the December 2008 Rule, the previous versions of 29 CFR 780.115, 780.201, 780.205, and 780.208 were published at 37 FR 12084, Jun. 17, 1972, and the previous version of 29 CFR 788.10 was published at 34 FR 15784, Oct. 14, 1969.

Following the issuance of the December 2008 Rule, United Farm Workers and others filed a lawsuit in the U.S. District Court for the District of Columbia on January 12, 2009 challenging the December 2008 Rule. *United Farm Workers, et al.* v. *Chao, et al.,* Civil No. 09–00062 RMU (D.D.C.). The plaintiffs asserted that in promulgating the December 2008 Rule, the Department violated section 218 of the Immigration and Nationality Act as well as the Administrative Procedure Act. The plaintiffs requested a temporary restraining order and preliminary injunction, along with a permanent injunction that would prohibit DOL from implementing the December 2008 Rule. On January 15, 2009, Judge Ricardo M. Urbina denied the plaintiffs' request for a temporary restraining order and preliminary injunction on the basis that the plaintiffs failed to show ''likely, imminent and irreparable harm;'' the court did not address the merits of the case or whether the plaintiffs demonstrated the substantial likelihood of success on the merits. Accordingly, the December 2008 Rule went into effect as scheduled on January 17, 2009.

As the Department began implementing the December 2008 Rule, it immediately encountered a number of operational challenges which continue to prevent the full, effective and efficient implementation of the December 2008 regulation. The Department also has realized that the implementation of the December 2008 Rule without further consideration of the relevant legal and economic concerns that have arisen since its publication was proving to be disruptive and confusing not only to the Department's administration of the H–2A program but also to State Workforce Agencies (SWAs), agricultural employers, and domestic and foreign workers, especially in light of the severe economic conditions facing the country. Furthermore, the development of the December 2008 Rule was based in part on the policy positions of the prior Administration with which the current Administration may differ and wish to reconsider, especially in light of changed economic conditions. This is particularly true with respect to the changes to wages paid to H–2A workers wrought by the shift of the Adverse

Effect Wage Rate (AEWR) from the wage rates based on data compiled by the U.S. Department of Agriculture (USDA) to those calculated on data from the Bureau of Labor Statistics in its Occupational Employment Statistical Survey (OES). This reconsideration may result in new rulemaking to seek additional comment from affected users and other interested parties. In light of the potential for new rulemaking, the Department believes it would not be an efficient use of limited agency resources, appropriated from taxpayer funds, to continue to attempt to operationalize the December 2008 Rule, and that it would be disruptive and confusing for program users and the Department to engage in the steps necessary to make the current rule fully operational.

For these reasons, on March 17, 2009 the Department published a Notice of Proposed Suspension of Rule (the Notice), which proposed to suspend the December 2008 Rule for 9 months and reinstate on an interim basis the prior H–2A regulation in effect on January 16, 2009 (the Prior Rule). 74 F.R. 11408 (March 17, 2009). The suspension of the December 2008 Rule and temporary reinstatement of the Prior Rule will allow the Department to review the December 2008 Rule to ensure that it effectively carries out the statutory objectives and requirements of the program in a manner that minimizes disruption to the Department, SWAs, employers, and workers by temporarily reinstating prior regulations which had been in effect for over 20 years and with which the agricultural community already is familiar.

II. Comments on the Proposal and the Department's Responses and Decision

The Department received over 800 comments in response to the publication of the Notice of Proposed Suspension of Rule (the Notice). The majority of the comments were based on form letters raising similar issues and concerns. Commenters included individual farmers and associations of farmers, farm bureaus, law firms, farmworker advocates, State agencies (including SWAs), Members of Congress, and individual members of the public. The Department has reviewed the comments and taken them into consideration in drafting this Final Suspension Rule (Final Rule, or Final Suspension).

The Department received several comments through means beyond those listed in the Notice or after the comment period closed. In fairness to all parties, these comments were not reviewed in the consideration of the Final Rule. In addition, in the Notice, the Department requested that parties limit their comments to the issue of whether the Department should suspend the December 2008 Rule for further review and consideration of the issues that have arisen since the December 2008 Rule's publication. Though all comments have been reviewed, only those comments responding to issues on which the Department sought comment were considered in this Final Rule.

A. Comments Regarding the Stated Policy Rationale for Suspension

1. The Department's Problems in Implementing the December 2008 Rule Have Resulted in Confusion, Processing Delays and Program Disruption

a. Lack of Resources

The Department received a number of comments, both supporting and opposing a suspension, responding to the suggestion that both the Department and the SWAs lack resources to fully implement and administer the current regulations. Some commenters indicated support for the Department's position that the December 2008 rule should be suspended due to the shortage in resources available for fully implementing and administering that rule past the transition period. Conversely, a substantial number of comments called into question the substance of the rationale, arguing that the Department failed to present concrete evidence of a lack of resources to fully implement the December 2008 rule. The majority of comments that discussed the lack of resources to operationalize the program as written in the December 2008 Rule argued that the Department presented insufficient evidence and only relatively vague statements with no clear supporting evidence. Other commenters asserted that the new program *is* in fact already operational and has been for more than two months and is working just as the DOL said it would in the December 2008 Rule. One commenter pointed to some evidence believed to contradict the Department's claims of insufficient resources, citing the DOL's discretionary budget for the Fiscal Year 2009 being more than $17.5 billion, constituting a nearly 50% increase over Fiscal Year 2008 levels, and indicating that the growing trend is likely to continue with the President's budget for Fiscal Year (FY) 2010 which includes further increases for the Department.

The Department's FY 2009 budget is irrelevant to the Department's ability to implement the December 2008 Rule when it was promulgated. The December 2008 rulemaking was commenced and conducted without regard to resources required by the Employment and Training Administration (ETA) generally or for Office of Foreign Labor Certification (OFLC) specifically to implement the changed processes and the potential increased use of the program. The Department has determined that the agency's mandate is advanced by evaluating the December 2008 Rule, as opposed to bringing a potentially flawed program into full operation. The suspension will allow the Department to focus its resources in a more efficient manner, and will result in a more thorough determination regarding the best direction for the H–2A program.

A few commenters asserted that the Department's claims of resource shortfalls are suspect in light of having engaged in the perceived costly exercise of suspending the December 2008 Rule and reinstating the old regulations that will presumably require more work on the part of the Department and the SWAs. Other commenters asserted that complaints of funding shortfalls have been prevalent in the State and local DOL offices long before the current regulations were implemented. A handful of commenters argued that the attestation process under the current regulations and related SWA relief from certain housing inspection obligations lessened demand on DOL resources, thus undermining the Department's argument of budgetary shortfalls. One commenter indicated that DOL failed to provide evidence about the new role of the SWAs under the current regulations, arguing that SWAs have less to do under the current regulations than before and therefore should require the same or lesser amount of resources.

The Department's statutory obligations, especially many of those it delegates to the SWAs, have not changed regardless of the set of regulations under which they operate. The process of filing an application for H–2A workers under either set of regulations still begins with the placement of an agricultural order into clearance with the SWA having jurisdiction over the work, and continues through the State-assisted referral process and the mandatory housing inspection.[1] SWAs retain many

[1] The commenters' suggestion that SWAs are no longer required to perform housing inspections under the December 2008 Rule is simply inaccurate; the fact that, in some exigent circumstances, the Department will not withhold a certification for lack of an inspection does not relieve the SWA of its responsibility to perform the statutorily required inspection. The December 2008 Rule is clear that the SWAs are still expected to perform preoccupancy housing inspections.

of the same responsibilities under the December 2008 Rule as they did under the prior rule.

b. Inability To Implement Sequence of Operational Events

In the Notice of Proposed Suspension, the Department cited as crucial to the proposed suspension its inability to implement the sequence of operational events required to avoid confusion and processing delays, including implementing an automated review system, and training program users and SWA staff. One commenter supporting this rationale for the suspension indicated that the December 2008 regulations compound the application processing problem with guaranteed delays in temporary programs—mainly H–2A and H–2B—by creating an additional burden in increased supervised recruitment, as well as increased demands from the PERM program. Since its effective date, the Department has seen a steady increase in the numbers of delayed applications, where compliance with the statutory processing times has not been met. (See below section II.A.1.c. Processing Delays.) Delayed applications can translate into delayed petitions for nonimmigrant workers, delayed entries by needed workers, and—for lack of workers—delayed activities by farms and farming operations. The Department is concerned with the correlation between this increasing delay in the Department's meeting of its statutory mandate. The suspension is intended to allow the Department to work with a system with which it is familiar while it determines whether to retain the new system or engage in new rulemaking. Using a system with which the Department is familiar and which it has the infrastructure to implement will hopefully reduce processing times and enable the Department to more closely meet its statutory processing obligations.

Some commenters argued that all new rules require staff training, new materials and programs, but that issues arising during the implementation period may not be permanent and should not derail a lawfully promulgated rule. The Department readily recognizes that new regulations undergo necessary implementation phases and that alone is not a reason to suspend a rule, even where (as here) the office is promulgating significant changes for the first time in over 20 years that create considerable need for re-training staff and establishing of new guidelines for adjudication, new policy interpretations, etc. However, here the extremely narrow window between the publication and the effective date of the current regulations, especially since it occurred during the Presidential transition period, simply provided too little time for the Department to adequately train both staff and users in the basics of the program, much less the many nuances in program administration. Thus, absent a suspension, an untenable situation has developed in which the newly promulgated H–2A program has not been effectively implemented, putting users and adjudicators alike at a substantive disadvantage.

A number of comments focused on the Department's statement of need for an automated processing system and asserted that the December 2008 H–2A program is less resource intensive than the old program which had no automated system, and is therefore less in need of such a system. Other commenters pointed out that the prior H–2A program never had an automated processing system due to its complexity. Another commenter said that the Department never promised an automated system nor was the regulated community expecting one, and that in its experience, the processing times have been faster under the new program. Still other commenters pointed out that reverting to the old program, with its duplicative filing and requirements for manual processing, will not result in shorter processing times.

In the December 2008 Rule, the Department noted that an automated system was contemplated at some future time for the public. However, the Department's inability to create an internal automated system for tracking and processing of applications, not an external one, is the most substantial factor with which the Department is currently concerned. In a time in which the Department receives thousands of H–2A applications, an automated system geared to the relevant format and information collection is a necessity for the 21st century. Core program processing requirements—such as the calculation of statutory processing dates from date of receipt—require some electronic ability for collection and calculation. The current system, designed to a now-obsolete information collection of two pages (compared to the current 10 page collection), is simply inadequate to track the increased information required under the December 2008 regulations—information that, under an attestation-based collection, is critical for analysis to determine compliance with program requirements. Use of the current system to administer the December 2008 Rule will adversely impact program integrity. The Department notes, for example, that an inability to systematically track information that would enable it to conduct audits of certified applications and undertake actions resulting from audits means that the Department cannot effectively implement that part of the new system. This lack of functionality creates a significant inability to adequately address the procedures and systems necessary to implement an attestation-based system.[2] Furthermore, the ability to capture particular data elements from employers' applications as a basis for determining how to allocate audit resources was fundamental to the design of the December 2008 Rule. As discussed in the preamble to the December 2008 Rule, the Department envisioned a robust audit system that monitored filings under the re-engineered attestation-based process to ensure that the employment of H–2A workers does not adversely affect the wages and working conditions of similarly employed U.S. workers. Without such a system, the potential for fraud is increased, program integrity is in jeopardy, and U.S. workers are at risk of adverse affect.

In response to the Department's statements about its inability to provide sufficient training for SWAs and stakeholders on the December 2008 regulations, a number of commenters indicated that trainings were conducted in Denver and Atlanta in advance of the effective date of the regulations. In addition, several commenters asserted that DOL conducted more than one training for both SWA staff and employers prior to the effective date of the regulations and noted that this was the first time DOL presented training on the December 2008 Rule to the user community.[3] Another commenter indicated that extensive training was conducted and materials were provided at no charge to stakeholders and had been available in PDF on DOL's Web site.

The Department made attempts to educate both stakeholders and SWAs as well as its own staff, holding not only

[2] In addition, the Department has not yet created a fillable form, compelling employers to print the form and type or hand-write the information being collected.

[3] This is in fact incorrect, even if relevant; even in recent years the Department has engaged in significant outreach to its user communities in foreign labor programs. See, e.g., Announcement of Public briefings on the H–2B Temporary Non-agricultural Worker Labor Certification Program, 72 FR 17940 (Apr. 10, 2007); Announcement of Public Briefings on Using Redesigned Labor Certification Forms and Stakeholder Meeting, 74 FR 2634 (Jan. 15, 2009).

briefing sessions for the public (in which some SWA staff participated) but also for SWAs, limiting the latter to the transition procedures. However, the December 2008 Rule, published during the middle of a Presidential transition period, became effective only 30 days after the publication, as noted above. This gave both internal and external users little time to understand, implement, and adapt to the changes contained in the December 2008 Rule. Most significantly, the Department had little opportunity, prior to the effective date of the rule, to provide adequate assistance to the affected communities on both sides of the application process.

c. Processing Delays

In its March 17, 2009 Notice of Proposed Suspension, the Department pointed to delays and corresponding disruption to the program in the middle of the growing season as a core reason for temporarily suspending the current regulations pending additional review.

Most comments received in response to this statement disagreed with the Department's assertion that it had experienced processing delays. Many commenters complained that the Department failed to offer specific, detailed and concrete evidence demonstrating the nature and extent of the processing delays. Large growers associations cited contrary experience, indicating either fewer delays under the current regulations than in the past, or timely processing of applications. However, several commenters along with a substantial number of other program users expressed a great deal of frustration with the Department for failing to meet their need for extensive technical assistance, as well as a general lack of comprehension of the December 2008 Rule.

One commenter stated that DOL staff has done a good job implementing the current regulations on the operational level, despite complaints of inadequate staff, improper infrastructure and archaic computer support. Others commenters noted that employers have experienced fewer delays under the new regulations despite the fact that the H–2A program has always been understaffed.

Despite the anecdotal experiences of individual commenters, the ability of the Chicago National Processing Center (CNPC) to issue timely case decisions under the new H–2A regulations has decreased. Timely case decisions (in which an acceptance/modification letter is issued no later than 7 days of receipt of the H–2A application and/or a final determination no later than 30 days before the employer's date of need) have decreased as a percentage of H–2A applications adjudicated in any given week. While the percentage of delayed cases—cases outside the statutory timeframes for adjudication—has varied since the effective date of the current rule, it has not fallen below 27% of all cases in process at that time, and has been as high as 58%. The median days processing time for 2009 has also exceeded the times in 2008; in February 2009, the median number of days to process a case was 27 days (compared to 23 days for the same time period in 2008). In March 2009, the median number of days to process a case was 25, compared to 23 days in March 2008. In summary, the number of days from case receipt to adjudication has increased, as has the Department's percentage of delayed cases. Therefore, despite the December 2008 rule's intended purpose, that rule is at least one factor in the increases in the time in which applications have been handled, which has led to increased delays in application processing.

While the increased processing times may seem modest, they are cause for concern to the Department. In a statutory processing timeframe in which applications are filed only 45 days prior to the date of need and must be adjudicated no later than 30 days prior to date of need, delays of even a few days signal a significant failure by the Department to meet its statutory timeframes. One of the Department's goals in seeking to streamline the processing of H–2A applications was to ensure timely processing of applications—which was already a concern for the Department. Not only has that goal not been achieved, the new processing model has, at least so far, pushed that goal farther away. The processing delays also highlight the Department's ever-increasing inability to adequately perform its functions under the December 2008 Rule. This is particularly worrisome considering that the Department has seen its number of H–2A applications actually decrease compared to the same time span last year, with the Department receiving only 706 H–2A applications in February 2009, compared to 930 applications it received during the same month last year. Due to this demonstrated trend, the Department foresees increased difficulties in meeting its statutory processing times if the H–2A program experiences its anticipated increase in future participation. Delays in the Department's processing times mean that DHS and the Department of State have less time to process visa petitions, grant visas and admit workers before the employer's date of need. While there is no evidence that the current delays have caused harm, if the delays continue to increase, as it appears likely that they will, at some point the harm will become very real.

Though most commenters did not address the effect of additional demands on the Department to process incoming applications, one large growers' association opposed to the suspension noted that the existing DOL-reported delays will be increased by a suspension, resulting in unacceptable delays and gridlock for H–2A and H–2B employers for the majority of applications scheduled to be filed in April through June 2009.

The Department disagrees that a suspension will exacerbate the current delays in processing program applications. The process for filing and handling applications during the suspension will be the filing procedures of the former rule with which CNPC and SWA staff and all previous program users are familiar. The burden of review during a suspension will be shared by SWAs and the CNPC. As a consequence, processing times should decrease with the reinstatement of the former rule.

d. Confusion and Disruption Under the Procedures of the December 2008 Rule

The Department said in its March 17, 2009 Notice of Proposed Suspension that there is increasing evidence that continuing to implement the December 2008 regulations in light of existing experience and before additional examination is disruptive and confusing to the Department's administration of H–2A program, SWAs, agricultural employers and domestic and foreign workers.

The Department received several comments supporting the suspension because of this confusion and ensuing disruption. One commenter noted that the regulations should be suspended because they have caused confusion among employers, State Workforce Agency staff and workers. Another commenter cited anecdotal evidence of policy confusion and contradictions on the local level requiring a certain group of employers to pay overtime wages contrary to the current regulations, although this commenter generally opposed suspension of the 2008 rule on this basis. Another commenter, writing on behalf of a State Workforce Agency, indicated that confusion is already manifest in the processing of job orders during the transition period. Yet another commenter provided examples of confusion prevalent in communications between the SWA and the CNPC on such issues as the timing of receipt of

job orders from the CNPC, the use of master applications, and the timely identification of traditional labor supply States.

