



# Federal Register

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**Friday,  
February 12, 2010**

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## **Part II**

### **Department of Labor**

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**Employment and Training Administration  
20 CFR Part 655**

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**Wage and Hour Division**

**29 CFR Part 501**

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**Temporary Agricultural Employment of  
H-2A Aliens in the United States; Final  
Rule**

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

RIN 1205-AB55

**Temporary Agricultural Employment of  
H-2A Aliens in the United States**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Labor (the Department or DOL) is amending its regulations governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. The Department is also amending the regulations at 29 CFR part 501 to provide for enhanced enforcement under the H-2A program requirements so that workers are appropriately protected when employers fail to meet their obligations under the H-2A program.

**DATES:** This Final Rule is effective March 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** For further information on 20 CFR part 655, contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, Employment and Training Administration, 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 on 29 CFR part 501 contact James Kessler, Farm Labor Branch Chief, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****I. Revisions to 20 CFR Part 655 Subpart B****A. Statutory and Regulatory Background**

The H-2A nonimmigrant worker visa program enables United States (U.S.) agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 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); see also 8 U.S.C. 1184(c)(1) and 1188.<sup>1</sup> The INA authorizes the Secretary of the Department of Homeland Security (DHS) to permit employers to import foreign workers to perform temporary agricultural labor or services of a temporary or seasonal nature if the Secretary of the U.S. DOL (Secretary) certifies that:

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

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

8 U.S.C. 1188(a)(1). The Secretary has delegated these responsibilities, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA's Office of Foreign Labor Certification (OFLC). The Secretary has delegated responsibility for enforcement of the worker protections to the Administrator of the Wage and Hour Division (WHD). The Department's H-2A regulations remained largely unchanged from the 1987 Rule until 2008. In 2008, the Department significantly revised these regulations at 73 FR 77110, Dec. 18, 2008 (the 2008 Final Rule). Over the past several months, the Department undertook a review of the policy decisions reflected in the 2008 Final Rule, specifically reviewing the worker protections afforded under that rule. This review resulted in a Notice of Proposed Rulemaking (NPRM) published in September 2009, 74 FR 45906, Sep. 4, 2009.

**B. Overview of Comments Received**

The Department received almost 7,000 comments on the proposed rule. We have determined that 349 of these comments were completely unique, 13 were considered duplicates, and 6,577 were considered a form letter or based on a form letter.

<sup>1</sup> For ease of reference, all subsequent sections of the INA will be referred to by their corresponding section in the United States Code (U.S.C.).

Commenters represented a broad range of constituencies for the H-2A program, including individual farmers, farm workers, farm associations, farm worker advocate groups, agents, law firms, farm labor bureaus, State Workforce Agencies (SWAs), State Government Officials, U.S. Congress Members and Committees, and various interested members of the public. The Department received comments both in support of and in opposition to the proposed regulation, which are discussed in greater detail below. These comments raised a variety of concerns, some general and some pertaining to specific provisions or specific proposals. After reviewing the comments thoughtfully and systematically, the Department has modified several provisions and retained others as originally proposed in the NPRM. In addition, there were several commenters that requested that due to the timing of the regulation falling during harvest time for many farmers and based on the complexity of the issues addressed, the Department should provide additional time to comment on the proposed rule. In response to these comments, the Department provided an additional 15 days for comments on the proposed rule.

The Department received many comments that were deemed to be beyond the scope of the proposed rule. Some of these issues included pending legislation, the H-2B temporary nonagricultural worker program, comprehensive immigration reform, and specific issues related to the control of our nation's borders. These are issues that cannot be resolved or implemented through this regulatory process or are not within the purview of the Department. Additionally, comments submitted in a manner inconsistent with the specific directions of the NPRM or submitted after the comment period closed were not considered.

The Department received many comments challenging the Department's decision to engage in new rulemaking for the H-2A program. The Department has inherent authority to change its regulations in accordance with the Administrative Procedure Act (APA). In this Final Rule we provide an appropriate justification for all of the changes that we are making to the H-2A program.

The Department received requests by several commenters that the proposed rule be published in Spanish since the workers who use the program predominantly speak and write Spanish as their first language. The APA at 5 U.S.C. 552(a)(1) requires agencies to

publish regulations in the **Federal Register**. The Department initiated conversations with the Office of the **Federal Register** on the subject of publishing regulations in a language other than English. However, the Office of the **Federal Register** informed the Department that based on its limited resources and personnel it is unable to publish any documents in a language other than English.

### C. Severability

To the extent that any portion of this Final Rule is declared invalid by a court, the Department intends for all other parts of the Final Rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a court decision invalidating a portion of this Final Rule results in a partial reversion to the current regulations or to the statutory language itself, the Department intends that the rest of the Final Rule continue to operate, if at all possible in tandem with the reverted provisions.

## II. Discussion of Comments Received

The Department has addressed those areas in which it received comments. With regard to specific provisions on which the Department did not receive comments, it has retained the provisions as proposed, except where clarifying edits have been made, which have been explained below.

### A. Section 655.103 Overview of This Subpart and Definition of Terms

#### 1. Section 655.103(a) Overview

The overview section in the proposed rule was shortened from the 2008 Final Rule to avoid any possibility that it may contain mandates not contained in the sections following it. The Department received no comments on this change and is leaving the section unchanged in the Final Rule.

#### 2. Section 655.103(b) Definitions

For the purposes of this section, the Department has included a discussion of those definitions that received comments. Any definitions that did not receive comments have been retained as proposed without further changes, unless otherwise noted.

##### a. Agricultural Association

The NPRM proposed a slight change to the definition of agricultural association. The 2008 Final Rule seemed to imply that an agricultural association could be both an agent of its employer members and an employer at the same time. The NPRM clarified that an agricultural association could either

be an agent or an employer (whether a sole employer or joint with its members) but not both. The Department received no comments on this change; therefore, the Final Rule reflects the language proposed in the NPRM without any modification.

##### b. Area of Intended Employment

The NPRM made no significant changes from the 2008 Final Rule in the definition of area of intended employment. The only changes were in the elimination of the redundancies and the use of etc. in the listing of examples of the factual circumstances that could constitute a normal commuting distance or commuting area. One commenter suggested that the Department add a definite number of miles, such as 75 miles, within which all work locations must be located. The commenter suggested that because of the size of the area of intended employment coupled with the length of the certification period, U.S. workers who only want to do one kind of agricultural job may be dissuaded from applying. Another commenter suggested narrowing the area of intended employment because commuting distances within an area of intended employment could be upwards of 90 miles and it would be unreasonable for the Department to expect U.S. workers to commute such a distance every day without being provided housing.

The Department understands the concerns of both commenters; however, their concerns are misplaced. The term area of intended employment is used in conjunction with recruitment, which should cast a net as wide as possible to inform all potential U.S. workers of an upcoming contract in their area. U.S. workers are entitled to the same housing as the H-2A workers if they are not reasonably able to return to their residence within the same day as discussed under § 655.122(d)(1).