Another commenter indicated that SWAs are currently receiving insufficient support from the CNPC for dealing with pre-filing issues, such as rejection of qualified U.S. workers. Confusion also exists about the timing of housing inspections which are being conducted under two sets of differing regulations. The same commenter provided additional evidence of confusion and disruption, including the presence of anomalies in wage rates, which have caused the issuance of wage rate determinations that are occasionally lower than the State minimum wage rate; and also, instances where an SWA was instructed to make referrals to non-provider and non-traditional labor supply states, which in turn reduced the chances of getting U.S. workers to fill the positions.

The Department received other comments which challenged its assertions about the confusion and disruption caused by the current regulations. The most common objection from the commenters challenged the very existence of confusion and disruption under the December 2008 regulations, and noted that DOL did not specify in the Notice of Proposed Suspension the types of confusion and disruption experienced in administering the program or present examples. In addition, a large number of commenters argued that employers and the larger regulated community were not experiencing confusion. At least one commenter added that DOL would create confusion and disruption by suspending the regulations. One large grower association identified DOL as the source of confusion and disruption and accused the Department of limiting access to guidance, training and informational resources, and neglecting to fulfill its obligations in advising the regulated community on the current regulations.

The majority of commenters opposed to the suspension posited that there is no disruption among users resulting from the relevant legal and economic concerns associated with the December 2008 Rule. One commenter indicated that the current H–2A program is different from the prior regulatory regime in form and substance but the changes do not constitute such a fundamental shift in the Department's obligations, given the long lead time before the rule's promulgation to warrant a precipitous change in direction. One association noted that the largest users of the current H–2A program reported that the December 2008 regulations have made for a more logical, predictable, reliable and less disruptive approach to securing legal labor than the old regulations.

While each commenter's experience may be different, the Department disagrees with those commenters that there has been no disruption or confusion resulting from the new regulations. That the Department did not spell out in detail the specifics of the confusion experienced by program users, but only summarized the level of confusion and suggested it was sufficient to propose suspending the rule, does not negate the existence or lessen the impact of such confusion. Indeed, the Department received over 200 e-mail inquiries seeking clarification of the December 2008 regulations during the 3 months that a special mailbox was open to the public.

Moreover, the inquiries that the Department has received show the general lack of understanding and knowledge among employers with the process implemented by the December 2008 Rule. As noted above, the Department did conduct two briefing sessions for the public in December 2008 just before the publication of the December 2008 Rule, which fewer than 200 H–2A employers, agents, attorneys, farmworker advocates, State Workforce Agency employees, and others were able to attend. The attendees were provided an advance (draft) copy of the rule text at the meeting, and were provided a brief overview of the new regulations to be issued by DOL, (by both ETA and ESA). The Department of Homeland Security, which issued its own H–2A regulations at the same time, also participated in both briefings. These two briefings, however, did not even begin to respond to the questions and concerns arising from the new rule. Moreover, because of the resource constraints discussed earlier and the change in administrations and priorities, the Department has not been able to individually address the subsequent comments and questions nor provide adequate general program guidance.

After that briefing, the Department has received, between late December and early March, at least 250 written inquiries from program users on the basic program requirements. Some of these questions, both simple and complex, have come from some of the same commenters who now say they have seen no difficulties with the new rule. While a few questions demonstrated an understanding of the new rule, many others demonstrated complete confusion with the new regulatory requirements, the forms, or the process in general. The following are some of the questions received by the Department as recently as March 2009 which show a fundamental lack of understanding of the new rule:

> ''Do I advertise before I send in the application and do I send copies of this advertising?''
>
> ''To confirm, does form 9142 take the place of both form 750 and 790 in the new H–2A certification processing?''
>
> ''Does employer have to place a job order with SWA before filing the application with DOL? Is there any wait time?''

These questions evidence confusion about the basic program requirements and employers' obligations under the December 2008 regulations.

In addition, many more questions were directed to the individual SWAs, which at times over the past few months have provided contradictory or misinformed guidance (as noted by some commenters), in large part due to the SWA staff's own lack of understanding of the December 2008 rule. The Department has become aware, for example, that at least one SWA, a full month into the program, was erroneously giving out incorrect wage rates, which were directly contrary to the requirements of the new regulations. Another SWA asked the Department, as recently as April 2009, whether, on an application filed under the December 2008 Rule, it was required to refer, and the employer required to accept, referrals through 50 percent of the contract period (the ''50 percent rule'' of the former regulations), not the 30 days post-date of need as required under the December 2008 Rule.

SWAs still have a significant role under the December 2008 regulation, so their fundamental misunderstanding of the essential elements of the new regulation threatens program integrity and contributes to the public's continued confusion about the H–2A application process and corresponding employer obligations.

The most telling evidence of confusion among the farming employer community, however, lies in the number of applications the Department has received that require modifications in order to be made acceptable for processing. In the first three months of the program, January, February and March 2009, the Department found that 50%, 56%, and 46% of the applications processed in those months, respectively, required modifications to the applications. For the same timeframe last year, the percentages of applications requiring modifications were 10%, 16%, and 26%, respectively. This severe disparity of modifications of everything

from minimum requirements to contract issues demonstrates how little knowledge of the new regulations even seasoned users of the program have been able to glean.

Based on the volume and nature of the inquiries that the Department has received in the early days of the December 2008 Rule, as well as the number of applications that require further investigation, the Department disagrees that there is no confusion. The significant lack of understanding of the new rule is evident from the questions the Department continues to receive daily from even seasoned program users, and is of deep concern to the Department. Even if some members of the regulated community understand the current implementation of the new rule sufficiently for compliance purposes, there remains the fact that the December 2008 rule is not yet fully implemented, as the Department is still operating the program within the transition procedures prior to full Final Rule implementation.

2. Avoiding the Disruption of Fully Implementing a Complex Regulatory Scheme When Further Review of Policy and Economic Concerns Are Warranted

In the March 17 Notice, the Department identified as a factor in considering whether to suspend the current regulations the disruptive effect of implementing a complex regulatory scheme without further consideration of the legal and economic concerns that have arisen during the current economic downturn, such as the rising unemployment among U.S. workers and the impact that may have on the Department's H–2A statutory obligation to ensure no adverse effect on the U.S. worker population from the introduction of the foreign workforce. Although the Department received many comments opposing this basis for suspending the regulations, the Department also received several comments strongly supporting the proposed action.

One commenter asserted that the current regulations should be suspended because of the change in economic circumstances which has taken place since the promulgation of the December 2008 Rule, including the increased unemployment that is having an effect on the availability of U.S. workers. Another commenter on the State level noted that unemployment has increased nationally and in its State in a way not anticipated during the rulemaking process for the December 2008 Rule. The commenter urged that the Department must have an opportunity to reconsider policy implications of the H–2A program overall, particularly those program components that are likely to have an adverse impact on the U.S. workforce in the changed economic circumstances.

Another commenter indicated that DOL did not provide supporting evidence showing that the delay in implementation of the December 2008 regulations will cause disruption in the agricultural sales, production and market conditions, even in this unstable economic environment. This commenter went on to assert that DOL's proposed suspension will drive up costs and force users out of the program and negatively impact supporting jobs in the greater economy, thus itself generating a disruptive economic impact. Another commenter noted that DOL's mandate is not to abate the effects of increased unemployment but to protect workers, which it is adequately doing under the current regulations.

The commenter's objection to the proposed suspension based on the purported increase in employers' expenses due to an increase in required wage rates is a critical reason the Department needs to examine and re-evaluate the wage regime instituted under the December 2008 Rule. One of the Department's most important functions in its administration of the H–2A program is to ensure that admission of H–2A workers does not adversely affect the wages of U.S. workers. At all times, but particularly in the midst of a severe economic downturn, the Department is required to ensure that its regulations do not create or compound an adverse effect on U.S. workers. This is particularly the case where, as in the H–2A program, the Department has a statutory obligation to ensure protection of U.S. agricultural workers, one of the most vulnerable sectors of the workforce.[4] The many commenters who cite increased wages as a central reason for not suspending the December 2008 Rule are doing so on the grounds that wage costs for their foreign workforce under the former regulations will be higher than under the December 2008 Rule. One of the primary reasons that the new Administration wants to review the December 2008 Rule is precisely to determine whether the generally reduced wage rates under that rule are having a depressive effect on farmworker wages.

The Department stated in its Notice of Proposed Suspension that the December 2008 Rule, and the policy positions from which the rule was promulgated, may need to be reconsidered given the efforts being made by the current Administration to stabilize the economy. A majority of commenters criticized the Department for considering a change in the regulations on policy grounds. Some of these commenters asserted that even if the current Administration does not agree with the policies represented by the December 2008 Rule, the December 2008 Rule was carefully considered, planned and prepared over a long period of time and underwent a significant amount of review. Others noted that the December 2008 Rule was legally promulgated and should not be ''scrapped'' without the Department first undertaking a similarly painstaking new rulemaking process.

The Department also received comments supporting its desire to revisit the policies of the previous Administration reflected in the December 2008 Rule in light of the goals and objectives of the current Administration. One such commenter argued that it would be an inefficient use of limited agency resources, as well as confusing and disruptive to the program users, to engage in the full implementation of the December 2008 Rule if the Department is likely to issue a different rule soon. This commenter felt the suspension would be less disruptive and confusing than continuation of the December 2008 rule.

The Department agrees that it is not appropriate to fully implement a rule that is under reexamination by the current Administration. The Administration has, through the suspension, taken the first step to begin a review of the regulatory policies of the previous Administration reflected in the December 2008 Rule in light of its own policies.

The Department also agrees with those commenters who feel that less disruption will follow from a suspension than from a continuation of the December 2008 Rule. The Administration is not at this time eliminating the rulemaking of the previous Administration; rather, it is temporarily putting that rulemaking on hold in order to review the policies in that rulemaking and, if warranted, reopen the issues contained in the H–2A program for further notice and comment. The suspension is of limited duration in both effect and time; by providing notice and an end date, the Department is limiting the impact of the suspension as much as is feasible while

[4] There is little dispute among commenters with the Department's position that farm hires are disadvantaged in the labor market relative to most other U.S. wage and salary workers. U.S. Department of Agriculture, ''Profile of Hired Farmworkers, A 2008 Update,'' Economic Research Report, No. 60, July 2008, page iii.

still enabling the review the Administration believes is necessary. The December 2008 Rule is not now being ''scrapped'' but is being temporarily suspended in order for the Administration to undertake what it considers to be an essential review.

B. Impetus for the Timing of Suspension

The March 17 Notice of Proposed Suspension stresses the importance of moving swiftly with the suspension in order to avoid confusion and disruption of the H–2A program in the midst of the growing season.

One group of farmworker advocate organizations offered support for the immediate implementation of a suspension, arguing that the regulations must be suspended before the end of the transition period of the current regulations to avoid compounded confusion and disruptions in application processing due to the Department's inability to fully and properly implement the complex new regulatory program. Other comments supported this position, noting that if there is a likelihood that a new program will be designed and the December 2008 Rule changed, the December 2008 Rule should be suspended immediately in order to prevent confusion and disruption.

Most commenters, however, criticized the Department's timing of the suspension, indicating that it would be disruptive during the critical time for crop production. The commenters argued that the suspension overlapping with the growing season will hurt the employers who have already planned and calculated their costs on the basis of the current regulations.

As discussed further below, however, the Department has clearly indicated its intent to apply the current regulations to all applications filed prior to the effective date of this Final Rule. Since most applications for this growing season have been filed or will have been filed before this Final Rule becomes effective, the Department does not believe that the concerns about disruption for this season are a major concern. For additional discussion, see Section III. infra.

C. The Department's Authority To Suspend the December 2008 Rule

A number of commenters objected to the proposed suspension of the December 2008 Rule because the Department's rulemaking process for the proposed suspension was not in compliance with the Administrative Procedure Act (APA). There appeared to be differing views among the commenters on the conformity of the Notice of Proposed Suspension with the rulemaking requirements under the APA. Accordingly, the Department reiterates the key facts relating to the rulemaking process undertaken thus far. On March 17, 2009, the Department published its Notice of Proposed Suspension in the **Federal Register**. The Notice proposed to suspend the December 2008 Rule for nine months and to reinstate the Prior Rule. The Notice requested comments relating solely to the proposed suspension itself (*i.e.*, not the substance or merits of either rule) from the public through March 27, 2009. The publication of the Notice of Proposed Suspension did not in any way result in the immediate suspension of the December 2008 Rule. Rather, the Department accepted comments from the public during the ten-day period between March 17, 2009 and March 27, 2009. Once the comment period closed, the Department reviewed and considered the comments that it received from the public and, through this Final Rule, is suspending the December 2008 Rule and reinstating the Prior Rule for 9 months. The suspension of the December 2008 Rule and reinstatement of the Prior Rule will not take effect until 30 days after the date of this Final Rule's publication.

These facts are significant with respect to various comments that the Department's actions during this rulemaking process are a violation of the APA. Because different actions are cited by the commenters as bases of the asserted APA violation, we address each action separately.

1. 10-Day Comment Period

A number of commenters argued that the 10-day comment period provided in the Notice of Proposed Suspension was unreasonable and violated the APA. Commenters claimed that many farmers were in the midst of their growing season, and 10 days was too short of a period to provide a sufficient response to the notice. Rather, these commenters stated that an adequate comment period required at least 30 days. Additionally, some commenters cited the apparent discrepancy between the 10-day comment period for the proposed suspension and the 60-day comment period for the Department's rulemaking process for the December 2008 Rule. Accordingly, there were many requests to extend the comment period up to 60–90 days.

Section 553 of the APA plainly states:

> (b) General notice of proposed rule making shall be published in the **Federal Register**, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include:
>
> a statement of time, place, and nature of public rule making proceedings;
>
> reference to the legal authority under which the rule is proposed; and
>
> either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> * * * * *
>
> (c) After notice required by this section, * * * the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis or purpose.

An agency is only required to provide a ''meaningful opportunity'' for comments on a proposed rule, which means that an agency's mind must be open to considering them. See *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F.3d 455 (D.C. Cir. 1998). Nowhere does the APA set forth a minimum time period for accepting rulemaking comments. In fact, courts have upheld comment periods as short as seven days. See *Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309 (8th Cir. 1981). Additionally, comment periods shorter than 30 days have been upheld where there was no evidence of any harm to the petitioners by the short comment period, as demonstrated by the volume and substance of comments received by the agency and the measurable effect such comments had on the final rule. See *Florida Power & Light Company* v. *U.S.*, 846 F.2d 765, 772 (D.C. Cir. 1988) (upholding 15-day comment period where 61 comments were received, ''some of them lengthy'') and *Omnipoint Corporation* v. *FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (upholding 15-day comment period where 45 comments and 42 letters were received).

Here, the Department received over 800 comments, many of which contained detailed analyses of the impact suspension would have on the participants in the H–2A program and which the Final Rule has addressed and taken into account. Given the absence of a required minimum comment period under the APA, the sheer volume and substance of the comments and the Department's detailed discussion and consideration of the comments in this Final Rule, the Department believes that the 10-day comment period for this rulemaking is reasonable. Furthermore, while the Department did provide a longer comment period during the 2008 H–2A rulemaking process, a shorter timeframe is warranted here given the

need for expediency as discussed earlier in this preamble and the much more limited scope of this suspension rulemaking.

2. Limitation of Scope of Comments to Suspension

An agricultural association objected to the Department's limitation of the scope of comments to the suspension itself, as opposed to comments on the merits or substance of either the current H–2A rule or its predecessor rule. The association stated that it has numerous comments it would like to offer on both the current regulations, as well as the prior regulations, and on this basis the association objected to the Department's reinstatement of the old regulations during the suspension period.

As the Notice of Proposed Suspension makes clear, the current Administration intends to review and evaluate the social and economic implications of the December 2008 Rule. The Department stated that if it were to decide to suspend the December 2008 Rule, the Department will either ''engage in further rulemaking or the suspension will be lifted after 9 months.'' Thus, comments on the merits of the existing and previous program would be appropriate when the merits of the program are actually at issue in that rulemaking. The suspension of the December 2008 Rule and reinstatement of the Prior Rule is strictly a temporary measure arising from the Department's need to review in an expeditious manner the December 2008 Rule to ensure that the Department effectively carries out the statutory objectives and requirements of the H–2A program. The December 2008 Rule has not been repealed; it will only be held in abeyance for nine months. Unless the Department engages in further rulemaking, about which comments on the substance and merits of the proposed regulation will be solicited, the December 2008 Rule will continue to remain in effect once the suspension expires after nine months.

3. Effective Date of Suspension

As mentioned earlier, there was some confusion among the commenters as to when the suspension would take effect. Some commenters believed that the suspension took effect upon publication of the Notice of Proposed Suspension or would take effect immediately at the close of the comment period. Another commenter believed that the suspension would take effect before April 1, 2009. Accordingly, a few commenters stated that the Department was required to show good cause in order for the suspension of the current H–2A rule to take effect immediately. However, the Department never stated in the Notice of Proposed Suspension, nor does it intend in this Final Rule, that the suspension would take effect immediately.

As explained earlier, neither the publication of the Notice of Proposed Suspension, nor the close of the comment period resulted in the immediate suspension of the December 2008 Rule. The Department never intended to issue, and in fact is not issuing, a Final Rule suspending the December 2008 Rule without having undertaken a substantive review and consideration of the comments that were submitted during the comment period. Part of this misunderstanding may be attributed to the Department's reference in its Notice of Proposed Suspension that ''if the suspension continues on April 1, 2009, the previous regulations that were in effect on April 1, 2008 would appear in the next published version of the CFR as 20 CFR 655.1 and 20 CFR part 655.'' The Department merely intended to track the publication schedule of the CFR, in which title 20 is updated annually as of April 1st. However, the Department acknowledges that the statement may have been thought to erroneously imply that the suspension would have been in effect before April 1, 2009, which was not the Department's intention. The Department would like to clarify that because the suspension did not take effect before April 1, 2009, this year's published version of the CFR as 20 CFR 655.1 and 20 CFR part 655 will contain the December 2008 Rule in effect as of April 1, 2009.

A farmworker advocacy organization expressed support for the suspension to take effect immediately upon publication of the Final Rule of suspension. However, while the circumstances described in this preamble warrant suspending the December 2008 Rule, the Department recognizes the need to have some period of adjustment to the Prior Rule, in light of the challenges associated with changing regulatory programs, as noted by many commenters. Accordingly, the Department has determined not to waive the 30-day delayed effective date requirement in Section 553(d) of the APA.

D. Impact of Suspension

The Department received many comments expressing concern about the impact of the suspension. The Department first would like to explain and clarify how the suspension of the current rule and reinstatement of the Prior Rule will take effect before addressing the particular concerns raised by commenters. The suspension will become effective 30 days after the date of publication of this Final Rule. The Department stated in its Notice of Proposed Suspension that ''[i]f a final decision is reached to suspend the H–2A Final Rule, any H–2A application for which pre-filing positive recruitment was initiated in accordance with the H–2A Final Rule prior to the date of suspension will continue to be governed by the H–2A Final Rule.'' This statement must be understood in the context of the Department's subsequent extension of the transition procedures.

On April 16, 2009, after the issuance of the Notice of Proposed Suspension, the Department published an Interim Final Rule (IFR) which extended the transition period under 20 CFR 655.102(b)(2) to cover all applications with a date of need on or before January 1, 2010. See 74 FR 17597. During the transition period employers do not engage in pre-filing recruitment in traditional or expected labor supply States in which there are a significant number of qualified domestic workers. Under the transition procedures, employers are provided information on expected labor supply States as part of their post-filing recruitment instructions. Given that all applications filed before the effective date of the suspension will still be subject to the transition provision at 20 CFR 655.102(b)(2), which provides for post-filing recruitment, no employers will be required to engage in pre-filing positive recruitment before the effective date of the suspension. Nevertheless, in keeping with the intent expressed in the Notice of Proposed Suspension, any H–2A application which is filed while the December 2008 Rule is still in effect will continue to be governed by the December 2008 Rule, while applications filed on or after the effective date of the suspension and the reinstatement of the Prior Rule will be governed by the Prior Rule.

Despite a recommendation from a farmworker advocacy organization to apply the Prior Rule to all pending and approved job orders, the Department does not believe there is a legal basis to do so, and therefore will not apply the Prior Rule to applications filed under the December 2008 Rule. Following the farmworker advocacy organization's suggestion would undermine employers' expectations and reliance on the current rule prior to its suspension. Moreover, implementing this suggestion may violate the prohibition on retroactive rulemaking. See *Nat'l Mining Ass'n* v. *Dep't of Labor,* 292 F.3d 849, 860 (D.C. Cir. 2002).

The reinstatement of the Prior Rule will be accompanied by the reinstatement of Form ETA–750 in the H–2A program. Form ETA–9142 for H–2A applications[5] may be filed up to the day before the effective date of the suspension. However, as of the effective date of this Final Rule, employers will be expected to use Form ETA–750, and any H–2A applications filed using the Form ETA–9142 will not be accepted.

1. Uncertainty of Applicable Regulations; Impact on Planning and Operations

A number of commenters expressed concerns about the confusion and disruption that would result from the suspension of the December 2008 Rule. In particular, a State agricultural agency questioned: (1) Whether farmers would be allowed to abandon applications when they learn that they are going to be subject to the Prior Rule; (2) whether it would be possible for farmers to end up with some workers being subject to the December 2008 Rule and some to the Prior Rule; (3) whether farmers will find that their applications filed under the December 2008 Rule are rejected once the Prior Rule is in place. Such concerns were echoed by a number of farmers and agricultural associations, particularly as to how the suspension would affect applications filed but not yet approved.

Employers always have had the ability to abandon or withdraw pending applications without penalty, regardless of which regulations apply. However, as explained above, the Department has clearly identified the time frame for determining whether an application falls under the December 2008 Rule or the Prior Rule. Applications filed before the effective date of this Final Rule will be governed by the December 2008 Rule. Applications filed on or after the effective date of this Final Rule will be governed by the Prior Rule. Thus, applications filed before the effective date of this Final Rule will not be governed by the Prior Rule and therefore, could not be rejected, nor will the employer be penalized, because the application is not in compliance with the Prior Rule.

The Department understands that one of the results of this suspension is that a farmer may have workers subject to two different sets of rules, depending on the date on which the applications covering the H–2A workers were filed. However, as discussed in greater detail in Section II(C)(3) of this preamble, such situations already occur and have not detrimentally affected the H–2A enforcement process.

A number of growers also raised concerns about having invested much time and effort in learning the December 2008 Rule, and that their reliance on the December 2008 Rule in planning for their 2009 growing season will cause them to incur additional administrative, operations, and financial burdens if the December 2008 Rule is suspended. In particular, one agricultural association stated that their members planned for their 2009 crop activities using the December 2008 Rule to budget for operating costs, secure financing, plan personnel needs, finalize contracts, and schedule product deliveries. They claimed that such changes mid-season would not only disrupt their operations, but could potentially put them out of business based on differences in compliance costs, particularly with respect to wages and transportation. One State department of agriculture claimed that the suspension would cause disruptions in the harvest due to an insufficient labor supply and create shortages of products in the marketplace which would raise food prices. Other commenters were concerned that the suspension would create a disincentive for employers to participate in the H–2A program and result in greater use of illegal labor and the outsourcing of food production.

The Department acknowledges that the suspension of the December 2008 Rule is a change that will inevitably result in some disruption from the status quo created by the December 2008 Rule. However, the Department does not believe that the disruption will rise to the damaging levels claimed by the commenters. First of all, the Prior Rule that will be reinstated through this Final Rule and which was replaced by the December 2008 Rule only 3 months ago had been in effect for over 20 years. Clearly, the agricultural industry did not grind to a halt during that period, and most of the current users under the H–2A program have a sufficient degree of familiarity and experience with the Prior Rule. Even though one agricultural association claimed that there was a wide consensus regarding the problems with the Prior Rule and that reverting back to it would be more disruptive than staying with the December 2008 Rule which has only a few perceived minor problems, the rulemaking record of the December 2008 Rule contradicts these points. The Department received over 11,000 comments in response to the NPRM for the December 2008 Rule, which addressed a diversity of issues in the H–2A program and evidenced a lack of consensus regarding the purported advantages of the December 2008 Rule. Additionally, as discussed earlier, applications which have been filed under the December 2008 Rule, and which represent most of the applications that will be filed for this growing season, will continue to be governed by the December 2008 Rule.

This Final Rule also suspends the December 2008 revisions to 29 CFR part 501, implementing the Department's enforcement of the H–2A program, as that regulation is so integrally intertwined into 20 CFR part 655, Subpart B that a suspension of the December 2008 rule must apply equally to both revised regulations.

2. Elimination of Certain Categories of Activities From the H–2A Program

A number of commenters expressed concern about the impact that the proposed suspension would have on certain categories of activities which were classified as ''agricultural'' under the December 2008 Rule, but which were not part of the H–2A program under the Prior Rule. While the Department acknowledges and understands that the suspension may affect growers conducting such activities more so than others, the Department has determined that for purposes of administrative efficiency and advancing consistency in application, the suspension will apply to the December 2008 Rule in its entirety. The particular concerns of the commenters are addressed in greater detail below.

a. Logging

The Department received a number of comments from logging contractors, employers related to the logging industry (*e.g.*, sawmills, land companies), and associations representing the logging industry. All of these commenters opposed the proposed suspension arguing that the suspension removes the only alternative source of labor for this industry for this year. The temporary suspension of the December 2008 Rule will remove logging from the definition of agricultural labor or services, and thus, employers seeking to hire temporary foreign labor will have to file applications under the non-agricultural H–2B program. The H–2B program is limited to 66,000 visas per year, with 33,000 being made available during each 6 month period of a fiscal year. The United States Citizenship and Immigration Service (USCIS) announced that the cap for the second half of Fiscal Year 2009 was reached on January 7,

[5] Note that the discontinuation of Form ETA–9142 in the H–2A program in no way affects the requirement to use the Form ETA–9142 in the H–2B program.

2009.[6] Therefore, petitions for new H–2B workers seeking employment start dates prior to October 1, 2009 would be rejected by USCIS. The commenters stated that the suspension would devastate the logging industry and harm the related forest products industries. Several of these commenters identified June 1, 2009 as the approximate beginning date of the upcoming summer harvest season.

The Department recognizes that the suspension will remove the ability of the logging industry to obtain workers via the H–2A program for the 9-month period the suspension is in effect. However, as stated earlier, any H–2A application which was filed under the December 2008 Rule prior to the effective date of the suspension will continue to be governed by the December 2008 Rule. The Department's experience in administering the labor certification processes for the temporary worker programs is that the most of the applications for job opportunities in the logging industry are received and processed during late winter or early spring. Therefore, the Department believes that the majority of applications for temporary employment in the logging industry will be processed prior to the effective date of this Final Rule and will be subject to the December 2008 Rule, as they will have been filed before its suspension takes effect. Even taking the industry's date of June 1, 2009 as the start of the logging season and thus as the beginning date of need, all applications for loggers (of which there are only annual applications for approximately 600 workers) are expected to be filed and processed prior to the effective date of this Final Rule.

b. Incidental Activity and Packing

Two U.S. Senators expressed concern that reinstating the Prior Rule would eliminate the expanded definition of agriculture under the December 2008 Rule which included: (1) Work typically performed on a farm and incidental to the agricultural labor or services for which the H–2A worker is sought, but not specifically listed on the Application for Temporary Employment Certification; and (2) packing shed operations that were not part of a farming operation, where fresh fruits and vegetables are packaged for sale after harvest.

Even though the definition of ''agricultural or labor services'' under the Prior Rule differs from that provided in the December 2008 Rule, the definition of ''agricultural or labor services'' under the Prior Rule still encompasses incidental work and packing shed operations. The Prior Rule, like the December 2008 Rule, incorporates the definitions of ''agricultural labor'' from Section 3121(g) of the Internal Revenue Code and ''agriculture'' from Section 3(f) of the Fair Labor Standards Act (FLSA) in the definition of ''agricultural or labor services.''

The definition of ''agriculture'' from Section 3(f) of the FLSA includes incidental work:

> (f) * * * 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.*

(emphasis added).

The definition of agriculture in the December 2008 Rule, however, also included in the definition of ''agricultural labor or services of a temporary or seasonal nature'' the following provision that specifically addressed incidental work beyond the definition of agriculture provided under Section 3(f) of the FLSA:

> Other work typically performed on a farm that is not specifically listed on the Application for Temporary Labor Certification and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the Application for Temporary Employment Certification) and incidental to the agricultural labor or services for which the H–2A worker was sought.

20 CFR 655.100(d)(1)(vi).

Although reinstatement of the Prior Rule would eliminate this provision, the definition of agriculture under Section 3(f) of the FLSA is broad enough to encompass the work described in 20 CFR 655.100(d)(1)(vi). The definition of ''agricultural labor'' from section 3121(g) of the Internal Revenue Code includes packing shed operations by including all service performed:

> (4)(A) 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.

The definition of agriculture under the December 2008 Rule, however, also included in the definition of ''agricultural labor or services of a temporary or seasonal nature'' a provision that specifically addressed packing that goes beyond the definition of agricultural labor in Section 3121(g) of the Internal Revenue Code:

> Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage, 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 where no H–2B workers are employed to perform the same work at the same establishment.

20 CFR 655.100(d)(1)(v).

Although packing shed operations which were not part of the farming operation would no longer be included in the definition of agriculture once the Prior Rule is reinstated, the Department does not believe that the removal of such activities would unduly harm growers; in fact, the Department received no comments from any growers objecting to the suspension on that ground. Accordingly, while the Department recognizes the concerns raised by the commenters about the changes in definition of agricultural labor or services of a temporary or seasonal nature, the Department does not believe that such changes are so critical that they outweigh the benefits of suspending the December 2008 Rule.

3. Enforcement; Wage Discrimination

Many commenters expressed concern that suspending the December 2008 Rule and replacing it with the Prior Rule would subject workers performing the same work to different certifications, different regulatory requirements and different wages.

Such disparities already exist. Under the December 2008 Rule, for example, U.S. workers hired during the period of time set forth in the labor certification are entitled to H–2A wages as they are engaged in corresponding employment, while U.S. workers who were already in the employer's employ are not. Similarly, a grower may pay its own U.S. workers one wage and hire a labor contractor employing H–2A workers paid at a different wage, though both

[6] 6 USCIS Press Release, USCIS Reaches H–2B Cap for Second Half of Fiscal Year 2009. Available at: *http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b2b547dfb32be110VgnVCM1000004718190aRCRD&vgnextchannel=3381c0ed71f85110VgnVCM1000004718190aRCRD.*

sets of workers will be employed in the same fields performing the same work. Suspending the December 2008 Rule will allow for the reconsideration of the questions arising from these disparities.

4. Flaws in the Text of the Prior Regulation

An agricultural association noted that the reinstatement of the Prior Rule verbatim would include the reinstatement of certain errors in the regulation, such as a pre-McConnell Amendment reference to the granting of certifications no later than 20 days before the date of need. The Department acknowledges that the Prior Rule contains that error, but this error, along with other outdated references in the regulatory text, did not and will not prevent the Department from complying with its statutory requirements under the Immigration and Nationality Act and other laws.

E. Suspension of 29 CFR Part 501

As discussed above, 29 CFR part 501 implements the Department's enforcement responsibilities under the H–2A program. These regulations complement the ETA regulations at 20 CFR Part 655 Subpart B and are so integrated with the ETA regulations that the suspension of 20 CFR part 655 necessitates the suspension of 29 CFR part 501. This is evident in that in the comments received, commenters did not differentiate between the ETA and the WHD regulations.

F. Suspension of Pertinent Sections of 29 CFR Parts 780 and 788

As part of the H–2A rulemaking, the Fair Labor Standards Act (FLSA) regulations, 29 CFR 780.115, 780.201, 780.205, and 780.208, were amended to include the production of Christmas trees within the scope of ''agriculture'' under the FLSA and to remove specific reference to Christmas trees as part of forestry activities in 29 CFR 788.10. This classification of Christmas tree production impacts workers' entitlement to minimum wages and overtime pay, as well as the application of child labor protections under the FLSA.

As explained in the preamble to the December 2008 Rule, this provision was based on the decision in *U.S. Department of Labor* v. *North Carolina Growers Association*, 377 F.3d 345 (4th Cir. 2004), which held that production of Christmas trees was within the scope of the FLSA definition of agriculture at 29 U.S.C. 203(f), thus allowing application of exemptions pertaining to agriculture. 29 U.S.C. 213(a)(6)(A) and 29 U.S.C. 213(b)(12). That decision was contrary to regulations dating from the 1950s which included Christmas trees among ''other forestry products'' that were not included within the scope of FLSA agriculture. *See* 16 FR 481–482, Jan 28, 1950; 21 FR 2933, May 3, 1956.

Comments from growers and representatives of this industry opposed suspension of these FLSA revisions, pointing out that the treatment of Christmas tree production under the FLSA is unrelated to the changes made to the H–2A program, and that the Christmas tree regulation is not impacted by the programmatic concerns affecting the H–2A regulations.

The Department acknowledges that this change in FLSA regulations is unrelated to the H–2A program and was not necessary to accomplish the revisions to the H–2A program. Nevertheless, the Department believes that suspending these FLSA regulatory changes will provide an opportunity for additional review with an explicit focus on the ramifications of the rule on the implementation of the FLSA. For example, neither the NPRM nor the preamble to the December 2008 Rule mentioned the impact of the regulatory change on child labor protections in this industry. Accordingly, no comments were received, and no information was obtained, concerning the impact of this change on child labor protections. DOL is especially sensitive to potential adverse impacts that the December 2008 Rule's FLSA regulatory changes might have on our Nation's most vulnerable workers, including low-wage workers and youth.

Given the longstanding nature of the Department's prior position on this issue, and the removal of FLSA wage and child labor protections that the December 2008 Rule triggered, it is the Department's view that a suspension of the December 2008 Rule in its entirety is appropriate to provide an opportunity for a more complete review of this important regulatory issue.

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 Final Rule is not an ''economically significant regulatory action'' under Section 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, 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, or public health or safety in a material way. In fact, this Final Rule is intended to provide to growers clear and consistent guidance on the requirements for participation in the H–2A temporary worker program, and to eliminate the potential for disruption, confusion, and processing delays resulting from the Department's and SWAs' lack of resources for efficient implementation of the December 2008 Rule. The Department, however, has determined that this Final Rule is a ''significant regulatory action'' under Section 3(f)(4) of the E.O. and accordingly OMB has reviewed this Final Rule.

Summary of Impacts

The changes in this Final Rule are expected to have little net direct cost impact on employers, above and beyond the baseline of the current costs required by the program as it is currently implemented. While the effect of the December 2008 Rule was to require employers to engage in recruitment of U.S. workers in advance of filing their applications for foreign labor certification, the Department included a transition period to enable it to implement the new rule and to enable employers to become accustomed to the filing procedures and new recruitment regime under the new regulations. During the transition period, employers initiate recruitment after filing the temporary labor certification application. The transition period contained in the December 2008 Rule applied to employers with a date of

need before July 1, 2009. On April 16, 2009, the Department published an Interim Final Rule extending the transition period to include all employers with a date of need on or before January 1, 2010. See 74 FR 17597. Therefore, employers will experience no change from the current application filing and recruitment procedures.

During the 9-month suspension period, employer costs for newspaper advertising will decrease slightly, as this Final Rule suspends the requirement that one of the two required advertisements be run on a Sunday. This Final Rule temporarily reinstates the requirement on employers to engage in post-filing recruitment efforts as determined by the OFLC Administrator. It is the Department's view that the protections and opportunities for employment for U.S. workers provided by this requirement more than outweigh the marginal uncertainty in recruitment costs for employers.

During the 9-month suspension period, civil money penalties are returned to the level established in 1987 (maximum of $1,000 per violation). The Department recognizes the deterrent effect of civil money penalties on fostering greater program compliance under the Final Rule, and will use, as appropriate, all of the tools available to ensure compliance with H–2A program requirements.