As for the commenter's concern that a worker who only wanted to do one type of agricultural activity would be precluded from applying, changing the definition of an area of intended employment would not alleviate such a situation. The term is used primarily for recruitment purposes to ensure that the designated SWAs receive the job order so that U.S. workers have the opportunity to apply for the job. Therefore, the Final Rule adopts the definition as proposed in the NPRM, with the exception of a minor editorial change.

##### c. Corresponding Employment

In the definition of corresponding employment, the Department proposed

that all workers employed by H-2A employers doing work performed by H-2A workers be considered engaged in corresponding employment. The proposal returns to the requirements of the 1987 Rule, with one difference which is explained below. The Final Rule adopts the language of the NPRM as proposed.

The change from the 1987 Rule is the addition of the phrase or in any agricultural work performed by the H-2A workers. This language was added to address the adverse impact on U.S. workers when an H-2A employer engages H-2A workers in agricultural work outside the scope of work found in the approved job order, including work impermissibly performed outside the area of intended employment. Domestic workers should not be disadvantaged when an employer violates the terms and conditions of the H-2A job order. This does not require that every worker on a farm be paid the H-2A required wage. It does, however, require that workers employed by an H-2A employer who perform the same agricultural work as the employer's H-2A workers be paid at least the H-2A required wage for that work.

A number of commenters opposed the proposal to return to the prior definition of corresponding employment because they agreed with the rationale offered for the change in the 2008 Final Rule (which limited the protections to newly hired workers). These commenters stated that we provided no basis for a return to the prior definition, offered no evidence to support the proposed definition, and did not account for the increased costs. A labor contractor opposed the definition because it would require the payment of the Adverse Effect Wage Rate (AEWR) to non-H-2A workers who performed incidental work that was also performed by H-2A workers.

A worker advocate favored the proposal because it would ensure that U.S. workers would not be adversely affected by H-2A workers. Another advocacy organization supported the proposal because it would not penalize local workers and would contribute to a stable workforce.

The effect of the proposed definition which would require U.S. workers to be paid the same wages and conditions that H-2A workers receive when performing the same work is not new. Hearings were held in 1962 to address the impact on the wages and working conditions of domestic workers due to the use of temporary foreign workers to perform agricultural work. The 1980 Senate Judiciary Report on Temporary Worker Programs discussing the 1962 hearings

stated that U.S. employers were required to offer domestic workers wages equal to foreign workers as a prerequisite for labor certification. See Congressional Research Service: "Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues, 53 (1980)." For many years, the H-2 program has required employers to pay wage rates to domestic workers as determined by DOL. See 32 FR 4571, Mar. 28, 1967.

The preamble to the 1979 H-2 rulemaking provided that employers must offer and provide U.S. workers at least the same level of wages, benefits, and working conditions offered or provided to foreign workers. See 43 FR 10308, Mar. 10, 1979. The 1987 Rule continued the application of this principle and introduced the term corresponding employment, stating that those regulations were 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 the H-2A certification. The regulations made specific reference to workers in corresponding employment hired by H-2A employers as well as to any other worker employed in corresponding employment. See 52 FR 20527-20528, and 20531, Jun. 1, 1987.

Courts have consistently upheld the Department's interpretation that the wages and benefits offered or provided to the H-2A workers must also be provided to domestic workers. See *Farmer v. Employment Security Comm'n of N.C.*, 4 F.3d 1274, 1276, n.2, 3 (4th Cir. 1993) (H-2A employers must make certain benefits available to all temporary agricultural laborers); see also *Williams v. Uesry*, 531 F.2d 305, 306 (5th Cir. 1976) (the Secretary's authority is limited to making an economic determination of what rate must be paid all workers to neutralize any adverse effect resulting from the influx of temporary foreign workers), and *NAACP, Jefferson County v. Donovan*, 566 F.Supp. 1202, 1205 (D.D.C. 1983) (the AEW is the rate at which DOL requires growers to pay all of their farm workers before the Department will allow them to import alien labor; the purpose of requiring payment of the AEW is to prevent importation of nonimmigrant laborers from having an adverse effect on the prevailing wage rate).

The 2008 Final Rule stripped these protections from longtime employees of H-2A employers, applying H-2A protections only to newly-hired workers and the H-2A workers themselves. The preamble to the 2008 Final Rule

reasoned that longtime U.S. workers paid below the AEW were no worse off for the hiring of H-2A workers at the higher AEW and therefore were not adversely affected by the hiring of H-2A workers. On further review, this explanation fails to account for the role of the AEW in protecting against possible wage depression from the introduction of foreign workers. Further, as one commenter observed, since newly-hired employees are entitled to the AEW, a longtime employee may quit his current employment and re-apply for the same job with the same employer to obtain the new higher AEW. This anomaly puts too high a premium on longtime employees knowing the AEW, understanding their rights under the regulations, and having the security, rare in low-wage agricultural employment, to quit a job with the expectation of being immediately rehired. Under this Final Rule, longtime U.S. workers will be entitled to the wage rates paid to H-2A employees without having to quit their jobs and be rehired.

One commenter noted that the proposal ignores market-based principles. Another asserted that supervisors who occasionally did jobs performed by H-2A workers would have to be paid the AEW. As explained above, the AEW is intended to supplement wage rates that have been depressed by the presence of H-2A and other foreign workers. In that sense it is not reflective of market forces. Supervisors presumably would be paid more than the AEW and the Final Rule does not require that their wages be reduced. To the extent that is not the case, the requirement to pay them the AEW would only apply for the period of time they perform work done by H-2A workers.

One commenter requested that the definition of corresponding employment be expanded to include joint employment, and another requested that U.S. workers of fixed-site employers be included in the definition when their employer contracts with an H-2A Labor Contractor (H-2ALC) to provide H-2A workers. We do not believe it is necessary to include joint employment in the definition of corresponding employment, as the regulatory definition of joint employment makes clear that each employer in a joint employment relationship bears all of the obligations of an employer. Accordingly, U.S. workers employed by a joint employer of H-2A workers would be in corresponding employment, if performing the same work. However, the INA limits the Secretary's enforcement authority to

employers (or joint employers) of H-2A workers. See 8 U.S.C. 1188(g)(2).

#### d. H-2A Labor Contractors (H-2ALCs)

The definition of an H-2ALC in the Final Rule remains unchanged from the NPRM. One commenter questioned whether the Department should grant certification to labor contractors to participate in the program, noting that, for growers, the H-2A program is a means to obtain the labor needed to meet their end, the production of a farm commodity, whereas for the labor contractor, the H-2A workers themselves are the desired end. Some commenters objected to the inclusion of the activities of recruitment and employment in the definition of an H-2ALC, asserting that these activities are only applicable to domestic migrant and seasonal workers already covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Because the Department's enforcement experience shows agricultural labor contractors have lower compliance rates than fixed-site agricultural employers, additional obligations are required for them. This requires a definition that distinguishes each type of employer. The fact that some H-2ALCs engage in activities covered by other statutes (such as MSPA) does not mean that the Department should ignore those activities when they relate to H-2A workers.