In the December 2008 Rule, the Department estimated the biggest cost to employers of that rule to be the increased cost of foreign recruitment, since employers can no longer allow foreign recruiters with whom they were in privity of contract to charge foreign workers fees for recruitment. Despite the temporary suspension, the Department does not anticipate any increase in employer costs because regulations issued by the Department of Homeland Security, USCIS on December 18, 2008 prohibit the payment of certain job-placement related fees by prospective H–2A workers. See 73 FR 76891 (codified at 8 CFR 214.2(h)(5)(xi)). Employers are encouraged to review their obligations under the USCIS rule with respect to payments made by foreign workers to foreign recruiters.

The Department also estimated that employers' recordkeeping costs under the December 2008 Rule would increase minimally; with the return to the previous H–2A Final Rule, the costs associated with recordkeeping requirements will minimally decrease.

The Department identified no other specific cost changes as a result of the December 2008 Rule and therefore, can identify no other specific cost changes that would result from the temporary suspension of that rule.

Based on historical program use, the Department estimates that approximately 83% of applications will have been processed by the effective date of this Final Rule, therefore few applications will be subject to the previous H–2A program rules during the 9-month suspension. The Department recognizes that for the employers submitting applications under the reinstated regulations, particularly employers who have already received certifications based on the December 2008 Rule, there will be some confusion and perhaps a change in labor costs for applications filed after the effective date of the suspension due to the different adverse effect wage rate (AEWR) methodology. However, in analyzing those potential costs it is unclear that such costs will be significant based on the number of users who will have already initiated the application process prior to the suspension.

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 rule on small entities. See 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 rulemaking is not expected to have significant economic impact on a substantial number of small entities. The Secretary 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 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.

As a factual basis for such a certification, although this 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 affected. Of the total 2,089,790 farms in the United States, 98 percent have sales of less than $750,000 per year and fall within SBA's definition of small entities. In FY 2007, however, only 7,725 employers filed requests for only 80,294 workers. That represents fewer than 1 percent of all farms in the United States. Even if all of the 7,725 employers who filed applications under H–2A in FY2007 were small entities, that is still a relatively small number of employers affected. However, the universe of filers expected to file applications under this Final Rule is far fewer than the 7,725 employers who filed in FY2007. The Department estimates approximately 1,313 employers to file during the 9-month period this Final Rule is in place, not all of which would be small entities.

Even more important than the number of small entities affected, the Department believes, for the reasons stated above, that the costs incurred by employers under this Final 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 of Labor'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 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. Therefore, the Department believes that this Final Rule is expected to have little net direct cost impact on employers, above and beyond the baseline of the current costs required by the program as it is currently implemented.

C. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 *et seq.*) directs agencies to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector to determine whether the regulatory action imposes a Federal mandate which may result in expenditures by such governments or the private sector of $100,000,000 or more. A Federal mandate is defined in the Act at 2 U.S.C. 658(5)–(7) to include 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. Further, each agency is required to provide a process where State, local, and tribal governments may comment on the regulation as it develops, which further promotes

coordination between the Federal and the State, local, and tribal governments.

This Final Rule imposes a minimal duty upon State, local or tribal governments. However, as discussed above, this Final Rule will not result in expenditures of $100,000,000 by governments or private entities.

D. Executive Order 13132—Federalism

Executive Order 13132 addresses the Federalism impact of an agency's regulations on the States' authority. Under E.O. 13132, Federal agencies are required to consult with States prior to and during the implementation of national policies that have a direct effect on the States, the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Further, an agency is permitted to limit a State's discretion when it has statutory authority and the regulation is a national activity that addresses a problem of national significance. This Final Rule has no direct effect on the States, the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government.

E. Executive Order 13175—Indian Tribal Governments

Executive Order 13175 requires Federal agencies to develop policies in consultation with tribal officials when those policies have tribal implications. This final rule regulates the H–2A visa program and does not have tribal implications. Therefore, the Department has determined that this E.O. does not apply to this rulemaking.

F. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Federal regulations and policies on families. The assessment must address whether the regulation strengthens or erodes the stability, integrity, autonomy, or safety of the family.

The final rule does not have an impact on the autonomy or integrity of the family as an institution, as it is described under this provision. The Department has determined that although there may be some costs associated with the final rule, they are not of a magnitude to adversely affect family well-being.

G. Executive Order 12630—Protected Property Rights

Executive Order 12630, Governmental Actions and the Interference with Constitutionally Protected Property Rights, prevents the Federal government from taking private property for public use without compensation. It further institutes an affirmative obligation that agencies evaluate all policies and regulations to ensure there is no impact on constitutionally protected property rights. Such policies include rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. The Department has determined that this Final Rule has no effect on constitutionally protected property rights.

H. Executive Order 12988—Civil Justice Reform

Section 3 of E.O. 12988, Civil Justice Reform, requires Federal agencies to draft regulations in a manner that will reduce needless litigation and will not unduly burden the Federal court system. Therefore, agencies are required to review regulations for drafting errors and ambiguity; to minimize litigation; ensure that it provides a clear legal standard for affected conduct rather than a general standard; and promote simplification and burden reduction.

The rule has been drafted in language that states as clearly as possible the bases for the decision to suspend the December 2008 Rule and reinstate the Prior Rule. Therefore, the Department has determined that the regulation meets the applicable standards set forth in Section 3 of E.O. 12988. The Department received no comments about this section.

I. Plain Language

Every Federal agency is required to draft regulations that are written in plain language to better inform the public about policies. The Department has assessed this Final Rule under the plain language requirements and determined that it follows the Government's standards requiring documents to be accessible and understandable to the public. The purpose of this Final Rule is to provide to growers clear and consistent guidance on the requirements for participation in the H–2A temporary worker program, and to eliminate the potential for disruption, confusion, and processing delays resulting from the Department's and SWAs' lack of resources for efficient implementation of the temporarily suspended rule.

J. Executive Order 13211—Energy Supply

This final rule is not subject to E.O. 13211, which assesses whether a regulation is likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, the Department has determined that this rule does not represent a significant energy action and does not warrant a Statement of Energy Effects.

K. Paperwork Reduction Act

The paperwork requirements of this rule have been previously complied with in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Specifically, under the Prior Regulation, the information collection instrument used by the employer to file an application was the Form ETA–750. This is a currently approved collection under OMB control number 1205–0015, which expires 10/31/2011. Because the request for OMB to approve the extension of this collection was filed in 2008, prior to the effective date of the rule being now suspended, the burden information reported to OMB in that extension request took into account the H–2A program's time and monetary burden on the public. Therefore, no adjustments are necessary at this time.

List of Subjects

20 CFR Part 655

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

29 CFR Part 501

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

29 CFR Part 780

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

29 CFR Part 788

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

■ Accordingly, the Department of Labor amends 20 CFR part 655 and 29 CFR parts 501, 780, and 788 as follows:

Title 20—Employees' Benefits

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m), (n), and (t), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 323, Pub. L. 103–206, 107 Stat. 2149; Title IV, Pub. L. 105–277, 112 Stat. 2681; Pub. L. 106–95, 113 Stat. 1312 (8 U.S.C. 1182 note); and 8 CFR 213.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

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

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

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

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b1), 1182(n), 1182(t), and 1184; 29 U.S.C. 49 *et seq.*; sec 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and Title IV, Pub. L. 105–277, 112 Stat. 2681.

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

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c), 1182(m), and 1184; and 29 U.S.C. 49 *et seq.*

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

§ 655.5 [Redesignated as § 655.81 and Suspended]

■ 3a. Redesignate § 655.5 as § 655.81 and suspend it.

§ 655.1 [Redesignated as § 655.5 and Suspended]

■ 3b. Redesignate § 655.1 as § 655.5 and suspend it.

■ 4. Add § 655.1 to read as follows:

§ 655.1 Scope and purpose of subpart A.

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

Subpart B [Redesignated as Subpart N and Suspended]

■ 5. Redesignate subpart B, consisting of §§ 655.90, 655.92, 655.93, and 655.100 through 655.119, as subpart N, consisting of §§ 655.1290, 655.1292, 655.1293, and 655.1300 through 655.1319, and suspend newly designated subpart N.

■ 6. Add subpart B to read as follows:

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

Sec.

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

§ 655.90 Scope and purpose of subpart B.

(a) *General.* This subpart sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of: (1) 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 (2) whether the employment of H–2A workers will adversely effect the wages and working conditions of workers in the U.S. similarly employed. Under the authority of the INA, the Secretary of Labor has promulgated the regulations in this subpart. This subpart sets forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers in agriculture. This subpart provides the Secretary's methodology for the two-fold determination of availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers, for particular temporary and seasonal agricultural jobs in the United States.

(b) *The statutory standard.* (1) A petitioner for H–2A workers must apply to the Secretary of Labor for a certification that, as stated in the INA:

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

(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.

(2) Section 216(b) of the INA further requires that the Secretary may not issue a certification if the conditions regarding U.S. worker availability and adverse effect are not met, and may not issue a certification if, as stated in the INA:

(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 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 non-immigrant 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 multistate 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 * * * shall terminate on the date the H–2A workers depart for the employer's place of employment.

(3) Regarding the labor certification determination itself, section 216(c)(3) of the INA, as quoted in the following, specifically directs the Secretary to make the certification if:

(i) The employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) The employer does not actually have, or has not been provided with referrals of, qualified 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.

(c) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected must be established. (The regulations in this subpart establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F. 2d 299 (5th Cir. 1976). Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this subpart set forth requirements for recruiting U.S. workers in accordance with this principle.

(d) *Construction.* This subpart shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc.* v. *Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974); *Flecha* v. *Quiros*, 567 F. 2d 1154, 1156 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed. *Williams* v. *Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), cert. denied, 429 U.S. 1000, and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

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

Under this subpart, the accepting for consideration and the making of temporary alien agricultural labor certification determinations are ordinarily performed by the Office of Foreign Labor Certification (OFLC) Administrator (OFLC Administrator), who, in turn, may delegate this responsibility to a designated staff member. The OFLC Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

§ 655.93 Special circumstances.

(a) *Systematic process.* The regulations under this subpart are designed to provide a systematic process for handling applications from the kinds of employers who have historically utilized nonimmigrant alien workers in agriculture, usually in relation to the production or harvesting of a particular agricultural crop for market, and which normally share such characteristics as:

(1) A fixed-site farm, ranch, or similar establishment;

(2) A need for workers to come to their establishment from other areas to perform services or labor in and around their establishment;

(3) Labor needs which will normally be controlled by environmental conditions, particularly weather and sunshine; and

(4) A reasonably regular workday or workweek.

(b) *Establishment of special procedures.* In order to provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from the statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the OFLC Administrator has the authority to establish special procedures for processing 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 OFLC 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 § 655.107 of this part, provided that the OFLC Administrator uses a methodology to establish such adverse effect wage rates which is consistent with the methodology in § 655.107(a). Prior to making determinations under this paragraph (b), the OFLC Administrator may consult with employer representatives and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the OFLC Administrator to continue and, where the OFLC Administrator deems appropriate, to revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.

§ 655.100 Overview of this subpart and definition of terms.

(a) *Overview*—(1) *Filing applications.* This subpart provides guidance to an employer who desires to apply for temporary alien 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), which describes the material terms and conditions of employment to be offered and afforded to U.S. workers and H–2A workers, with the OFLC Administrator. The entire application shall be filed with the OFLC Administrator no less than 45 calendar days before the first date of need for workers, and a copy of the job offer shall be submitted at the same time to the local office of the State employment service agency which serves the area of intended employment. Under the regulations, the OFLC Administrator will promptly review the application and notify the applicant in writing if there are deficiencies which render the application not acceptable for consideration, and afford the applicant a five-calendar-day period for resubmittal of an amended application or an appeal of the OFLC Administrator's refusal to approve the application as acceptable for consideration. Employers are encouraged to file their applications in advance of the 45-calendar-day period mentioned above in this paragraph

(a)(1). Sufficient time should be allowed for delays that might arise due to the need for amendments in order to make the application acceptable for consideration.

(2) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the OFLC Administrator's certification determination, to increase the number of workers requested in the initial application; without requiring, under certain circumstances, an additional recruitment period for U.S. workers.

(3) *Untimely applications.* If an H–2A application does not satisfy the specified time requirements, this subpart provides for the OFLC Administrator's advice to the employer in writing that the certification cannot be granted because there is not sufficient time to test the availability of U.S. workers; and provides for the employer's right to an administrative review or a de novo hearing before an administrative law judge. Emergency situations are provided for, wherein the OFLC Administrator may waive the specified time periods.

(4) *Recruitment of U.S. workers; determinations*—(i) *Recruitment.* This subpart provides that, where the application is accepted for consideration and meets the regulatory standards, the State agency and the employer begin to recruit U.S. workers. If the employer has complied with the criteria for certification, including recruitment of U.S. workers, by 20 calendar days before the date of need specified in the application (except as provided in certain cases), the OFLC Administrator makes a determination to grant or deny, in whole or in part, the application for certification.

(ii) *Granted applications.* This subpart provides that the application for temporary alien agricultural labor certification is granted if the OFLC Administrator finds that the employer has not offered 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, and qualified 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 aliens 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 OFLC Administrator fees for each temporary alien agricultural labor certification received. The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee.

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

(iv) *Denied applications.* This subpart provides that if the application for temporary alien 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:

Accept for consideration means, with respect to an application for temporary alien agricultural labor certification, the action by the OFLC Administrator to notify the employer that a filed temporary alien agricultural labor certification application meets the adverse effect criteria necessary for processing. An application accepted for consideration ultimately will be approved or denied in a temporary alien agricultural labor certification determination.

Administrative law judge means a person within the Department of Labor 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 § 655.112 of this part. ''*Chief Administrative Law Judge*'' means the chief official of the Department of Labor 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 (OFLC Administrator), or the OFLC Administrator's designee.

Adverse effect wage rate (AEWR) means the wage rate which the OFLC Administrator has determined must be offered and paid, as a minimum, to every H–2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H–2A worker so 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 alien agricultural labor certification purposes, and (2) is not itself an employer, or a joint employer, as defined in this paragraph (b).

Department of Homeland Security (DHS) through the *United States Citizenship and Immigration Services (USCIS)* makes the determination under the INA on whether or not to grant visa petitions to employers seeking H–2A workers to perform temporary agricultural work in the United States.

DOL means the United States Department of Labor.

Eligible worker means a U.S. worker, as defined in this section.

Employer means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (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. An association of employers shall be considered the sole employer if it has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

Employment Service (ES), in this subpart, 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), the National Processing Centers (NPCs) and the Office of Foreign Labor Certification (OFLC).

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

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

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

H–2A worker means any nonimmigrant alien 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)).

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 both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

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

Office of Foreign Labor Certification (OFLC) means the organizational component within 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 alien workers seeking admission to the United States in order to work under the Immigration and Nationality Act, as amended.

Positive recruitment means the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in 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:

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

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

Secretary means the Secretary of Labor or the Secretary's designee.

Solicitor of Labor means the Solicitor, United States Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

State Workforce Agency (SWA) means the State employment service agency designated under § 4 of the Wagner-Peyser Act to cooperate with OFLC in the operation of the ES System.

Temporary alien 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 import an alien as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 216 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 alien 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 1186).

Temporary alien 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 temporary alien agricultural labor certification.

United States (U.S.) worker means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as defined at § 101(a)(38) of the INA (8 U.S.C. 1101(a)(38)).

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 section 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 either ''agricultural labor'' as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or ''agriculture'' as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be ''agricultural labor or services'', notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below:

(i) ''*Agricultural labor*''. Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), quoted as follows, defines the term ''agricultural labor'' to include all service performed:

> (1) 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;
>
> (2) Services performed 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;
>
> (3) 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;
>
> (4)(A) 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;
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> (B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, 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;
>
> (C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable

with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) 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.

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.

(ii) ''*Agriculture*''. Section 203(f) of title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938, as codified), quoted as follows, defines ''agriculture'' to include:

(f) * * * 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.

(iii) ''*Agricultural commodity*''. Section 1141j(g) of title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended), quoted as follows, defines ''agricultural commodity'' to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of Title 7.

(iv) ''*Gum rosin*''. Section 92 of title 7, United States Code, quoted as follows, defines ''gum spirits of turpentine'' and ''gum rosin'' as—

(c) ''*Gum spirits of turpentine*'' means spirits of turpentine made from gum (oleoresin) from a living tree.

(h) ''*Gum rosin*'' means rosin remaining after the distillation of gum spirits of turpentine.

(2) ''*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 Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* For informational purposes, the definition of ''on a seasonal or other temporary basis'', as set forth at 29 CFR 500.20, is provided below:

''*On a seasonal or other temporary basis*'' means:

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.

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.

''*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.

''*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, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part.

§ 655.101 Temporary alien agricultural labor certification applications.

(a) *General*—(1) *Filing of application.* An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the OFLC Administrator, for a temporary alien agricultural labor certification for temporary foreign workers (H–2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the OFLC Administrator. At the same time, a duplicate application shall be submitted to the SWA serving the area of intended employment.

(2) *Applications filed by agents.* If the temporary alien agricultural labor certification application is filed by an agent on behalf of an employer, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer's behalf. The employer may authorize the agent to accept for interview workers being referred to the job and to make hiring commitments on behalf of the employer. The statement shall specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for compliance with all regulatory and other legal requirements.

(3) *Applications filed by associations.* If an association of agricultural producers which uses agricultural labor or services files the application, the association shall identify whether it is: (i) The sole employer; (ii) a joint employer with its employer-member employers; or (iii) the agent of its employer-members. The association shall submit documentation sufficient to enable the OFLC Administrator to verify the employer or agency status of the association; and shall identify by name and address each member which will be an employer of H–2A workers.

(b) *Application form.* Each H–2A application shall be on a form or forms prescribed by ETA. The application shall state the total number of workers the employer anticipates employing in the agricultural labor or service activity during the covered period of employment. The application shall include:

(1) *A copy of the job offer which will be used by each employer for the recruitment of U.S. and H–2A workers.* The job offer shall state the number of workers needed by the employer, based upon the employer's anticipation of a shortage of U.S. workers needed to perform the agricultural labor or services, and the specific estimated date on which the workers are needed. The job offer shall comply with the requirements of §§ 655.102 and 653.501 of this chapter, and shall be signed by the employer or the employer's agent on behalf of the employer; and

(2) An agreement to abide by the assurances required by § 655.103 of this part.