A representative of the sheep shearing industry objected to the potential classification of sheep shearing contractors as H-2ALCs. The argument presented by this commenter is that Congress specifically exempted employers in this industry from farm labor contractor (FLC) licensing requirements under MSPA; therefore, they should be exempt from being considered H-2ALCs.

The definition of an H-2ALC broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer. The shearing contractor does not have a fixed site where the agricultural activities are performed; therefore, it cannot be a fixed-site employer and by default is an H-2ALC. The fact that shearing contractors are exempt from MSPA licensing requirements does not affect their status as H-2ALCs.

In addition, this commenter mistakenly believes that the name and location of each ranch where the shearing will take place must be in the advertisement. This was a requirement in the 2008 Final Rule, but was eliminated in the NPRM. The NPRM proposed to require that advertisements

contain the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the labor or services. Therefore, the Department does not believe this to be a significant burden warranting a special definition of employer for the shearing industry.

This commenter also asserted that sheep shearing contractors will have to file separate applications for each area of intended employment and in some cases may have to file two different applications for one area of intended employment, if the contractor must return to the same area of intended employment after moving to a different area of intended employment. This commenter points out that under the 1987 Rule and the 2008 Final Rule there were special procedures for shearing contractors that provided for itinerary work and required only one application. The NPRM did not remove the special procedures at § 655.102. In addition, the "Special Procedures for Employers in the Itinerant Animal Shearing Industry Under the H-2A Program" found in Training and Employment Guidance Letter No. 17-06 are still in effect and would permit a sheep shearing employer to file an itinerary-based application. Therefore, the Department is not persuaded that this is a valid reason to exempt shearing contractors from the definition of an H-2ALC.

#### e. Job Opportunity

One commenter opined that the new definition of job opportunity offered by the NPRM was not as specific as the 1987 Rule because it does not include the words job opening. The commenter contended that a definition of job opportunity without a reference to a job opening is invalid. The Department disagrees. There is no meaningful distinction between the two concepts and adding the phrase job opening would be redundant.

#### f. Job Order

The definition of job order has been modified in this Final Rule to add the word material for consistency with the definitions of job offer and work contract.

#### g. Master Application

The NPRM proposed to include a definition of master application. Although we did not receive comments directly addressing the definition, based on comments received on the treatment of master applications in § 655.131(b), we are clarifying several aspects including that a master application may

cover multiple areas of intended employment within a single State but no more than two contiguous States. These clarifications are discussed in more detail in the preamble for that section.

#### h. Positive Recruitment

The 2008 Final Rule definition included the concept of interviewing qualified and eligible individuals. The NPRM added the language that positive recruitment is performed under the auspices and direction of the OFLC. The Department received no comments on the definition of this term; therefore, the definition is unchanged in the Final Rule.

#### i. Prevailing Practice

The 2008 Final Rule defined the term prevailing whereas the NPRM defined the term prevailing practice. We have returned to the formulation used in the 1987 Rule which defines prevailing practice. This definition applies to certain terms of employment, *e.g.*, family housing, which must be offered by employers if they reflect prevailing practice, *i.e.*, are offered by a majority of the employers employing a majority of the workers in the area. Since the term prevailing wage is otherwise defined, there is no need for a definition of the term prevailing.

#### j. Prevailing Wage

The NPRM defined prevailing wage as the wage established under 20 CFR 653.501(d)(4). The Department received no comments on this change. Therefore, the Final Rule adopts the language of the NPRM without change.

#### k. Successor in Interest

The NPRM proposed no substantive changes to the definition of successor in interest; however, it added one factor to the circumstances that may be considered in determining whether an employer is a successor in interest. The change clarified that whether the former management or persons with an ownership interest in the prior firm retain a management interest in the successor firm may be considered in the successor determination. One commenter opposed the proposed clarification, but did not provide a reason for its opposition. The definition is adopted as proposed.

#### l. United States

The NPRM included in the definition of United States language regarding the transition program effective date of the application of Federal immigration law to the Commonwealth of the Northern Mariana Islands (CNMI). That transition program effective date having passed,

we have accordingly deleted that language as CNMI now is included automatically in the definition of United States under U.S. immigration law.

#### m. United States Worker

The NPRM included a definition of U.S. workers that referenced, as did the 2008 Final Rule, the INA. Although no comments were received on this definition we have edited the definition for clarity.

#### 3. Section 655.103(c) Definition of Agricultural Labor or Services

The NPRM proposed to modify the definition of agricultural labor or services in several ways. It proposed to retain all three of the statutory definitions set forth in the INA, which include agricultural labor as defined in sec. 3121(g) of the Internal Revenue Code of 1986 (IRC), agriculture as defined in sec. 3(f) of the Fair Labor Standards Act (FLSA), and the pressing of apples for cider on a farm, 8 U.S.C. 1188(a)(15)(H)(ii)(a). The NPRM proposed to remove three provisions from the definition. The first expressly provided that an activity is agriculture, even though it meets only one of the statutory definitions. The second allowed H-2A employees to engage in certain activities that are not included in the statutory definitions, provided that H-2B workers were not performing the same work in the same place. The third allowed H-2A workers to perform work that was not listed on the *Application for Temporary Employment Certification* (Application), so long as it was less than 20 percent of the work and incidental to the agricultural work performed. The Final Rule retains the first provision that had been proposed for removal but removes the latter two provisions. The NPRM also had proposed to retain logging employment in the definition and to add reforestation and pine straw activities. The Final Rule retains logging, but does not add reforestation and pine straw activities.

The IRC and FLSA definitions include work performed by a farmer or on a farm cultivating, raising, or harvesting crops and raising livestock and other animals and bees, including the operation and maintenance of the farm. The IRC definition also includes the packing and processing of agricultural and horticultural commodities so long as more than half of the commodities are produced by the farmer performing the packing and processing.

The FLSA definition has been interpreted to have a primary meaning (*e.g.*, production, cultivation, growing and harvesting of any agricultural or

horticultural commodities) as well as a broader secondary meaning that includes any practices 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, and delivery to carriers for transportation to market.

In 2008, changes to FLSA regulations at 29 CFR part 780 and 29 CFR part 788 addressing Christmas tree production were published simultaneously with the H-2A regulations. These changes to FLSA regulations did not change the applicability of H-2A to Christmas tree production. The H-2A definition of agricultural labor or services includes the IRC definition of this term. The IRC recognizes as agricultural labor those services performed in the employ of any person in connection with the planting, raising, cultivating, and harvesting of Christmas trees when such services are performed on a farm. Therefore, such activities come within the scope of H-2A.

#### a. An Occupation Included in Either Statutory Definition

The NPRM proposed the removal of a clarifying sentence stating that an occupation included in either the IRC or the FLSA definition is considered agricultural labor or services even though the occupation does not appear in both definitions. This means that if the work is within the scope of either the IRC or the FLSA definition of agriculture, then the work is within the scope of the H-2A program. Although the Department believed that this principle was clear and the provision superfluous, several commenters found it useful. The Final Rule reinstates the deleted sentence, with slight editorial modifications.

#### b. Removal of Handling, Packing, Processing, and Other Non-Agricultural Activities Where the Farmer Processed Less Than 50 Percent of the Commodity

The NPRM also proposed the removal of the definition of agricultural labor and services that had been added in the 2008 Final Rule that permitted handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm where no H-2B workers are employed to perform the same work at the same establishment. This provision allowed activities defined as nonagricultural work under the FLSA and the IRC to be performed

by H-2A workers, so long as no H-2B workers were employed at the same worksite doing the same work. The Final Rule adopts the proposed deletion, returning to the definition used in the 1987 Rule.

A few commenters sought the Department's rationale for the removal of this language. One commenter expressed disappointment regarding the proposed removal, asserting that it was a major change that would impact packing houses that might not be able to obtain workers through the H-2B program due to the annual cap on that program. This commenter further asserted that since such H-2B workers often worked alongside H-2A workers and their jobs are clearly in the stream of agriculture, the language should be re-inserted.

The 2008 Final Rule's definition was problematic because it allowed a farmer to employ both H-2A workers and H-2B workers to perform identical work, so long as the H-2A workers and the H-2B workers were employed in different locations. Congress clearly intended to create two separate programs: H-2A for agricultural work and H-2B for other, nonagricultural work. Compare 8 U.S.C. 1101(a)(15)(H)(ii)(a) and 8 U.S.C. 1101(a)(15)(H)(ii)(b). A regulation that allows H-2A workers and H-2B workers to perform the same activity is inconsistent with this Congressional intent. Furthermore, Congress has already addressed the proper classification of packing and processing work by including the IRC definition, which specifies that these activities are considered agricultural labor only if more than 50 percent of the commodity on which the work is being performed has been produced by the farmer. In other words, work in a packing shed on a farm, packing apples or peaches which are grown on the same farm, falls within the definition and thus within the H-2A program. However, if more than 50 percent of the apples or peaches being packed come from other farms, the work is no longer considered agriculture.

The Department believes that this statutory limitation is meaningful, and that Congress intended it to apply to different types of work. As a result, the Department has determined that it is appropriate to return to the definition of agriculture as set forth in the 1987 Rule and has deleted this provision.

#### c. Removal of Minor and Incidental Activities

Further, the NPRM proposed the removal of the phrase other work typically performed on a farm that is not specifically listed on the Application and is minor (*i.e.*, less than 20 percent

of the total time worked) and incidental to the agricultural labor or services for which the H-2A worker was sought. Several commenters objected to this change, asserting that the removal of this language would unfairly limit their flexibility in assigning H-2A workers to different kinds of work, and/or to work which was not listed on the job order. Commenters also expressed fears that the removal of the 20 percent tolerance for work that is not listed on the Application would subject employers to debarment if H-2A workers perform work that is outside the scope of the job order for even a small fraction of their time.

The comments appear to reflect a misunderstanding of the 2008 Final Rule's use of the terms minor and incidental. For example, commenters complained that they would no longer be able to assign H-2A workers to such nonagricultural work as directing traffic at retail outlets (as opposed to roadside stands selling agricultural goods produced on the farm), and unloading truckloads of purchased merchandise (as opposed to farm products) to be offered for sale to retail customers. These activities are not incidental to the agricultural activities performed by H-2A workers, and they do not appear to relate to agriculture in any way. In light of these comments, it appears that the language added to the definition of agriculture led to confusion rather than clarification.

On further review, the Department believes that the proposed return to the 1987 Rule definition still provides farmers adequate flexibility in the use of H-2A workers, while respecting congressional intent that the work be agricultural in nature. These workers can, for example: Work at a farmer's roadside retail stand; handle, package or sell agricultural or horticultural goods produced on the farm; or perform maintenance work on farm buildings and machinery. These activities are performed by a farmer or on a farm and are incidental to farming operations, and therefore meet the FLSA definition of agriculture. In addition, the IRC definition of agricultural labor or services encompasses a broad range of activities, such as the management of wildlife on a farm, the ginning of cotton, or the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market, of any agricultural or horticultural commodity, as long as more than 50 percent of the goods were produced by the farmer-employer. These definitions provide considerable latitude to the employer as to the type of work for which H-2A

workers may be used. They have been used for decades and are well understood.

Further, the INA is clear that in order for the Secretary to certify a petition, an applicant must demonstrate that there are not sufficient workers to perform the labor or services involved in the petition. It is incongruous to claim that such a broad degree of flexibility is needed to encompass work that has not yet been identified, while representing in the Application for H-2A workers that there are not enough U.S. workers available to perform such work. To approve an Application that would allow a worker to perform a substantial amount of work that was not included in the Application would not be in keeping with the plain statutory language requiring the Department to find that there are not enough workers available to perform the work for which H-2A workers are being sought. The 2008 Final Rule's 20 percent tolerance allowed H-2A workers to work a full day a week, every week for the entire job order, in work other than that listed on the Application. This broad language effectively allowed an employer to apply for 10 workers although the employer had only identified work for which eight workers were needed. This permitted an employer with a substantial number of H-2A workers to routinely assign them unadvertised work that would have been sufficient to support the hiring of additional U.S. workers. Such a tolerance is not minor and is inconsistent with the statutory standard. Therefore, the Final Rule deletes this provision from the definition.

Finally, several commenters expressed concerns that removing the reference to incidental work from the definition of agricultural labor or services, coupled with proposed changes in the provisions addressing revocation and debarment, might lead to an employer being debarred for having assigned a worker outside the scope of the job order for even a small fraction of time. However, the Department does not intend to debar an employer whose H-2A workers perform an insubstantial amount of agricultural work not listed in the Application. In exercising our enforcement discretion when an employer has worked an H-2A worker outside the scope of the activities listed on the job order due to unplanned and uncontrollable events (such as a freeze that prevents planting or heavy rains that prevent harvesting), the Department will consider the employer's explanation, so long as the activities are within the scope of H-2A agriculture, have been occasional or sporadic, and

the time spent in total is not substantial. Moreover, the debarment regulations require that the violation be substantial, and that a number of factors must be considered in making that determination, including: An employer's previous history of violations; the number of workers affected; the gravity of the violation; the employer's explanation, if any; its good faith; and its commitment to future compliance. Under these criteria, the good faith assignment of a worker to work not listed in the Application for a small amount of time would not result in debarment. The Final Rule deletes the provision providing a blanket 20 percent tolerance for work outside the scope of the Application, as proposed.

#### d. Definition of Agricultural Labor or Services—Inclusion of Reforestation and Pine Straw Activities

The Department proposed that the definition of agricultural labor or services include reforestation activities, defined as predominately manual forestry work including but not limited to tree planting, brush clearing, and pre-commercial tree thinning. It also proposed to include pine straw activities, defined as certain activities predominately performed using hand tools, including but not limited to raking, gathering, baling, and loading of pine straw, a product of pine trees that are managed using agricultural or horticultural/silvicultural techniques. Currently, employers engaged in these activities may use the H-2B program. Reforestation, a sub-industry of forestry, is commonly performed by migrant crews who are overseen by labor contractors and share the same characteristics as traditional agricultural crews. The same reasoning was used in proposing to include pine straw activities within the scope of the H-2A program. Overwhelmingly, the comments were opposed to adding reforestation activities and pine straw activities to the H-2A program. We are convinced by these comments and therefore the Final Rule does not include reforestation and pine straw activities.