(c) *Timeliness.* Applications for temporary alien agricultural labor certification are not required to be filed

more than 45 calendar days before the first day of need. The employer shall be notified by the OFLC Administrator in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The OFLC Administrator's temporary alien agricultural labor certification determination on the approved application shall be made no later than 20 calendar days before the date of need if the employer has complied with the criteria for certification. To allow for the availability of U.S. workers to be tested, the following process applies:

(1) *Application filing date.* The entire H–2A application, including the job offer, shall be filed with the OFLC Administrator, in duplicate, no less than 45 calendar days before the first date on which the employer estimates that the workers are needed. Applications may be filed in person; may be mailed to the OFLC Administrator (Attention: H–2A Certifying Officer) by certified mail, return receipt requested; or delivered by guaranteed commercial delivery which will ensure delivery to the OFLC Administrator and provide the employer with a documented acknowledgment of receipt of the application by the OFLC Administrator. Any application received 45 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the OFLC Administrator as being acceptable for processing.

(2) *Review of application; recruitment; certification determination period.* Section 655.104 of this part requires the OFLC Administrator to promptly review the application, and to notify the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration and to afford an opportunity for resubmittal of an amended application. The employer shall have five calendar days in which to file an amended application. Section 655.106 of this part requires the OFLC Administrator to grant or deny the temporary alien agricultural labor certification application no later than 20 calendar days before the date on which the workers are needed, provided that the employer has complied with the criteria for certification, including recruitment of eligible individuals. Such recruitment, for the employer, the State agencies, and DOL to attempt to locate U.S. workers locally and through the circulation of intrastate and interstate agricultural clearance job orders acceptable under § 653.501 of this chapter and under this subpart, shall begin on the date that an acceptable application is filed, except that the SWA shall begin to recruit workers locally beginning on the date it first receives the application. The time needed to obtain an application acceptable for consideration (including the job offer) after the five-calendar-day period allowed for an amended application will postpone day-for-day the certification determination beyond the 20 calendar days before the date of need, provided that the OFLC Administrator notifies the applicant of any deficiencies within seven calendar days after receipt of the application. Delays in obtaining an application acceptable for consideration which are directly attributable to the OFLC Administrator will not postpone the certification determination beyond the 20 calendar days before the date of need. When an employer resubmits to the OFLC Administrator (with a copy to the SWA) an application with modifications required by the OFLC Administrator, and the OFLC Administrator approves the modified application as meeting necessary adverse effect standards, the modified application will not be rejected solely because it now does not meet the 45-calendar-day filing requirement. If an application is approved as being acceptable for processing without need for any amendment within the seven-calendar-day review period after initial filing, recruitment of U.S. workers will be considered to have begun on the date the application was received by the OFLC Administrator; and the OFLC Administrator shall make the temporary alien agricultural labor certification determination required by § 655.106 of this part no later than 20 calendar days before the date of need provided that other regulatory conditions are met.

(3) *Early filing.* Employers are encouraged, but not required, to file their applications in advance of the 45-calendar-day minimum period specified in paragraph (c)(1) of this section, to afford more time for review and discussion of the applications and to consider amendments, should they be necessary. This is particularly true for employers submitting H–2A applications for the first time who may not be familiar with the Secretary's requirements for an acceptable application or U.S. worker recruitment. Such employers particularly are encouraged to consult with DOL and SWA staff for guidance and assistance well in advance of the minimum 45-calendar-day filing period.

(4) *Local recruitment; preparation of clearance orders.* At the same time the employer files the H–2A application with the OFLC Administrator, a copy of the application shall be submitted to the SWA which will use the job offer portion of the application to prepare a local job order and begin to recruit U.S. workers in the area of intended employment. The SWA also shall begin preparing an agricultural clearance order, but such order will not be used to recruit workers in other geographical areas until the employer's H–2A application is accepted for consideration and the clearance order is approved by the OFLC Administrator and the SWA is so notified by the OFLC Administrator.

(5) [Reserved]

(d) *Amendments to application to increase number of workers.* Applications may be amended at any time, prior to an OFLC Administrator certification determination, to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than ten workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved only when the need for additional workers could not have been foreseen, and that crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(e) *Minor amendments to applications.* Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the OFLC Administrator determines they are justified and will have no significant effect upon the OFLC Administrator's ability to make the labor certification determination required by § 655.106 of this part. Amendments described at paragraph (d) of this section are not ''minor technical amendments''.

(f) *Untimely applications*—(1) *Notices of denial.* If an H–2A application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the OFLC Administrator may then advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial shall inform the employer of its right to an administrative review or de novo hearing before an administrative law judge.

(2) *Emergency situations.* Notwithstanding paragraph (f)(1) of this section, in emergency situations the

OFLC Administrator may waive the time period specified in this section on behalf of employers who have not made use of temporary alien agricultural workers (H–2 or H–2A) for the prior year's agricultural season or for any employer which has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the OFLC Administrator has an opportunity to obtain sufficient labor market information on an expedited basis to make the labor certification determination required by § 216 of the INA (8 U.S.C. 1186). In making this determination, the OFLC Administrator will accept information offered by and may consult with representatives of the U.S. Department of Agriculture.

(g) *Length of job opportunity.* The employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the OFLC Administrator that the need for the worker is ''of a temporary or seasonal nature'', as defined at § 655.100(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the OFLC Administrator shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H–2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, except in extraordinary circumstances.

§ 655.102 Contents of job offers.

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

(b) *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, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H–2A application always shall include each of the following minimum benefit, wage, and working condition provisions:

(1) *Housing.* The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

(i) *Standards for employer-provided housing.* Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404–654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii) of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at § 654.403 of this chapter.

(ii) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL Occupational Safety and Health Administration 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.

(iii) *Standards for other habitation.* Rental, public accommodation, or other substantially similar class of habitation must meet 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, Occupational Safety and Health Administration 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 OFLC Administrator that the housing complies with the local, State, or Federal housing standards applicable under this paragraph (b)(1)(iii).

(iv) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by an employer, and use of the public housing unit normally requires charges from migrant workers, such charges shall be paid by the employer directly to the appropriate individual or entity affiliated with the housing's management.

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

(vi) *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.

(2) *Workers' compensation.* The employer shall provide, at no cost to the worker, 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 which will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the OFLC Administrator prior to the issuance of a labor certification.

(3) *Employer-provided items.* Except as provided below, the employer shall provide, without charge including deposit charge, to the worker 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 is permissible if approved in advance by the OFLC Administrator.

(4) *Meals.* Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall provide each worker with three meals a day. When such facilities are not available, 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 which 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 (b)(4), the charge shall not be more than $5.26 per day unless the OFLC Administrator has approved a higher charge pursuant to § 655.111 of this part. Each year the charge allowed by this paragraph (b)(4) 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 OFLC Administrator as a notice in the **Federal Register**.

(5) *Transportation; daily subsistence*—(i) *Transportation to place of employment.* The employer shall advance transportation and subsistence costs (or otherwise provide them) to workers 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 amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved. 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. 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. If no charges will be made for meals and free and convenient cooking and kitchen facilities will be provided, the amount of the subsistence payment shall be no less than the amount permitted under paragraph (b)(4) of this section.

(ii) *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 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; except that, if the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer is not required to provide or pay for such expenses.

(iii) *Transportation between living quarters and worksite.* The employer shall provide transportation between the worker's living quarters (i.e., housing provided by the employer pursuant to paragraph (b)(1) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations. This paragraph (b)(5)(iii) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (b)(1) of this section.

(6) *Three-fourths guarantee*—(i) *Offer to worker.* The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods 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 and ending on the expiration date specified in the work contract or in its extensions, if any. 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 (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the guaranteed number of days. For purposes of this paragraph (b)(6), 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. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time specified in the job order. The work shall be offered for at least three-fourths of the workdays (that is, ¾ × (number of days) × (specified hours)). Therefore, if, for example, the contract contains 20 eight-hour workdays, the worker shall be offered employment for 120 hours during the 20 workdays. 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 hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays.

(ii) *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 AEWR, whichever is higher, to calculate the amount due under the guarantee.

(iii) *Failure to work.* Any hours which 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 pursuant to paragraph (b)(6)(i) of this section and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(iv) *Displaced H–2A worker.* The employer shall not be liable for payment under this paragraph (b)(6) with respect to an H–2A worker whom the OFLC Administrator certifies is displaced because of the employer's compliance with § 655.103(e) of this part.

(7) *Records.* (i) The employer shall keep accurate and adequate records with respect to the workers' earnings including 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 (b)(6) 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;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the three-fourths guarantee at paragraph (b)(6) of this section, the records shall state the reason or reasons therefore.

(iii) Upon reasonable notice, the employer shall make available the records, 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

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

(8) *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:

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

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

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

(iv) The hours actually worked by the worker;

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

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

(9) *Rates of pay.* (i) 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

(ii)(A) 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

(B) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention,

(*1*) Such standards shall be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum; or

(*2*) If the employer first applied for H–2 agricultural or H–2A temporary alien agricultural labor certification after 1977, such standards shall be no more than those normally required (at the time of the first application) by other employers for the activity in the area of intended employment, unless the OFLC Administrator approves a higher minimum.

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

(11) *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 SWA of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section, and that worker is not entitled to the ''three-fourths guarantee'' (see paragraph (b)(6) of this section).

(12) *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 which makes the fulfillment of the contract impossible the employer may terminate the work contract. In the event of such termination of a contract, the employer shall fulfill the three-fourths guarantee at paragraph (b)(6) of this section for the time that has elapsed from the start of the work contract to its termination. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the employer shall:

(i) Offer to return the worker, at the employer's expense, to the place from which the worker disregarding intervening employment came to work for the employer,

(ii) 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

(iii) Notwithstanding whether the employment has been terminated prior to completion of 50 percent of the work contract period originally offered by the employer, pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker, without intervening employment, has come to work for the employer to the place of employment. Daily subsistence shall be computed as set forth in paragraph (b)(5)(i) 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 similar common carrier transportation charges for the distances involved.

(13) *Deductions.* The employer shall make those deductions from the worker's paycheck which are 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. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the Federal minimum wage permitted by the FLSA as determined by the Secretary at 29 CFR part 531.

(14) *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) and (b) 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 job order and application for temporary alien agricultural labor certification shall be the work contract.

(c) *Appropriateness of required qualifications.* Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops, and shall be reviewed by the OFLC Administrator for their appropriateness. The OFLC Administrator may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer; and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

(d) *Positive recruitment plan.* The employer shall submit in writing, as a part of the application, the employer's plan for conducting independent, positive recruitment of U.S. workers as required by §§ 655.103 and 655.105(a) of this part. Such a plan shall include a description of recruitment efforts (if any) made prior to the actual submittal of the application. The plan shall describe how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area

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

§ 655.103 Assurances.

As part of the temporary alien agricultural labor certification application, the employer shall include in the job offer a statement agreeing to abide by the conditions of this subpart. By so doing, the employer makes each of the following assurances:

(a) *Labor disputes.* The specific job opportunity for which the employer is requesting H–2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(b) *Employment-related laws.* During the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable Federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.

(c) *Rejections and terminations of U.S. workers.* No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the SWA.

(d) *Recruitment of U.S. workers.* The employer shall independently engage in positive recruitment until the foreign workers have departed for the employer's place of employment and shall cooperate with the ES System in the active recruitment of U.S. workers by:

(1) Assisting the ES System to prepare local, intrastate, and interstate job orders using the information supplied on the employer's job offer;

(2) Placing advertisements (in a language other than English, where the OFLC Administrator determines appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator:

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier, if appropriate; and

(ii) Each such advertisement shall direct interested workers to apply for the job opportunity at the appropriate office of the State Workforce Agency in their area;

(3) Cooperating with the ES System and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone; and

(4) Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers.

(e) *Fifty-percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by § 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other benefits, wages, and working conditions required by § 655.102 of this part to any such U.S. worker and shall not treat less favorably than H–2A workers any U.S. worker referred or transferred pursuant to this assurance.

(f) *Other recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the OFLC Administrator required by § 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H–2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H–2A agricultural employers and shall provide an override which is no less than that being provided by non-H–2A agricultural employers. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an override. The employer shall not be required to provide for housing through an override.

(g) *Retaliation prohibited.* The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to § 216 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA (8 U.S.C. 1186);

(3) Testified or is about to testify in any proceeding under or related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA.

(h) *Fees.* The application shall include the assurance that fees will be paid in a timely manner, as follows:

(1) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, the fee for each employer-member receiving a temporary alien agricultural labor certification shall be $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be

charged a separate fee. Fees shall be paid by a check or money order made payable to ''Department of Labor'', and are nonrefundable. In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the OFLC Administrator within 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

§ 655.104 Determinations based on acceptability of H–2A applications.

(a) *State Workforce Agency activities.* The State Workforce Agency (SWA), using the job offer portion of the H–2A application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment. The OFLC Administrator should notify the SWA by telephone no later than seven calendar days after the application was received by the OFLC Administrator if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the SWA, whichever is earlier, the SWA shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *National Processing Center activities.* The OFLC Administrator, upon receipt of the H–2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§ 655.101–655.103 of this part. If the OFLC Administrator determines that the application does not meet the requirements of §§ 655.101–655.103, the OFLC Administrator shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the OFLC Administrator determines that the application is not timely in accordance with § 655.101 of this part and that neither the first-year employer provisions of § 655.101(c)(5) nor the emergency provisions of § 655.101(f) apply, the OFLC Administrator may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.

(c) *Rejected applications.* If the application is not accepted for consideration, the OFLC Administrator shall notify the applicant in writing (by means normally assuring next-day delivery) within seven calendar days of the date the application was received by the OFLC Administrator with a copy to the SWA. The notice shall:

(1) State all the reasons the application is not accepted for consideration, citing the relevant regulatory standards;

(2) Offer the applicant an opportunity for the resubmission within five calendar days of a modified application, stating the modifications needed in order for the OFLC Administrator to accept the application for consideration;

(3) Offer the applicant an opportunity to request an expedited administrative review of or a de novo administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date 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 Department of Labor (giving the address) and simultaneously serve a copy on the OFLC Administrator; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the OFLC Administrator's action; and

(4) 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 seven calendar days no further consideration of the employer's application for temporary alien agricultural labor certification will be made by any DOL official.

(d) *Appeal procedures.* If the employer timely requests an expedited administrative review or de novo hearing before an administrative law judge pursuant to paragraph (c)(3) of this section, the procedures at § 655.112 of this part shall be followed.

(e) *Required modifications.* If the application is not accepted for consideration by the OFLC Administrator, but the OFLC Administrator's written notification to the applicant is not timely as required by § 655.101 of this part, the certification determination will not be extended beyond 20 calendar days before the date of need. The notice will specify that the OFLC Administrator's temporary alien agricultural labor certification determination will be made no later than 20 calendar days before the date of need, provided that the applicant submits the modifications to the application which are required by the OFLC Administrator within five calendar days and in a manner specified by the OFLC Administrator which will enable the test of U.S. worker availability to be made as required by § 655.101 of this part within the time available for such purposes.

§ 655.105 Recruitment period.

(a) *Notice of acceptance of application for consideration; required recruitment.* If the OFLC Administrator determines that the H–2A application meets the requirements of §§ 655.101–655.103 of this part, the OFLC Administrator shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.103 with respect to the recruitment of U.S. workers. The notice shall require that the job order be laced into intrastate clearance and into interstate clearance to such States as the OFLC Administrator shall determine to be potential sources of U.S. workers. The notice may require the employer to engage in positive recruitment efforts within a multi-State region of traditional or expected labor supply where the OFLC Administrator finds, based on current information provided by a State agency and such information as may be offered and provided by other sources, that there are a significant number of able and qualified U.S. workers who, if recruited, would likely be willing to make themselves available for work at the time and place needed. In making such a finding, the OFLC Administrator shall take into account other recent recruiting efforts in those areas and will attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations. Positive recruitment is in addition to, and shall be conducted within the same time period as, the circulation through the interstate clearance system of an agricultural clearance order. The obligation to engage in such positive recruitment shall terminate on the date H–2A workers depart for the employer's place of work. In determining what positive recruitment shall be required, the OFLC Administrator will ascertain the normal recruitment practices of non-H–2A agricultural employers in the area and the kind and degree of recruitment efforts which the potential H–2A employer made to obtain H–2A workers.

The OFLC Administrator shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H–2A employer, during the period after filing the application and before the date the H–2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H–2A employer made to obtain H–2A workers.

(b) *Recruitment of U.S. workers.* After an application for temporary alien agricultural labor certification is accepted for processing pursuant to paragraph (a) of this section, the OFLC Administrator shall provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers.

(c) *Modifications.* At any time during the recruitment effort, the OFLC Administrator may require modifications to a job offer when the OFLC Administrator determines that the job offer does not contain all the provisions relating to minimum benefits, wages, and working conditions, required by § 655.102(b) of this part. If any such modifications are required after an application has been accepted for consideration by the OFLC Administrator, the modifications must be made; however, the certification determination shall not be delayed beyond the 20 calendar days prior to the date of need as a result of such modification.

(d) *Final determination.* By 20 calendar days before the date of need specified in the application, except as provided for under §§ 655.101(c)(2) and 655.104(e) of this part for untimely modified applications, the OFLC Administrator, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.103 of this part. If the OFLC Administrator concludes that the employer has not satisfied the requirements for recruitment of U.S. workers, the OFLC Administrator shall deny the temporary alien agricultural labor certification, and shall immediately notify the employer in writing with a copy to the SWA. The notice shall contain the statements specified in § 655.104(d) of this part.

(e) *Appeal procedure.* With respect to determinations by the OFLC Administrator pursuant to this section, if the employer timely requests an expedited administrative review or a de novo hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

§ 655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.