A number of employer commenters claimed that the way in which contracts are awarded to reforestation companies would preclude applicants from being able to file H-2A applications in realistic timeframes and would make it difficult to comply with H-2A provisions; they asserted that such contracts are often for short duration, making it particularly difficult to provide documentation that housing, typically hotels or motels, had been secured far in advance. Some of the

commenters projected their increased costs and predicted the costs could put them out of business or preclude them from using the program to employ an authorized workforce.

Employee advocates indicated they were concerned about moving such workers into the H-2A program, since such a change would mean these workers would lose the protections afforded to them by the MSPA, particularly the right to a Federal cause of action to enforce these rights, replete with statutory liquidated damages for violations. Commenters indicated that the loss of protections under MSPA outweighed whatever additional benefits or protections inclusion in the H-2A program would offer. Several commenters suggested that the better course of action would be for the Department to provide additional protections to these workers through changes in the regulations that govern the H-2B program.

Only a few commenters supported the proposed change. One stated that the activities were agricultural and thus it was unreasonable for forestry contractors to have all the regulatory responsibilities of agricultural employers but be denied access to agricultural labor under the H-2A visa program. Others supported the change based on the reasons the Department had used in making the proposal. A State agency supported the proposal but cautioned there would be increased efforts and costs for their agency to carry out additional housing inspections and prevailing wage and practices surveys. We received only one comment that specifically addressed the proposed inclusion of pine straw activities, and it supported the inclusion based on a circuit court decision that found that these activities fell within the definition of agriculture under MSPA. We note that the court in this decision did not rely on the definitions of agriculture used in either the FLSA or the IRC, which are the statutory definitions included in the H-2A program. See *Morante-Navarro v. T & Y Pine Straw, Inc.*, 350 F.3d 1163 (11th Cir. 2003).

Taking into account the lack of support from all sides to the proposed inclusion of reforestation activities and pine straw activities in the H-2A program, the Department has decided not to include these activities in the definition of agricultural labor or services in the Final Rule. We will consider whether it is appropriate to propose additional protections for these workers in any future revision of the H-2B program.

#### e. Definition of Agricultural Labor or Services—Logging

The NPRM proposed to keep logging in the H-2A program; however, the definition section of the NPRM proposed a more detailed definition of logging employment. The justification for this decision to include logging in the definition was contained in the preamble to the 2008 Final Rule.

The Department received some comments on the inclusion of logging in general and the definition in particular. One commenter indicated no opposition to the inclusion of logging in the definition of agricultural labor or services but noted that the Department offered no justification for inclusion of logging in the NPRM. Another commenter stated that the rationale for including logging in the definition is inconsistent with prior regulations and principles of statutory interpretation. This commenter asserted that the statutory language of 8 U.S.C. 1101(a)(15)(H)(ii)(b) clearly encompasses all temporary service or labor other than agricultural labor or services, and argued that the Department arbitrarily used the phrase agricultural labor or services (defined by several statutory provisions) as authority to expand the scope of the H-2A program to cover virtually all work with renewable natural resources. The commenter argued that the division of 8 U.S.C. 1101(a)(15)(H)(ii) into (a) and (b) (devolving into the H-2A and H-2B programs) was not intended to grant the Department unlimited discretion to make legislative changes, as proposed in § 655.103(b).

The same commenter asserted that the inclusion of logging in the definition as in 2008 would constitute a substantial change from past practice that does not protect U.S. workers. This commenter also contended that moving these workers from a visa program with caps to one without statutory caps would not assist in protecting them from exploitation by labor contractors. Instead the commenter proposed that the more stringent labor protections applicable to H-2ALCs be incorporated into the H-2B regulations for all temporary foreign workers not working at fixed locations.

The Department disagrees with this commenter. Congress clearly gave the Secretary authority to define agricultural labor and services through regulation. 8 U.S.C. 1101(a)(15)(H)(ii)(a). As stated previously, the Department's rationale was discussed in detail in the 2008 Final Rule. Proposed changes to the H-2B regulations are not a part of this rulemaking.

A reforestation contractor noted that logging was included under the H-2A program due to misconceptions about the industry, namely that the companies are mainly labor contractors who hire and move migrant crews. This commenter indicated that several logging employers would be interested in using temporary, seasonal foreign workers to fill labor shortfalls if the program allowed for working conditions and benefits that are common to prevailing logging employer practices. The commenter did not specify the prevailing logging practices being referenced; however, we believe that inclusion of logging activities in the H-2A program appropriately balances the interests of logging employers and workers.

A State agency indicated that the Department's definition of logging operations is consistent with the definition used by the Occupational Safety and Health Administration (OSHA) and commended the Department. However, the commenter was concerned that the definition of logging employment might encompass certain positions such as logging supervisors, mechanics, mechanics' helpers, and operations engineers (who cut and maintain roads for access). The commenter stated that these positions do not meet the standards for H-2A agricultural employment and do not constitute employment on an agricultural employer's farmstead. This commenter requested that the Department clarify that these positions are not included in the H-2A program. The NPRM definition identifies the types of logging activities for which labor certification may be granted. We did not intend to change the scope of logging activities adopted by the 2008 Final Rule and therefore employees who were previously granted logging status may continue to be certified under the definition now contained in the H-2A program. The Final Rule retains the language from the NPRM.

#### 4. Section 655.103(d) Temporary or Seasonal Nature

##### a. General Comments Regarding Temporary or Seasonal Nature

The NPRM proposed to adopt the definition of temporary or seasonal nature currently used by DHS in its H-2A regulations. The Department received more than a dozen comments on this proposed change in the definition. All of them opposed the change. Many found that there was no rational basis for the change and stated that the preamble explanation was insufficient. Many said that the existing

definition had worked effectively for more than 20 years and should be retained. Of those who explained why, the primary reason stated was that the DHS definition is meant to apply to the worker, not the employer, and DOL is tasked with determining the needs of the employer rather than the worker; therefore, the DHS definition used in the NPRM is inappropriate. Many of the commenters pointed out that the existing definition is well-established and is the subject of many years of precedential court decisions. These commenters asserted that departing from this well-established definition would be highly disruptive to the program.

Other commenters believe that the definition of temporary or seasonal nature in the NPRM is too vague and requires further delineation if it is to be kept. Specifically, these commenters point out that adding short to annual growing cycle limits the timeframe, and the requirement for labor levels far above those necessary for ongoing operations during that short timeframe could exclude small farmers who might only need one or two additional employees during the peak of their season.

The Department has decided to retain the language of the NPRM which was not intended to create any substantive change in how the Department administers the program. If additional clarification is needed in the future, we will provide such clarification through the use of guidance memoranda, bulletins, special procedures (as applicable) and other guidance documentation.

##### b. Treatment of the Dairy Industry Under the Definition of Temporary or Seasonal Nature

The Department received numerous comments requesting the inclusion of the dairy industry in the definition of agricultural labor or services.

All of these commenters expressed a critical need for foreign labor in the dairy industry. Several commenters referenced an internal survey of a national organization of milk producers that indicated that an estimated 62 percent of milk production on these farms was attributed to immigrant labor. One commenter asserted that domestic workers do not want to fill the available jobs in the dairy industry. Another commenter stated that a shortage of domestic labor is particularly acute in this industry, in which employers experience year-round employment needs and must invest significant resources into employee recruitment and retention.



Most of these commenters sought the inclusion of dairy under H-2A special procedures, likening the dairy industry to shepherders (and also loggers and cider pressers) whose need is not temporary, but who enjoy the benefits of the program. One commenter argued that the industry should be included on an expanded temporary basis of 1 year at a time. This commenter referred to isolated, anecdotal evidence from before the passage of the Immigration Reform and Control Act of 1986 (IRCA) where the Department permitted successive 1-year certifications for an employer that demonstrated a particular need.

The determination of whether a particular dairy activity is eligible for an H-2A certification rests on a finding that the duration of the activity and the need for that activity is temporary or seasonal. The majority of activities encompassed by the dairy industry, and milk production in particular, are year-round activities and therefore cannot be classified as temporary. The Department has no legal authority, nor is there legislative precedent, that would allow for the inclusion of the entire dairy industry in the H-2A program.

Shepherders, which many of the commenters cited as an example of an exception to the definition of temporary, owe their inclusion in the program to a statutory provision dating back to the 1950s. That legislative inclusion was implicitly ratified in IRCA. No such legislative inclusion of the dairy industry as a whole has yet to be provided by Congress.

### Prefiling Procedures

#### 5. Section 655.120 Offered Wage Rate

In response to comments, the Final Rule adds the agreed-upon collectively bargained wage to the list of required wage rates. The rationale for this change is explained below, after the discussion of the AEWR.

##### a. The Department's Execution of the Offered Wage Rate

###### (i) The Provision of an AEWR in the H-2A Program

The Department has decided to retain the concept of an AEWR as part of the H-2A program and that the basis for computing the H-2A AEWR shall be the annual average of combined crop and livestock workers' wages applicable for each state as reported by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) reports. This section discusses the Department's rationale for retaining the AEWR and then discusses the Department's rationale for changing the methodology used to calculate the AEWR.

###### (ii) The Need for an AEWR

The admission of temporary foreign workers under the H-2A program is predicated on a certification by the Secretary that

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

(8 U.S.C. 1188(a)(1)(B)).

Accordingly, under § 655.120(a) of this Final Rule, an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the collectively bargained wage rate, or the Federal or State minimum wage, except where a special procedure is approved.

This requirement reflects a longstanding concern that there is a potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers. The AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant foreign workers must offer to and pay their U.S. and foreign workers if the prevailing wage rate, the collectively bargained wage rate, and any Federal or State minimum wage rates are below the AEWR. The AEWR is designed to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce. The AEWR is a wage floor, and its existence does not prevent the worker from seeking, or the employer from paying, a higher wage.

From the outset of the Federal Government's involvement in the admission of temporary foreign agricultural workers, the Government has sought to protect similarly employed U.S. workers from the potential adverse effect such employment would have on their wages. Since 1953, the Department has computed and published AEWRs for the temporary employment of nonimmigrant foreign workers for agricultural employment under various admission programs. See H.N. Dellon, "Foreign Agricultural Workers and the Prevention of Adverse Effect", 17 Labor Law Journal 739 (1966) for a detailed history of the early decades of publication of AEWRs by the Department. Mr. Dellon's article notes that, as far back as 1953, employers seeking to employ foreign nationals to work in various crop activities (in that case, under the Bracero Program) were required to pay not less than a wage established by DOL. AEWRs began to be set periodically on a statewide basis, first for a subset of States based on

applications for temporary foreign workers and subsequently for all States (except Alaska).

As time passed, the establishment of AEWRs became more formalized, and AEWRs were computed and set for the H-2 program as well, after public notice and comment. See, e.g., 29 FR 19101-19102, Dec. 30, 1964; 32 FR 4569, 4571, Mar. 28, 1967; and 35 FR 12394-12395, Aug. 4, 1970.

Economic theory provides the initial justification for the use of an AEWR. Economic theory holds that, other things being constant, any increase in the supply of labor available in a labor market segment would result in a decrease in the equilibrium wage. This theory-based observation of the effect of increased labor supply is the basis for the concern that currently employed, or incumbent, farm workers would be adversely affected by lowered wages as a result of an influx of temporary foreign farm workers.

Similarly, economic theory holds that, under conditions of an emerging labor shortage, the previously observed wage (prevailing local wage) may not reflect the equilibrium wage.<sup>2</sup> Instead, adjustments would occur over time<sup>3</sup> and the observed wage would increase by an amount sufficient to attract more workers until supply and demand were met in equilibrium. Absent an increase of workers under the H-2A program, wages would rise above the currently observed wage in order to dispel the labor shortage until sufficient additional domestic labor was attracted into the market from neighboring geographic areas or other occupations. By computing an AEWR to approximate the equilibrium wage that would result absent an influx of temporary foreign workers, the AEWR serves to put incumbent farm workers in the position they would have been in but for the H-2A program. In this sense, the AEWR avoids adverse effects on currently employed workers by preventing wages from stagnating at the local prevailing

<sup>2</sup> The notion that a single point wage would be observed for a market in equilibrium is a simplification. In the abstract, an equilibrium wage is the wage at which the quantity of labor supplied by workers matches the quantity of labor demanded by employers. In practical reality a range of individual wage contract amounts may be observed reflecting individual labor productivity differences, relative bargaining strengths of contracting parties, timing of employment contracts, imperfect knowledge of market conditions by one or both parties, location factors and a myriad of other influences, but this array of individual wage contract values yields a particular average as a measure of the distribution's central tendency, and this average is conveniently referenced as the equilibrium wage.

<sup>3</sup> Including, given enough time, the possibility of substitution of capital for labor.

wage rate when they would have otherwise risen to a higher equilibrium level over time.

In practical application, there are a number of obstacles and limitations that hinder the market adjustment process to an equilibrium wage as indicated by the theoretical labor market analysis. Foremost of these is the limitation imposed by inefficiency in the transmission of information about labor market conditions (job openings, revised wage offers, conditions of employment, etc.) across both physical and social distances. Information transmission inefficiencies affect all labor markets. Most jobs in the U.S. are filled through informal information and referral processes. It has been estimated that fewer than 20 percent of job openings are listed on public labor exchange information systems or advertised in public media.<sup>4</sup>

Farm workers are especially likely to be disadvantaged in terms of access to information about new or changing labor market conditions or job opportunities. The physical distances and relative social isolation typical of many rural environments slows the transmission of information by word-of-mouth. Even though seasonal migrant workers may move great distances from one crop area to another over the course of the planting, tending and harvesting seasons, their knowledge is often limited to a familiar circuit of employment opportunities, and they often lack rapid access to information that would enable them to alter routine migration patterns to take advantage of new opportunities. The low educational attainment of farm workers is a major barrier to efficient access and rapid response to changing labor market conditions. Over 45 percent of U.S. citizens who are employed as hired farm workers do not have a high school diploma, and 21 percent of U.S. citizens employed as hired farm labor have less

than a 10th grade education.<sup>5</sup> These farm workers with low educational attainment, numbering over 246,000 U.S. citizens, and many more if permanent resident non-citizens are included, often have limited reading ability and limited access to newspapers and other media in which job opportunities and wage offers might be advertised. They are also disproportionately poor, and their economic status may limit their physical access to public labor market information and assistance resources.