(a) *Referral of able, willing, and qualified eligible U.S. workers.* With respect to the referral of U.S. workers to job openings listed on a job order accompanying an application for temporary alien agricultural labor certification, no U.S. worker-applicant shall be referred unless such U.S. worker has been made aware of the terms and conditions of and qualifications for the job, and has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job.

(b)(1) *Determinations.* If the OFLC Administrator, in accordance with § 655.105 of this part, has determined that the employer has complied with the recruitment assurances and the adverse effect criteria of § 655.102 of this part, by the date specified pursuant to § 655.101(c)(2) of this part for untimely modified applications or 20 calendar days before the date of need specified in the application, whichever is applicable, the OFLC Administrator shall grant the temporary alien agricultural labor certification request for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the OFLC Administrator shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads. Such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the OFLC Administrator determines are likely to sign a work contract. The OFLC Administrator shall count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons or who has not been provided with a lawful job-related reason for rejection by the employer, as determined by the OFLC Administrator. The OFLC Administrator shall not grant a temporary alien agricultural labor certification request for any H–2A workers if the OFLC Administrator determines that:

(i) Enough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer's job opportunities;

(ii) The employer, since the time the application was accepted for consideration under § 655.104 of this part, has adversely affected U.S. workers by offering to, or agreeing to provide to, H–2A workers better wages, working conditions or benefits (or by offering to, or agreeing to impose on alien workers less obligations and restrictions) than those offered to U.S. workers;

(iii) The employer during the previous two-year period employed H–2A workers and the OFLC Administrator 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 a temporary alien agricultural labor certification with respect to the employment of U.S. or H–2A workers;

(iv) The employer has not complied with the workers' compensation requirements at § 655.102(b)(2) of this part; or

(v) The employer has not satisfactorily complied with the positive recruitment requirements specified by this subpart.

Further, the OFLC Administrator, in making the temporary alien agricultural labor certification determination, will subtract from any temporary alien agricultural labor certification the specific verified number of job opportunities involved which are vacant because of a strike or other labor dispute involving a work stoppage, or a lockout, in the occupation at the place of employment (and for which H–2A workers have been requested). Upon receipt by the OFLC Administrator of such labor dispute information from any source, the OFLC Administrator shall verify the existence of the strike, labor dispute, or lockout and any resulting vacancies prior to making such a determination.

(2) *Fees.* A temporary alien agricultural labor certification determination granting an application shall include a bill for the required fees. Each employer (except joint employer associations) of H–2A workers under the application for temporary alien agricultural labor certification shall pay in a timely manner a nonrefundable fee upon issuance of the temporary alien agricultural labor certification granting the application (in whole or in part), as follows:

(i) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is $100 plus $10 for

each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, each employer-member receiving a temporary alien agricultural labor certification shall pay a fee of $100 plus $10 for each job opportunity for H–2A workers certified, provided that the fee to an employer for each temporary alien agricultural labor certification received shall be no greater than $1,000. The joint employer association will not be charged a separate fee. The fees shall be paid by check or money order made payable to ''Department of Labor''. In the case of employers of H–2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application may be paid by one check or money order.

(ii) *Timeliness.* Fees received by the OFLC Administrator no more than 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

(c) Changes to temporary alien agricultural labor certifications; temporary alien agricultural labor certifications involving employer associations—(1) Changes. Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the OFLC Administrator after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from one employer to another, except as provided for by paragraph (c)(2) of this section.

(2) *Associations*—(i) *Applications.* If an association is requesting a temporary alien agricultural labor certification as a joint employer, the temporary alien agricultural labor certification granted under this section shall be made jointly to the association and to its employer members. Except as provided in paragraph (c)(2)(iii) of this section, such workers may be transferred among its producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members. If an association is requesting a temporary alien agricultural labor certification as a sole employer, the temporary alien agricultural labor certification granted pursuant to this section shall be made to the association only.

(ii) *Referrals and transfers.* For the purposes of complying with the ''fifty-percent rule'' at § 655.103(e) of this part, any association shall be allowed to refer or transfer workers among its members (except as provided in paragraph (c)(2)(iii) of this section), and an association acting as an agent for its members shall not be considered a joint employer merely because of such referral or transfer.

(iii) *Ineligible employer-members.* Workers shall not be transferred or referred to an association's member, if that member is ineligible to obtain any or any additional workers, pursuant to § 655.110 of this part.

(3) *Extension of temporary alien agricultural labor certification*—(i) *Short-term extension.* An employer who seeks an extension of two weeks or less of the temporary alien agricultural labor certification shall apply for such extension to DHS. If DHS grants such an extension, the temporary alien agricultural labor certification shall be deemed extended for such period as is approved by DHS. No extension granted under this paragraph (c)(3)(i) shall be for a period longer than the original work contract period of the temporary alien agricultural labor certification.

(ii) *Long-term extension.* For extensions beyond the period which may be granted by DHS pursuant to paragraph (c)(3)(i) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the OFLC Administrator for an extension of the period of the temporary alien agricultural labor 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 OFLC Administrator shall grant or deny the request for extension of the temporary alien agricultural labor certification based on available information, and shall notify the employer of the decision on the request in writing. The OFLC Administrator shall not grant an extension where the total work contract period, including past temporary alien labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The OFLC Administrator shall not grant an extension where the temporary alien agricultural labor certification has already been extended by DHS pursuant to paragraph (c)(3)(i) of this section.

(d) *Denials of applications.* If the OFLC Administrator does not grant the temporary alien agricultural labor certification (in whole or in part) the OFLC Administrator shall notify the employer by means reasonably calculated to assure next-day delivery. The notification shall contain all the statements required in § 655.104(c) of this part. If a timely request is made for an administrative-judicial review or a de novo hearing by an administrative law judge, the procedures of § 655.112 of this part shall be followed.

(e) *Approvals of applications*—(1) *Continued recruitment of U.S. workers.* After a temporary agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers until the actual date the H–2A workers depart for the employer's place of employment.

(i) Unless the SWA is informed in writing of a different date, the SWA shall deem the third day immediately preceding the employer's first date of need to be the date the H–2A workers depart for the employer's place of employment. The employer may notify the SWA in writing if the workers depart prior to that date.

(ii)(A) If the H–2A workers do not depart for the place of employment on or before the first date of need (or by the stated date of departure, if the SWA has been advised of a different date), the employer shall notify the SWA in writing (or orally, confirmed in writing) as soon as the employer knows that the workers will not depart by the first date of need, and in no event later than such date of need. At the same time, the employer shall notify the SWA of the workers' expected departure date, if known. No further notice is necessary if the workers depart by the stated date of departure.

(B) If the employer did not notify the SWA of the expected departure date pursuant to paragraph (e)(1)(ii)(A) of this section, or if the H–2A workers do not leave for the place of employment on or before the stated date of departure, the employer shall notify the SWA in

writing (or orally, confirmed in writing) as soon as the employer becomes aware of the expected departure date, or that the workers did not depart by the stated date and the new expected departure date, as appropriate.

(2) *Requirement for Active Job Order.* The employer shall keep an active job order on file until the ''50-percent rule'' assurance at § 655.103(e) of this part is met, except as provided by paragraph (f) of this section.

(3) *Referrals by ES System.* The ES system shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

(f) *Exceptions*—(1) *''Fifty-percent rule'' inapplicable to small employers.* The assurance requirement at § 655.103(e) of this part does not apply to any employer who:

(i) Did not, during any calendar quarter during the preceding calendar year, use more than 500 ''man-days'' of agricultural labor, as defined in section 3(u) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(u)), and so certifies to the OFLC Administrator in the H–2A application; and

(ii) Is not a member of an association which has applied for a temporary alien agricultural labor certification under this subpart for its members; and

(iii) Has not otherwise ''associated'' with other employers who are applying for H–2A workers under this subpart, and so certifies to the OFLC Administrator.

(2) *Displaced H–2A workers.* An employer shall not be liable for payment under § 655.102(b)(6) of this part with respect to an H–2A worker whom the OFLC Administrator certifies is displaced due to compliance with § 655.103(e) of this part.

(g) *Withholding of U.S. workers prohibited*—(1) *Complaints.* Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers under § 655.103(e) of this part may submit a written complaint to the SWA. The complaint shall clearly identify the person or entity whom the employer believes has withheld the U.S. workers, and shall specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the SWA.

(2) *Investigations.* The SWA shall inform the OFLC Administrator by telephone that a complaint under the provisions of paragraph (g) of this section has been filed and shall immediately investigate the complaint. Such investigation shall include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld. In the event the SWA fails to conduct such interviews, the OFLC Administrator shall do so.

(3) *Reports of findings.* Within five working days after receipt of the complaint, the SWA shall prepare a report of its findings, and shall submit such report (including recommendations) and the original copy of the employer's complaint to the OFLC Administrator.

(4) *Written findings.* The OFLC Administrator shall immediately review the employer's complaint and the report of findings submitted by the local office, and shall conduct any additional investigation the OFLC Administrator deems appropriate. No later than 36 working hours after receipt of the employer's complaint and the local office's report, the OFLC Administrator shall issue written findings to the local office and the employer. Where the OFLC Administrator determines that the employer's complaint is valid and justified, the OFLC Administrator shall immediately suspend the application of § 655.103(e) of this part to the employer. Such suspension of § 655.103(e) of this part under these circumstances shall not take place, however, until the interviews required by paragraph (g)(2) of this section have been conducted. The OFLC Administrator's determination under the provisions of this paragraph (g)(4) shall be the final decision of the Secretary, and no further review by any DOL official shall be given to it.

(h) *Requests for new temporary alien agricultural labor certification determinations based on nonavailability of able, willing, and qualified U.S. workers*—(1) *Standards for requests.* If a temporary alien agricultural labor certification application has been denied (in whole or in part) based on the OFLC Administrator's determination of the availability of able, willing, and qualified U.S. workers, and, on or after 20 calendar days before the date of need specified in the temporary alien agricultural labor certification determination, such U.S. workers identified as being able, willing, qualified, and available are, in fact, not able, willing, qualified, or available at the time and place needed, the employer may request a new temporary alien agricultural labor certification determination from the OFLC Administrator. The OFLC Administrator shall expeditiously, but in no case later than 72 hours after the time a request is received, make a determination on the request.

(2) *Filing requests.* The employer's request for a new determination shall be made directly to the OFLC Administrator. The request may be made to the OFLC Administrator by telephone, but shall be confirmed by the employer in writing as required by paragraphs (h)(2)(i) or (ii) of this section.

(i) *Workers not able, willing, qualified, or eligible.* If the employer asserts that any worker who has been referred by the ES System or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H–2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified, or eligible because of lawful job-related reasons. The employer's burden of proof shall be met by the employer's submission to the OFLC Administrator, within 72 hours of the OFLC Administrator's receipt of the request for a new determination, of a signed statement of the employer's assertions, which shall identify each rejected worker by name and shall state each lawful job-related reason for rejecting that worker.

(ii) *U.S. workers not available.* If the employer telephonically requests the new determination, asserting solely that U.S. workers are not available, the employer shall submit to the OFLC Administrator a signed statement confirming such assertion. If such signed statement is not received by the OFLC Administrator within 72 hours of the OFLC Administrator's receipt of the telephonic request for a new determination, the OFLC Administrator may make the determination based solely on the information provided telephonically and the information (if any) from the SWA.

(3) *National Processing Center review*—(i) *Expeditious review.* The OFLC Administrator expeditiously shall review the request for a new determination. The OFLC Administrator may request a signed statement from the SWA in support of the employer's assertion of U.S. worker nonavailability or referred U.S. workers not being able, willing, or qualified because of lawful job-related reasons.

(ii) *New determination.* If the OFLC Administrator determines that the employer's assertion of nonavailability is accurate and that no able, willing, or qualified U.S. worker has been refused or is being refused employment for other than lawful job-related reasons,

the OFLC Administrator shall, within 72 hours after receipt of the employer's request, render a new determination. Prior to making a new determination, the OFLC Administrator promptly shall ascertain (which may be through the ES System or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received.

(iii) *Notification of new determination.* If the OFLC Administrator cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the OFLC Administrator shall grant the employer's new determination request (in whole or in part) based on available information as to replacement U.S. worker availability. The OFLC Administrator's notification to the employer on the new determination shall be in writing (by means normally assuring next-day delivery), and the OFLC Administrator's determination under the provisions of this paragraph (h)(3) shall be the final decision of the Secretary, and no further review shall be given to an employer's request for a new H–2A determination by any DOL official. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.107 Adverse effect wage rates (AEWRs).

(a) *Computation and publication of AEWRs.* Except as otherwise provided in this section, the AEWRs for all agricultural employment (except for those occupations deemed inappropriate under the special circumstances provisions of § 655.93 of this part) for which temporary alien agricultural labor certification is being sought shall be equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey. The OFLC Administrator shall publish, at least once in each calendar year, on a date or dates to be determined by the OFLC Administrator, AEWRs for each State (for which USDA publishes regional data), calculated pursuant to this paragraph (a) as a notice or notices in the **Federal Register**.

(b) *Higher prevailing wage rates.* If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the OFLC Administrator) is found to be higher that the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

(c) *Federal minimum wage rate.* In no event shall an AEWR computed pursuant to this section be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

§ 655.108 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving a temporary alien agricultural labor certification application is discovered prior to a final temporary alien agricultural labor certification determination or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the OFLC Administrator shall refer the matter to the DHS and DOL Office of the Inspector General for investigation. The OFLC Administrator shall continue to process the application and may issue a temporary alien agricultural labor certification.

(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 OFLC Administrator shall not deny the temporary alien agricultural labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) *Terminated processing.* If a court or the DHS determines that there was fraud or willful misrepresentation involving a temporary alien agricultural labor certification application, the application is thereafter invalid, consideration of the application shall be terminated and the OFLC Administrator shall return the application to the employer or agent with the reasons therefor stated in writing.

§ 655.110 Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications.

(a) *Investigation of violations.* If, during the period of two years after a temporary alien agricultural labor certification has been granted (in whole or in part), the OFLC Administrator has reason to believe that an employer violated a material term or condition of the temporary alien agricultural labor certification, the OFLC Administrator shall, except as provided in paragraph (b) of this section, investigate the matter. If, after the investigation, the OFLC Administrator determines that a substantial violation has occurred, the OFLC Administrator, shall notify the employer that a temporary alien agricultural certification request will not be granted for the next period of time in a calendar year during which the employer would normally be expected to request a temporary alien agricultural labor certification, and any application subsequently submitted by the employer for that time period will not be accepted by the OFLC Administrator. If multiple or repeated substantial violations are involved, the OFLC Administrator's notice to the employer shall specify that the prospective denial of the temporary alien agricultural labor certification will apply not only to the next anticipated period for which a temporary alien agricultural labor certification would normally be requested, but also to any periods within the coming two or three years; two years for two violations, or repetitions of the same violations, and three years for three or more violations, or repetitions thereof. The OFLC Administrator's notice shall be in writing, shall state the reasons for the determinations, and shall offer the employer an opportunity to request an expedited administrative review or a de novo hearing before an administrative law judge of the determination within seven calendar days of the date of the notice. If the employer requests an expedited administrative review or a de novo hearing before an administrative law judge, the procedures in § 655.112 of this part shall be followed.

(b) *Employment Standards Administration investigations.* The OFLC Administrator may make the determination described in paragraph (a) of this section based on information and recommendations provided by the Employment Standards Administration, after an Employment Standards Administration investigation has been conducted in accordance with the Employment Standards Administration procedures, that an employer has not complied with the terms and conditions

of employment prescribed as a condition for a temporary alien agricultural labor certification. In such instances, the OFLC Administrator need not conduct any investigation of his/her own, and the subsequent notification to the employer and other procedures contained in paragraph (a) of this section will apply. Penalties invoked by the Employment Standards Administration for violations of temporary alien agricultural labor certification terms and conditions shall be treated and handled separately from sanctions available to the OFLC Administrator, and an employer's obligations for compliance with the Employment Standards Administration's enforcement penalties shall not absolve an employer from sanctions applied by ETA under this section (except as noted in paragraph (a) of this section).

(c) *Less than substantial violations*—(1) Requirement of special procedures. If, after investigation as provided for under paragraph (a) of this section, or an Employment Standards Administration notification as provided under paragraph (b) of this section, the OFLC Administrator determines that a less than substantial violation has occurred, but the OFLC Administrator has reason to believe that past actions on the part of the employer may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before and after the temporary alien labor certification determination (including special on-site positive recruitment and streamlined interviewing and referral techniques) designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary alien agricultural labor certification. Such requirements shall be reasonable, and shall not require the employer to offer better wages, working conditions and benefits than those specified in § 655.102 of this part, and shall be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart. The OFLC Administrator shall notify the employer in writing of the special procedures which will be required in the coming year. The notification shall state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary alien agricultural labor certification, and shall offer the employer an opportunity to request an administrative review or a de novo hearing before an administrative law judge. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.112 of this part shall apply.

(2) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (c)(1) of this section, the OFLC Administrator shall send a written notice to the employer, stating that the employer's otherwise affirmative temporary alien agricultural labor certification determination will be reduced by twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year. Notice of such a reduction in the number of workers requested shall be conveyed to the employer by the OFLC Administrator in the OFLC Administrator's written temporary alien agricultural labor certification determination required by § 655.101 of this part. The notice shall offer the employer an opportunity to request an administrative review or a de novo hearing before an administrative law judge. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.112 of this part shall apply, provided that if the administrative law judge affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (c)(1) of this section, the reduction in the number of workers requested shall be twenty-five percent of the total number of H–2A aliens requested (which cannot be more than those requested in the previous year) for a period of one year.

(d) *Penalties involving members of associations.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the OFLC Administrator determines that a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) shall apply only to that member of the association unless the OFLC 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 penalty shall be invoked against the association or other association member as well.

(e) *Penalties involving associations acting as joint employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the OFLC Administrator determines that 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 denial of temporary alien agricultural labor certification penalty prescribed in paragraph (a) of this section shall apply only to the association, and shall not be applied to any individual producer member of the association unless the OFLC Administrator determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the penalty shall be invoked against the association member as well.

(f) *Penalties involving associations acting as sole employers.* If, after investigation as provided for under paragraph (a) of this section, or notification from the Employment Standards Administration under paragraph (b) of this section, the OFLC Administrator determines that a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, no individual producer member of the association shall be permitted to employ certified H–2A workers in the crop and occupation for which the H–2A workers had been previously certified for the sole employer association unless the producer member applies for temporary alien agricultural labor certification under the provisions of this subpart in the capacity of an individual employer/applicant or as a member of a joint employer association, and is granted temporary alien agricultural labor certification by the OFLC Administrator.

(g) *Types of violations*—(1) Substantial violation. For the purposes of this subpart, a substantial violation is one or more actions of commission or omission on the part of the employer or the employer's agent, with respect to which the OFLC Administrator determines:

(i)(A) That the action(s) is/are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H–2A workforce; and that:

(*1*) With respect to the action(s), the employer has failed to comply with one or more penalties imposed by the

Employment Standards Administration for violation(s) of contractual obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to § 216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations); or

(*2*) The employer has engaged in a pattern or practice of actions which are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. and/or H–2A workforce;

(B) That the action(s) involve(s) impeding an investigation of an employer pursuant to § 216 of the INA (8 U.S.C. 1186), this subpart, or 29 CFR part 501 (Employment Standards Administration enforcement of contractual obligations);

(C) That the employer has not paid the necessary fee in a timely manner;

(D) That the employer is not currently eligible to apply for a temporary alien agricultural labor certification pursuant to § 655.210 of this part (failure of an employer to comply with the terms of a temporary alien agricultural labor certification in which the application was filed under subpart C of this part prior to June 1, 1987); or

(E) That there was fraud involving the application for temporary alien agricultural labor certification or that the employer made a material misrepresentation of fact during the application process; and

(ii) That there are no extenuating circumstances involved with the action(s) described in paragraph (g)(1)(i) of this section (as determined by the OFLC Administrator).

(2) Less than substantial violation. For the purposes of this subpart, a less than substantial violation is an action of commission or omission on the part of the employer or the employer's agent which violates a requirement of this subpart, but is not a substantial violation.

§ 655.111 Petition for higher meal charges.

(a) *Filing petitions.* Until a new amount is set pursuant to this paragraph (a), the OFLC Administrator may permit an employer to charge workers up to $6.58 for providing them with three meals per day, if the employer justifies the charge and submits to the OFLC Administrator 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 twelve-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 OFLC 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 OFLC Administrator'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 available for inspection by the OFLC Administrator for a period of one year.

§ 655.112 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 not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the OFLC Administrator 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 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 five working days after receipt of the case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions submitted from the parties involved or amici curiae, either affirm, reverse, or modify the OFLC Administrator's denial 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, OFLC 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 temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL 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 not to accept for consideration a temporary alien agricultural labor certification application, of the denial of a temporary alien agricultural labor certification, or of a penalty under § 655.110 of this part, the OFLC Administrator shall send a certified copy of the 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 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 working days after the administrative law judge's receipt of the case file, and

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

(2) *Decision.* After a de novo hearing, the administrative law judge shall either affirm, reverse, or modify the OFLC Administrator's determination, and the administrative law judge's decision shall be provided immediately to the employer, OFLC 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 temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

§ 655.113 Job Service Complaint System; enforcement of work contracts.

Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints which involve worker contracts shall be referred by the local office to the Employment Standards Administration for appropriate handling and resolution. See 29 CFR part 501. As part of this process, the Employment Standards Administration may report the results of its investigation to ETA for consideration of employer penalties under § 655.110 of this part or such other action as may be appropriate.

■ 7. Add subpart C to read as follows:

Subpart C—Labor Certification Process for Logging Employment and Non-H–2A Agricultural Employment

Sec.

Subpart C—Labor Certification Process for Logging Employment and Non-H–2A Agricultural Employment

§ 655.200 General description of this subpart and definition of terms.

(a) This subpart applies to applications for temporary alien agricultural labor certification filed before June 1, 1987, and to applications for temporary alien labor certification for logging employment.

(b) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with an appropriate State Workforce Agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a determination by the OFLC Administrator as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the OFLC Administrator makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working condition standards, the OFLC Administrator shall deny the temporary labor certification application and offer the employer an administrative-judicial review of the denial by an Administrative Law Judge. If the application is not timely, the OFLC Administrator has discretion, as set forth in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the DHS regulations. Where the application is timely and meets the regulatory standards, the State Workforce Agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the OFLC Administrator grants the temporary labor certification if the OFLC Administrator finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer may seek an administrative-judicial review of the denial by an Administrative Law Judge as provided in these regulations. The Department of Labor thereafter advises the United States Citizenship and Immigration Services of the Department of Homeland Security (DHS) of approvals and denials of temporary labor certifications. The DHS may accept or reject this advice. 8 CFR 214.2(h)(3). The DHS makes the final decision as to whether or not to grant visas to the foreign workers. 8 U.S.C. 1184(a).

(c) *Definitions for terms used in this subpart.*

Administrative Law Judge means an official who is authorized to conduct administrative hearings.

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

Adverse effect rate means the wage rate which the OFLC Administrator has determined must be offered and paid to foreign and U.S. workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. The OFLC Administrator may determine that the prevailing wage rate in the area and/or occupation is the adverse effect rate, if the use (or non-use) of aliens has not depressed the wages of similarly employed U.S. workers. The OFLC Administrator may determine that a wage rate higher than the prevailing wage rate is the adverse effect rate if the OFLC Administrator determines that the use of aliens has depressed the wages of similarly employed U.S. workers.

Agent means a legal person, such as an association of employers, which (1) is authorized to act as an agent of the employer for temporary labor certification purposes, and (2) which is not itself an employer, or a joint employer, as defined in this section.

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

Department of Homeland Security (DHS) through the United States Citizenship and Immigration Services (USCIS) makes the determination under the INA on whether or not to grant visa petitions to an alien seeking to perform temporary agricultural or logging work in the United States.

Employer means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employees. An association of employers shall be considered an employer if it has all of the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if it shares with the employer member one or more of the definitional indicia.

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

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.

Office of Foreign Labor Certification (OFLC) means the organizational component within 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 alien workers seeking admission to the United States in order to work under the Immigration and Nationality Act, as amended.

Secretary means the Secretary of Labor or the Secretary's designee.

State Workforce Agency (SWA) means the State employment service agency.

Temporary labor certification means the advice given by the Secretary of Labor to the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS), pursuant to the regulations of that agency at 8 CFR 214.2(h)(3)(i), that (1) there are not sufficient U.S. workers who are qualified and available to perform the work and (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

United States workers means any worker who, whether U.S. national, citizen or alien, is legally permitted to work permanently within the United States.

§ 655.201 Temporary labor certification applications.

(a)(1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a SWA in the area of intended employment.

(2) If the temporary labor certification application is filed by an agent, however, the agent may sign the application if the application is accompanied by a letter from each employer the agent represents, signed by the employer, which authorizes the agent to act on the employer's behalf and which states that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for the fulfillment of all legal requirements arising under this subpart.

(3) If an association of employers files the application, the association shall identify and submit documents to verify whether, in accordance with the definitions at § 655.200, it is: (i) The employer, (ii) a joint employer with its member employers, or (iii) the agent of its employer members.

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which will be used by the employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of §§ 655.202 and 653.108 of this chapter;

(2) The assurances required by § 655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the SWA in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the OFLC Administrator to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later. That section also requires the OFLC Administrator to offer employers an expedited administrative-judicial review in cases of denials of the temporary labor certification applications. Following an administrative-judicial review, the employer has a right to contest any denial before the DHS pursuant to 8 CFR 214.2(h)(3)(i). Finally, employers need time, after the temporary labor certification determination, to complete the process for bringing foreign workers into the United States, or to bring an appeal of a denial of an application for the labor certification. Therefore, employers should file their temporary labor certification applications at least 80 days before the estimated date of need specified in the application.

(d) Applications may be amended at any time prior to OFLC Administrator determination to increase the number of workers requested in the original application for labor certification by not more than 15 percent without requiring an additional recruitment period for U.S. workers. Requests for increases beyond 15 percent may be approved only when it is determined that, based on past experience, the need for additional workers could not be foreseen and that a critical need for the workers would exist prior to the expiration of an additional recruitment period.

(e) If a temporary labor certification application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the SWA shall immediately send both copies directly to the appropriate OFLC Administrator. The OFLC Administrator may then advise the employer and the DHS in writing that the temporary labor certification cannot be granted because, pursuant to the regulations at paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial to the employer shall inform the employer of the right to administrative-judicial review and to ultimately petition DHS for the admission of the aliens. In emergency situations, however, the OFLC Administrator may waive the time period specified in this section on behalf of employers who have not made use of temporary alien workers for the prior year's harvest or for other good and substantial cause, provided the OFLC Administrator has sufficient labor market information to make the labor certification determinations required by 8 CFR 214.2(h)(3)(i).

(Approved by the Office of Management and Budget under control number 1205–0015)

§ 655.202 Contents of job offers.

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each

employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to advance the transportation costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the OFLC Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of standards set forth at 29 CFR 1910.142 or the full set of standards set forth at part 654, subpart E of this chapter, whichever is applicable under the criteria of 20 CFR 654.401; except that, for mobile range housing for sheepherders, the housing shall meet existing Departmental guidelines. When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers.

(2)(i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for workers' compensation for injury and disease arising out of and in the course of worker's employment; or

(ii) If the job opportunity is not covered by the 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;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

(4) The employer will provide the worker with three meals a day, except that where under prevailing practice or longstanding arrangement at the establishment workers prepare their meals, employers need furnish only free and convenient cooking and kitchen facilities. Where the employer provides the meals, the job offer shall state the cost to the worker for such meals. Until a new amount is set pursuant to this paragraph (b)(4), the cost shall not be more than $4.94 per day unless the OFLC Administrator has approved a higher cost pursuant to § 655.211 of this part. Each year the charge allowed by this paragraph (b)(4) will be changed by 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 their publication by the OFLC Administrator in the **Federal Register**.

(5)(i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment, subject to the deductions allowed by paragraph (b)(13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount the employer will charge the worker for providing the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transportation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6)(i) The employer guarantees to offer the worker employment for 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 and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragraph, a workday shall mean any period consisting of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is, $\frac{3}{4} \times$ (number of days $\times$ 8 hours.)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be required to work for more than 8 hours per workday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met;

(7)(i) The employer will keep accurate and adequate records with respect to the workers' earnings, including 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 guarantee); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay; the worker's earnings per pay period; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements:

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

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

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

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

(9)(i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii)(A) 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 earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will 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 adverse effect rate.

(B) If the employer who pays on a piece rate basis requires one or more minimum productivity standards of workers as a condition of job retention,

(*1*) Such standards shall be no more than those applied by the employer in 1977, unless the OFLC Administrator approves a higher minimum; or

(*2*) If the employer first applied for temporary labor certification after 1977, such standards shall be no more than those normally required (at the time of that first application) by other employers for the activity in the area of intended employment, unless the OFLC Administrator approves a higher minimum.

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section;

(12) 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 or other Act of God which makes the fulfillment of the contract impossible, and the OFLC Administrator so certifies, the employer may terminate the work contract. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker

(i) Will be returned to the place from which the worker, without intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed 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 borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are 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. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker 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) and (b) of this section.

§ 655.203 Assurances.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(1) Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall direct interested workers to apply for the job opportunity at the appropriate office of the State Workforce Agency in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organizations, fraternal and veterans organizations, and non-profit organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions

required by § 655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the OFLC Administrator required by § 655.205(a).

§ 655.204 Determinations based on temporary labor certification applications.

(a) Within two working days after the temporary labor certification application has been filed with it, the SWA shall mail the duplicate application directly to the appropriate OFLC Administrator.

(b) The SWA, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment.

(c) The OFLC Administrator, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§ 655.201–655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the OFLC Administrator determines that the temporary labor certification application is not timely in accordance with § 655.201 of this subpart, the OFLC Administrator may promptly deny the temporary labor certification on the grounds that, in accordance with that regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the OFLC Administrator determines that the application does not meet the requirements of §§ 655.202–655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the OFLC Administrator shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

(d) If the certification is denied, the OFLC Administrator shall notify the employer in writing of the determination, with a copy to the SWA. The notice shall:

(1) State the reasons for the denial, citing the relevant regulations; and

(2) Offer the employer an opportunity to request an expedited administrative-judicial review of the denial by an Administrative Law Judge. The notice shall state that in order to obtain such a review, the employer must, within five calendar days of the date of the notice, file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request for such a review to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the OFLC Administrator. The notice shall also state that the employer's request for review should contain any legal arguments which the employer believes will rebut the basis of the OFLC Administrator's denial of certification; and

(3) State that, if the employer does not request an expedited administrative-judicial review before an Administrative Law Judge within the five days:

(i) The OFLC Administrator will advise the DHS that the certification cannot be granted, giving the reasons therefor, and that an administrative-judicial review of the denial was offered to the employer but not accepted, and enclosing, for DHS review, the entire temporary labor certification application file; and

(ii) The employer has the opportunity to submit evidence to the DHS to rebut the bases of the OFLC Administrator's determination in accordance with the DHS regulation at 8 CFR 214.2(h)(3)(i) but that no further review of the employer's application for temporary labor certification may be made by any Department of Labor official.

(e) If the employer timely requests an expedited administrative-judicial review pursuant to paragraph (d)(2) of this section, the procedures of § 655.212 shall be followed.

§ 655.205 Recruitment period.

(a) If the OFLC Administrator determines that the temporary labor certification application meets the requirements of §§ 655.201 through 655.203, the OFLC Administrator shall promptly notify the employer in writing, with copies to the SWA. The notice shall inform the employer and the SWA of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed both into intrastate clearance and into interstate clearance to such States as the OFLC Administrator shall determine to be potential sources of U.S. workers.

(b) Thereafter, OFLC Administrator, shall provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, the OFLC Administrator, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.203. If the OFLC Administrator concludes that the employer has not satisfied the requirement for recruitment of U.S. workers, the OFLC Administrator shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency. The notice shall contain the statements specified in § 655.204(d).

(d) If the employer timely requests an expedited administrative-judicial review before an Administrative Law Judge, the procedures in § 655.212 shall be followed.

§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.

(a) If the OFLC Administrator, in accordance with § 655.205 has determined that the employer has complied with the recruitment assurances, the OFLC Administrator, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available. In making this determination the OFLC Administrator shall consider as available for a job opportunity any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the OFLC Administrator determines are very likely to sign such a work contract. The OFLC Administrator shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related related reasons unless the OFLC Administrator determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job opportunities; or

(2) The employer, since the time of the initial determination under § 655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better wages, working conditions, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b)(1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor certifications shall be for a limited duration such as for ''the 1978 apple harvest season'' or ''until November 1, 1978'', and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in § 655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in § 655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the OFLC Administrator denies the temporary labor certification in whole or part, the OFLC Administrator shall notify the employer in writing by means normally assuring next-day delivery. The notice shall contain all of the statements required in § 655.204(d). If a timely request is made for an administrative-judicial review by an Administrative Law Judge, the procedures of § 655.212 shall be followed.

(d)(1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance at § 655.203(e) is met.

(2) The State Workforce Agency (SWA) system shall continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

§ 655.207 Adverse effect rates.

(a) Except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment.

(b)(1) For agricultural employment (except sheepherding) in the States listed in paragraph (b)(2) of this section, and for Florida sugarcane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate by the percentage change (from the second year previous to the prior year) in the U.S. Department of Agriculture's (USDA's) average hourly wage rates for field and livestock workers (combined) based on the USDA Quarterly Wage Survey. The OFLC Administrator shall publish, at least once in each calendar year, on a date or dates he shall determine, adverse effect rates calculated pursuant to this paragraph (b) as a notice or notices in the **Federal Register**.

(2) *List of States.* Arizona, Colorado, Connecticut, Florida (other than sugar cane work), Maine, Maryland, Massachusetts, New Hamsphire, New York, Rhode Island, Texas, Vermont, Virginia, and West Virginia. Other States may be added as appropriate.

(3) *Transition.* Notwithstanding paragraphs (b)(1) and (2) of this section, the 1986 adverse effect rate for agricultural employment (except sheepherding) in the following States, and for Florida sugarcane work, shall be computed by adjusting the 1981 adverse effect rate (computed pursuant to 20 CFR 655.207(b)(1), 43 FR 10317; March 10, 1978) by the percentage change between 1980 and 1985 in the U.S. Department of Agriculture annual average hourly wage rates for field and livestock workers (combined) based on the USDA Quarterly survey: The States listed at 20 CFR 655.207(b)(2) (1985).

(c) In no event shall an adverse effect rate for any year be lower than the hourly wage rate published in 29 U.S.C. 206(a)(1) and currently in effect.

§ 655.208 Temporary labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a temporary labor certification application is discovered prior to a final temporary labor certification determination, or if it is learned that the employer or agent (with respect to an application) is the subject of a criminal indictment or information filed in a court, the OFLC Administrator shall refer the matter to the DHS for investigation and shall notify the employer or agent in writing of this referral. The OFLC Administrator shall continue to process the application and may issue a qualified temporary labor certification.

(b) If a court finds an employer or agent innocent of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the OFLC Administrator shall not deny the temporary labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) If a court or the DHS determines that there was fraud or willful misrepresentation involving a temporary labor certification application, the application shall be deemed invalidated, processing shall be terminated, and the application shall be returned to the employer or agent with the reasons therefor stated in writing.

§ 655.209 Invalidation of temporary labor certifications.

After issuance, temporary labor certifications are subject to invalidation by the DHS upon a determination, made in accordance with that agency's procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the temporary labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the OFLC Administrator, the OFLC Administrator shall notify the DHS in writing.

§ 655.210 Failure of employers to comply with the terms of a temporary labor certification.