The resulting limitations in the flow of labor market information hinder the rapid adjustment of wages to a market equilibrium level. This situation can lead to localized short-run critical shortages of farm labor and result in spikes in farm labor wages that are much greater in magnitude than would be the case if information flowed more readily and markets adjusted more rapidly to a final equilibrium. Wide fluctuations in local wages may create a hardship for farmers who need to plan financially for expected labor costs. Unexpectedly large increases in labor costs may reduce profits. Shortages of labor at critical times may cause tangible waste if crops cannot be harvested at the appropriate time. It was in part to alleviate such difficulties facing farmers, as well as to discourage the unauthorized employment of workers, that Congress enacted legislation to facilitate the temporary importation of foreign labor to meet short-term gaps in the domestic supply of labor in critical locales. However, Congress also recognized the need to protect the wages and access to jobs of citizens and other permanent residents employed in the farm labor sector, and Congress placed with the Secretary the responsibility to ensure that the process of importation of foreign labor to aid farmers did not cause damage to the economic condition of domestic farm workers.

The apparent existence of a shortage of domestic workers, at least temporarily, is the basis on which employers apply to import temporary foreign H-2A workers. The requirement that employers first attempt to recruit domestic labor by listing job openings and wage offers with SWAs which are part of the public labor exchange system and to advertise openings in appropriate media is an essential part of the process of protecting domestic workers.

<sup>5</sup> Based on analysis of 2005–2009 data from the Current Population Survey (CPS), Annual Social and Economic Conditions Supplement. The analysis of CPS data was restricted to U.S. citizens because non-citizens in the sample could not be identified as legally documented residents or not.

However, as a result of the known limitations faced by farm workers in obtaining information from these sources, there may not be enough time for additional domestic workers to enter the local farm labor market. In such cases, because there is a long history of temporary migrant work in the U.S. and because the potential supply of foreign low-wage agricultural workers is great, the importation of foreign workers might more expediently address the labor shortage. However, because such an influx of labor would imply that the wages of incumbent domestic workers would not adjust upward, the use of an AEWR circumvents this adverse effect on incumbent workers.

#### (iii) The Use of the Prevailing Wage Does Not Provide Sufficient Protection

A farm association commented that there is no valid economic justification for a separate AEWR standard in addition to the prevailing and statutory minimum wage. Another comment suggested that the concept of an AEWR is an outdated notion. They stated that the AEWR was created at a time when there was no Federal minimum wage for agricultural employees. The purpose of the AEWR, therefore, was to create a floor on the prevailing wage rate. Subsequently, the Government has established a Federal minimum wage for agricultural employees. The commenter asserted that once the agricultural minimum wage was established, the AEWR was retained simply as a matter of economic theory. The commenter further contended that keeping an AEWR that is higher than the prevailing wage actually has an adverse effect on employment of U.S. workers because it precludes access to jobs that would otherwise be available if there were a competitive wage. The commenter stated that he has moved to less labor-intensive farm practices as a direct result of the higher than market wage rate he has to pay based on the AEWR.

The commenter concluded that there is no current reason to have an AEWR. The commenter proposed that the Department refrain from further efforts to determine which of several flawed surveys are appropriate for the AEWR. Instead the Department should eliminate the AEWR and use the prevailing wage as the baseline for the H-2A program.

An AEWR distinct from a prevailing wage concept<sup>6</sup> is most relevant in cases in which the local prevailing wage is

<sup>6</sup> Under the 2008 Final Rule, which also retained the concept of an AEWR, the methodology used to calculate the AEWR was such that the AEWR was essentially the same as the prevailing wage.

<sup>4</sup> See Bayer, Patrick, Ross, Stephen, and Topa, Giorgio, "Place of Work and Place of Residence: Informal Hiring Networks and Labor Market Outcomes." National Bureau of Economic Research Working Paper No. 11019, 2005 for a review of research regarding the impact of differences in access to labor market information and social networks in shaping the different wage and employment outcomes of different groups of workers. See Ozga, S.A., "Imperfect Markets Through Lack of Information." Quarterly Journal of Economics, February 1960, 74(1), pp. 29–52, for a theoretical discussion of the effects of imperfect information flows on labor market dynamics. See Holzer, Harry J., "Informal Job Search and Black Youth Unemployment." American Economic Review, June 1987, 77(3), pp. 446–452 for a discussion of how minorities, and especially youth, are disadvantaged by the relative inefficiency of their informal job search and labor market information networks.

lower than the wage considered over a larger geographic area (within which movement of domestic labor is feasible) or over a broader occupation/crop/activity definition (within which reasonably ready transfer of skills is feasible). In such cases, the introduction of foreign workers paid at the local prevailing wage fails to account for the fact that the labor shortage would have otherwise resulted in higher local wages. The use of the observed local prevailing wage would adversely affect domestic workers by filling job vacancies with foreign workers before wages were allowed to adjust upward to alleviate the labor shortage in the imperfectly functioning labor market information system.

Thus, to more fully protect domestic workers from the adverse effects of temporary foreign workers, it is appropriate to compute wages based on a broader geographic area or broader occupation definition than the more specific prevailing wage computation when the local prevailing wage is below the average found in the broader market area. In this case, application of the AEW is an attempt to approximate the equilibrium wage that would have resulted but for the introduction of foreign workers. The AEW is, in essence, a prevailing wage concept defined over a broader geographic or occupational field, recognizing the relevant parameters over which wages could have adjusted to an equilibrium level in the absence of additional temporary workers under the H-2A program.

In cases in which the AEW is not higher than the prevailing wage, minimum wage, or collectively bargained wage, incumbent domestic workers would be disadvantaged by the use of the AEW instead of the higher alternative.<sup>7</sup> In these cases, the local shortage of labor exists despite a wage rate prevailing at a local level (or a mandated minimum wage or a collectively bargained wage) that is generally higher than wage average over a broader area, suggesting that wages have not fully adjusted to an equilibrium level. Therefore, in these cases, the AEW is not binding on employers because use of a higher alternative wage would afford greater protection to incumbent workers. The difference between the local prevailing wage (which would be paid to temporary foreign workers) and the

lower wage in the broader geographic or occupational definition area (represented by the AEW) provides an incentive for domestic resident workers to shift their labor supply into the affected market and to benefit from additional employment opportunities and potentially higher wages than are available to them elsewhere. Because employers would otherwise be compelled to pay the minimum wage (by law), the collectively bargained wage (by contract) or the prevailing wage (by market forces), the Final Rule only codifies what the employers would otherwise do. The requirement that imported foreign temporary workers be paid no less than the highest of the AEW, the local prevailing wage, the collectively bargained wage, or the applicable legal minimum wage ensures that domestic workers receive the greatest potential protection from adverse effects on their wages and working conditions, including the adverse effect of being denied access to the opportunity to earn a higher equilibrium wage that would have resulted as the market (perhaps slowly) adjusted in the absence of the guest workers.