(a) If, after the granting of a temporary labor certification, the OFLC Administrator has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, the OFLC Administrator shall investigate the matter. If the OFLC Administrator concludes that the employer has not complied with the terms of the labor certification, the OFLC Administrator may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year. The notice shall be in writing, shall state the reasons for the determination, and shall offer the employer an opportunity to request a hearing within 30 days of the date of the notice. If the employer requests a hearing within the 30-day period, the OFLC Administrator shall follow the procedures set forth at § 658.421(i)(1), (2) and (3) of this chapter. The procedures contained in §§ 658.421(j), 658.422 and 658.423 of this chapter shall apply to such hearings.

(b) No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section.

§ 655.211 Petition for higher meal charges.

(a) Until a new amount is set pursuant to this paragraph (a), the OFLC Administrator may permit an employer to charge workers up to $6.17 for providing them with three meals per day, if the employer justifies the charge

and submits to the OFLC Administrator the documentary evidence required by paragraph (b) of this section. A denial in whole or in part shall be reviewable as provided in § 655.212 of this part. Each year the maximum charge allowed by this paragraph (a) will be changed by 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 their publication by the OFLC Administrator in the **Federal Register**.

(b) Evidence 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 operations; 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 available for inspection by the Secretary's representatives for a period of one year.

§ 655.212 Administrative-judicial reviews.

(a) Whenever an employer has requested an administrative-judicial review of a denial of an application or a petition in accordance with §§ 655.204(d), 655.205(d), 655.206(c), or 655.211, the Chief Administrative Law Judge shall immediately assign an Administrative Law Judge to review the record for legal sufficiency, and the OFLC Administrator shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next day delivery. The Administrative Law Judge shall not have authority to remand the case and shall not receive additional evidence. Any countervailing evidence advanced after decision by the OFLC Administrator shall be subject to provisions of 8 CFR 214.2(h)(3)(i).

(b) The Administrative Law Judge, within five working days after receipt of the case file shall, on the basis of the written record and due consideration of any written memorandums of law submitted, either affirm, reverse or modify the OFLC Administrator's denial 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, OFLC Administrator, and DHS by means normally assuring next-day delivery. The Administrative Law Judge's decision shall be the final decision of the Department of Labor and no further review shall be given to the temporary labor certification determination by any Department of Labor official.

§ 655.215 Territory of Guam.

Subpart C of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor does not certify to the United States Citizenship and Immigration Services of the Department of Homeland Security (DHS) the temporary employment of nonimmigrant aliens under H–2B visas in the Territory of Guam. Pursuant to DHS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government.

Title 29—Labor

■ 8. Redesignate part 501 as part 502 and suspend newly designated Part 502.

■ 9. Add part 501 to read as follows:

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 216 OF THE IMMIGRATION AND NATIONALITY ACT

Subpart A—General Provisions

Subpart B—Enforcement of Work Contracts

Subpart C—Administrative Proceedings

Procedures Relating to Hearing

Rules of Practice

Referral for Hearing

Procedures Before Administrative Law Judge

Post-Hearing Procedures

Review of Administrative Law Judge's Decision

Record

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

Subpart A—General Provisions

§ 501.0 Introduction.

These regulations cover the enforcement of all contractual obligations provisions applicable to the employment of H–2A workers under section 216 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of other workers hired by employers of H–2A workers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting H–2A certification, including any extension thereof. Such other workers hired by H–2A employers are hereafter referred to as engaged in corresponding employment.

§ 501.1 Purpose and scope.

(a) Statutory standard. Section 216(a) of the INA provides that—

(1) A petition to import an alien as an H–2A worker (as defined in subsection (i)(2) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—

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

perform the labor or services involved in the petition, and

(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.

(b) *Role of the ETA, USES.* The issuance and denial of labor certification under section 216 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 such issues as whether U.S. workers were available, whether positive recruitment was conducted, whether there was a strike or lockout, the methodology for establishing adverse effect wage rates, whether workers' compensation insurance was provided, whether employment was offered to U.S. workers for up to 50 percent of the contract period and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the Employment and Training Administration are found in title 20 CFR part 655.

(c) *Role of ESA, Wage and Hour Division.* Section 216(g)(2) of the INA provides that—

[T]he Secretary of Labor is authorized to take such actions including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

Certain investigation, inspection and law enforcement functions to carry out the provisions of section 216 of the INA have been delegated by the Secretary of Labor to the Employment Standards Administration (ESA), Wage and Hour Division. In general, matters concerning the obligations of the work contract between an employer of H–2A workers and the H–2A workers and other workers in corresponding employment hired 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, seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages.

(d) *Effect of regulations.* The amendments to the INA made by title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the Wage and Hour Division under the INA and these regulations apply to the employment of any H–2A worker and any other workers hired by H–2A employers in corresponding employment as the result of any petition or application filed with the Department on and after June 1, 1987.

§ 501.2 Coordination of intake between DOL agencies.

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

§ 501.3 Discrimination prohibited.

No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(a) Filed a complaint under or related to section 216 of the INA or these regulations;

(b) Instituted or caused to be instituted any proceedings related to section 216 of the INA or these regulations;

(c) Testified or is about to testify in any proceeding under or related to section 216 of the INA or these regulations;

(d) Exercised or asserted on behalf of himself or others any right or protection afforded by section 216 of the INA or these regulations.

(e) Consulted with an employee of a legal assistance program or an attorney on matters related to section 216 of the INA (8 U.S.C. 1186), or to this subpart or any other DOL regulation promulgated pursuant to section 216 of the INA.

Allegations of discrimination in employment against any person will be investigated by Wage and Hour. Where Wage and Hour has determined through investigation that such allegations have been substantiated appropriate remedies may be sought. Wage and Hour 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 recommend to ETA that labor certification of any violator be denied in the future.

§ 501.4 Waiver of rights prohibited.

No person shall seek to have an H–2A worker, or other worker employed in corresponding employment by an H–2A employer, waive rights conferred under section 216 of the INA or under these regulations. Such waiver is against public policy. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or these regulations. This does not prevent agreements to settle private litigation.

§ 501.5 Investigation authority of Secretary.

(a) *General.* The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places and vehicles (including housing) and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under section 216 of the INA or these regulations.

(b) *Failure to permit investigation.* Where any person using the services of an H–2A worker does not permit an investigation concerning the employment of his or her workers the Wage and Hour Division shall report such occurrence to ETA and may recommend denial of future labor certifications to such person. In addition, Wage and Hour may take such action as may be appropriate, including the seeking of an injunction or assessing civil money penalties, against any person who has failed to permit Wage and Hour to make an investigation.

(c) *Confidential investigation.* The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of violations.* Any person may report a violation of the work contract obligations of section 216 of the INA or these regulations to the Secretary by advising any local office of the Employment Service of the various States, any office of ETA, any office of the Wage and Hour Division, ESA, U.S. Department of Labor, 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 Wage and Hour Division, ESA, for the area in which the

reported violation is alleged to have occurred.

§ 501.6 Prohibition on interference with Department of Labor officials.

No person shall interfere with any official of the Department of Labor assigned to perform an investigation, inspection or law enforcement function pursuant to the INA and these regulations during the performance of such duties. Wage and Hour will seek such action as it deems appropriate, including an injunction to bar any such interference with an investigation and/or assess a civil money penalty therefor. In addition Wage and Hour may refer a report of the matter to ETA with a recommendation that the person's labor certification be denied in the future. (Federal statutes which 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.)

§ 501.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to title 18, section 1001, of the U.S. Code, which provides:

Section 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 501.10 Definitions.

The definitions in paragraphs (a) through (d) are set forth for purposes of this part. In addition, the definitions in paragraphs (e) through (v) are promulgated at 20 CFR 655.100(b), are utilized herein, and are incorporated and set forth for information purposes.

(a) *Act and INA* mean the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), with reference particularly to section 216.

(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 required by the applicable regulations in subpart B of 20 CFR part 655, Labor Certification Process for Temporary Agricultural Employment in the United States, and those contained in the Application for Alien 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 wage rate which the Director has determined must be offered and paid, as a minimum, to every H–2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H–2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

(f) *Agricultural labor or services.* Pursuant to section 101(a)(15)(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 either ''agricultural labor'' as defined and applied in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) or ''agriculture'' as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)). An occupation included in either statutory definition shall be ''agricultural labor or services'', notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are quoted below.

(1) *Agricultural labor.* Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)) quoted as follows, defines the term ''agricultural labor'' to include all service performed:

(1) 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;

(2) Services performed 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;

(3) 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;

(4)(A) 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;

(B) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, 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;

(C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) 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.

As used in this subsection, the term farm includes stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* Section 203(f) of title 29, United States Code, (section 3(f) of the Fair Labor Standards Act of 1938), quoted as follows, defines agriculture to include:

(f) * * * 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 15(g)

of the Agricultural Marketing Act, as amended), 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.

(3) *Agricultural commodity.* Section 1141j(g) of title 12, United States Code, (section 15(g) of the Agricultural Marketing Act, as amended) quoted as follows, defines agricultural commodity to include:

(g) * * * in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in section 92 of title 7.

(iv) *Gum rosin.* Section 92 of title 7, United States Code, quoted as follows, defines gum spirits of turpentine and gum rosin as—

(c) *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree.

(g) *Gum rosin* means rosin remaining after the distillation of gum spirits of turpentine.

(g) *Of a temporary or seasonal nature*—(1) *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 Employment Standards Administration's Wage and Hour Division's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). For informational purposes § 500.20 as it pertains to seasonal or temporary basis is quoted below.

(2) *MSPA definition.* For information purposes, the definition of on a seasonal or other temporary basis, as set forth at § 500.20 of this title, is provided below:

On a seasonal or other temporary basis means:

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.

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

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.

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.

(3) *Temporary.* For the purpose 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, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this title.

(h) *DOL* means the U.S. Department of Labor.

(i) *Employer* means a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (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. An association of employers shall be considered the sole employer if it alone has the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with an employer member if it shares with the employer member one or more of the definitional indicia.

(j) *Employment Service (ES)* and *Employment Service (ES) System* mean, collectively, the USES, the State agencies, the local offices, and the ETA regional offices.

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

(l) *Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) which includes the U.S. Employment Service (USES).

(m) *H–2A worker* means any nonimmigrant alien 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)).

(n) *Immigration and Naturalization Service (INS)* means the component of the U.S. Department of Justice which makes the determination under the INA on whether or not to grant visa petitions to employers seeking H–2A workers to perform temporary agricultural work in the United States.

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

(p) *Secretary* means the Secretary of Labor or the Secretary's designee.

(q) *State agency* means the State employment service agency designated under section 4 of the Wagner-Peyser Act to cooperate with the USES in the operation of the ES System.

(r) *Solicitor of Labor* means the Solicitor, U.S. Department of Labor, and includes employees of the Office of the Solicitor of Labor designated by the Solicitor to perform functions of the Solicitor under this subpart.

(s) *Temporary alien agricultural labor certification* means the certification made by the Secretary of Labor with respect to an employer seeking to file with INS a visa petition to import an alien as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214 (a) and (c), and 216 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 alien 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 1186).

(t) *United States Employment Service (USES)* means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act, which is charged with administering the national system of public employment offices and carrying out certain functions of the Secretary under the INA.

(u) *United States (U.S.) worker* means any worker who, whether a U.S. national, a U.S. citizen, or an alien, is legally permitted to work in the job opportunity within the United States (as

defined at section 101(a)(38) of the INA (8 U.S.C. 1101(a)(38)).

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

Subpart B—Enforcement of Work Contracts

§ 501.15 Enforcement.

The investigations, inspections and law enforcement functions to carry out the provisions of section 216 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 worker employed in corresponding employment by an H–2A employer. Such enforcement includes those work contract provisions as defined in § 501.10(d). The work contract enforced includes the employment benefits which must be stated in the job offer, as prescribed in 20 CFR 655.102.

§ 501.16 General.

Whenever the Secretary believes that the H–2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(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 labor certification. ESA 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, the enforcement of any other contractual obligations and the assessment of a civil money penalty against any person for a violation of the H–2A work contract obligations of the Act or these regulations.

(c) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief, including the withholding of unpaid wages, to restrain violation of the H–2A provisions of the Act or these regulations by any person.

(d) Petition any appropriate District Court of the United States for specific performance of contractual obligations.

§ 501.17 Concurrent actions.

The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by the H–2A provisions of the Act and these regulations, or the regulations of 20 CFR part 655.

§ 501.18 Representation of the Secretary.

(a) Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act.

(b) The Solicitor of Labor, through the authorized representatives shall represent the Administrator and the Secretary in all administrative hearings under the H–2A provisions of the Act and these regulations.

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator for each violation of the work contract or these regulations.

(b) In determining the amount of penalty to be assessed for any violation of the work contract as provided in the H–2A provisions of the Act or these regulations the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations of the H–2A provisions of the Act and these regulations;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the H–2A provisions of the Act and these regulations;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H–2A provisions of the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed against each worker. A civil money penalty for discrimination or interference with Wage and Hour investigative authority will not exceed $1,000 for each such act of discrimination or interference.

§ 501.20 Enforcement of Wage and Hour investigative authority.

Sections 501.5 through 501.7 of this part prescribe the investigation authority conferred upon the Wage and Hour Division for the purpose of enforcing the contractual obligations. These sections indicate the actions which may be taken upon failure to permit or interference with an investigation. 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 in 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 Wage and Hour shall report each such occurrence to ETA and may recommend to ETA denial of future labor certifications. The taking of any one action shall not bar the taking of any additional action.

§ 501.21 Referral of findings to ETA.

Where Wage and Hour finds violations Wage and Hour shall so notify the appropriate representative of ETA and shall forward appropriate information, including investigative information to such representative for review and consideration.

§ 501.22 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, by an Administrative Law Judge, or by the Secretary, the amount of the penalty is immediately due and payable to the U.S. Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process which will be applied with respect to a determination to impose an assessment of civil money penalties 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, the Secretary may, in his discretion, seek enforcement action in Federal

court without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty 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.

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the Administrator including the amount of any unpaid wages due or contractual obligations required and the amount of any civil money penalty assessment and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

§ 501.33 Request for hearing.

(a) Any person desiring to request an administrative hearing on a determination referred to in § 501.32 shall make such request in writing to the official who issued the determination, at the Wage and Hour Division address appearing on the determination notice, no later than thirty (30) days after issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the Wage and Hour Division address appearing on the determination notice, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.

Rules of Practice

§ 501.34 General.

Except as specifically provided in these regulations, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

§ 501.35 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

§ 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of __, Respondent.

(b) For the purposes of such administrative proceedings the Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33 the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

(b) A copy of the Order of Reference, together with a copy of these regulations, shall be served by counsel for the Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the Order of Reference was filed.

§ 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator.

(b) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the Secretary in person or by certified mail. The decision when served by the Administrative Law Judge shall constitute the final order of the Administrator unless the Secretary, as provided for in § 501.42 below determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, the Administrator or any other party wishing review of the decision of an Administrative Law Judge shall, within 30 days of the decision of the Administrative Law Judge, petition the Secretary to review the decision. Copies of the petition shall be served on all parties and on the Administrative Law Judge. If the Secretary 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.

(b) Whenever the Secretary either on the Secretary's own motion or by acceptance of a party's petition, determines to review the decision of an Administrative Law Judge, a notice of the same shall be served upon the Administrative Law Judge and upon all parties to the proceeding in person or by certified mail.

§ 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice pursuant to § 501.42 of these regulations, the Office of Administrative Law Judges shall, promptly forward a copy of the complete hearing record to the Secretary.

§ 501.44 Additional information, if required.

Where the Secretary has determined to review such decision and order, the Secretary shall notify each party of:

(a) The issue or issues raised;

(b) The form in which submission shall be made (i.e., briefs, oral argument, etc.); and the time within which such presentation shall be submitted.

§ 501.45 Final decision of the Secretary.

The Secretary's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the administrative law judge, in person or by certified mail.

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

§ 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

■ 10. The authority citation for part 780 is revised to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219.

§ 780.115 [Redesignated as § 780.159 and Suspended]

■ 11. Redesignate § 780.115 as § 780.159 and suspend newly designated § 780.159.

■ 12. Add § 780.115 to read as follows:

§ 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not ''agricultural or horticultural commodities.'' Christmas trees, whether wild or planted, are also not so considered. 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 which discuss 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(a)(13) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter.

§ 780.201 [Redesignated as § 780.215 and Suspended]

■ 13. Redesignate § 780.201 as § 780.215 and suspend newly designated § 780.215.

■ 14. Add § 780.201 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 or planted Christmas trees are included. (See the related discussion in §§ 780.205 through 780.209 and in

part 788 of this chapter which considers the section 13(a)(13) 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.''

§ 780.205 [Redesignated as § 780.216 and Suspended]

■ 15. Redesignate § 780.205 as § 780.216 and suspend newly designated § 780.216.

■ 16. Add § 780.205 to read as follows:

§ 780.205 Nursery activities generally.

The employees of a nursery who are engaged in the following activities are employed in ''agriculture'':

(a) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees (but not Christmas trees), and shrubs, vines, and flowers;

(b) Handling such plants from propagating frames to the field;

(c) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

§ 780.208 [Redesignated as § 780.217 and Suspended]

■ 17. Redesignate § 780.208 as § 780.217 and suspend newly designated § 780.217.

■ 18a. Add § 780.208 to read as follows:

§ 780.208 Forest and Christmas tree activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. The planting, tending, and cutting of Christmas trees do not constitute farming operations. If such operations on forest products are 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

■ 18b. 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.

§ 788.10 [Redesignated as § 788.18 and Suspended]

■ 19. Redesignate § 788.10 as § 788.18 and suspend newly designated § 788.18.

■ 20. Add § 788.10 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 and Christmas trees, roots, stems, leaves, Spanish moss, wild fruit, and brush. 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 which change the natural physical or chemical condition of the products or which amount to extracting as distinguished from gathering, such as shelling nuts, or mashing berries to obtain juices.

Signed in Washington, DC, this 20th day of May, 2009.

Douglas F. Small,

Deputy Assistant Secretary, Employment and Training Administration.

Shelby Hallmark,

Acting Assistant Secretary, Employment Standards Administration.

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