#### (iv) Evidence of Current Wage Depression Is Not Needed

Citing various sources of evidence, some comments have suggested that the use of an AEW is not justified because there is no evidence of wage depression in agriculture. One farm organization noted that, in the proposed rule, the Department justified the use of an AEW despite the fact that the Department readily acknowledges that evidence is not conclusive on the existence of past adverse effect. Similarly, another association of agricultural employers asserted that there is no longer a rationale for an AEW because wages in the agricultural industry have increased over time.

First and foremost, regardless of any past adverse effect that the use of low-skilled foreign labor may or may not have had on the wages paid to authorized agricultural workers, the Department considers the forward-looking need to protect U.S. workers whose low skills make them particularly vulnerable to even relatively mild—and thus very difficult to capture empirically—wage stagnation or deflation that has the potential to result from the hiring of immigrant labor. The lack of evidence of wage depression at present is not evidence that an AEW is unnecessary; rather, it may be evidence that the imposition of the AEW heretofore has been successful in shielding domestic farm workers from

the potentially wage depressing effects of overly large numbers of temporary foreign workers. The fact, discussed below, that the localized wage adopted as the AEW in the 2008 Final Rule has led to significant decreases in farm worker wage in many cases suggests that an AEW linked to a wider geographic area and a wider spectrum of occupations has provided the protection it was intended to provide.

Furthermore, the Department recognizes that the empirical evidence is inconclusive about the past impact of immigration on wages and believes that the provision of an AEW in the face of such uncertainty will serve to ensure that wages and working conditions are not adversely affected. The 2008 Final Rule reviewed evidence on the depressive effects of immigration on wages and explicitly reiterated the conclusion stated in the 1989 Rule that evidence of wage depression in the agricultural sector was inconclusive. 73 FR 77168, Dec. 18, 2008. In the 1989 Rule, the Department noted that some studies had identified wage depression in specific agricultural labor markets, but labeled that evidence anecdotal. The Department further noted that even this anecdotal evidence of wage depression was highly localized and concentrated in specific areas and crop activities. 54 FR 28043, Jul. 5, 1989.

According to the 2008 Final Rule preamble, evidence developed during the 20 years after the 1989 Rule did not provide additional clarity on the issue of wage depression. The 2008 Final Rule cited experts who continued to claim that unauthorized workers cause wage depression (*e.g.*, Michael J. Wishnie, “Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails”, 2007 U. Chic. Leg. For. 193, 215 (2007) (asserting that unauthorized workers certainly contributed to the depression of wages and working conditions for U.S. workers). However, the rule also cited experts who suggested that the evidence was mixed. Thus, the 2008 Final Rule, after considering the comments received on the subject of wage depression, and after reviewing relevant literature in an attempt to identify empirical support for the assertions made in those comments, reaffirmed the Department’s conclusion in the 1989 rulemaking that evidence of wage depression in the agricultural sector is inconclusive. Furthermore, the 2008 Final Rule also stated that: there is no conclusive evidence one way or the other regarding the existence of wage depression in localized agricultural labor markets. 73 FR 77168–77169, Dec. 18, 2008.

<sup>7</sup> Evidence suggests that the AEW would be the highest of the computed wage alternatives, and therefore binding on employers, in the vast majority of cases. In Fiscal Year (FY) 2009, the AEW was not applicable in only 10 percent of the cases certified under the Rule before the 2008 Final Rule.

Additional research not previously considered suggests that any adverse wage effects would be more likely to affect lower-skill workers. See Pia M. Orrenius, Michael Nicholson, "Immigrants in the U.S. Economy: A Host-Country Perspective," *Journal of Business Strategies*, vol. 26, 2009, which concludes that those who suffer the most severe negative wage impacts are prior immigrants, who are the most substitutable for new immigrants. See also Vernon M. Briggs Jr., "Illegal Immigration: The Impact on Wages and Employment of Black Workers," U.S. Civil Rights Commission, April 4, 2008, Washington, DC, which suggests that low skilled workers, many of whom are black, have been more dramatically affected by immigration over time.

Most contemporary research on the economic impacts of immigration deals with the effects of permanent immigration (whether authorized or not) on wages of incumbent workers across the economy generally, and not specifically in agriculture. To some extent it is not surprising that the results are unclear, because the effects of increased labor supply in particular labor markets from immigration are at least partially (and perhaps more than) offset in general economic equilibrium terms by the increase in aggregate demand from the formation of new households. The specific labor market impacts of permanent immigrants are also attenuated by the fact that immigrants are not limited by law to particular industries, occupations or places of residence. They may adapt to current economic conditions and seek opportunities in relatively fast growing economic areas where their potentially negative impact on wages is subsumed under a strong upward trend.

For several reasons, temporary authorized importation of foreign farm labor may differ from permanent immigration in its impact on labor markets. The guest workers are by definition admitted for only a temporary time, and their shelter and sometimes food are provided by the employer. They do not bring family; they do not set up permanent households; most of their earnings return to their home countries so that they add relatively little to the domestic economy; and their labor is not transferable to other industries where wages and jobs may be growing faster. The Department is concerned that the potential adverse impact on domestic workers of large numbers of authorized temporary foreign workers admitted under the H-2A program may be greater than the negative impact (if any) of similar numbers of permanent immigrants who

contribute positively to aggregate economic demand through household formation and whose impact on agricultural wages may be reduced by their potential mobility to move into other industries.

Thus, in light of the uncertainty about the wage effects of immigration and the likelihood that any impact would be felt more severely by low-skill workers, the Department believes that the risk of wage depression must be recognized and therefore that there is a rational basis for the use of an AEWR.

The Department also recognizes the potential for the presence of unauthorized workers to exert a stagnating influence on agricultural wages. Evidence from the National Agricultural Workers Survey (NAWS) suggests that about 60 percent of hired farm workers may not have legal authorization to work. This large presence of unauthorized workers in the agricultural workforce heightens the concern about stagnating agricultural wages for authorized workers.<sup>8</sup>

(v) The AEWR Is Unique to the H-2A Program

One commenter focused on an apparent inconsistency between the H-2A program and other temporary worker programs, none of which requires an AEWR in addition to a prevailing wage, suggesting that, because there is no provision for an AEWR in other guest worker programs, there is no justification for providing for an AEWR in the H-2A program.

For other programs, the Department currently applies the assumption that U.S. workers in the same occupation will be adequately protected from having their wages adversely affected by the hiring of foreign workers so long as the workers are paid prevailing wage rates. Congress itself has applied this assumption by statute with respect to admitting foreign workers under the H-1B program. 8 U.S.C. 1182(n)(1)(A), 1182(p).

However, the Department established special adverse effect wage rates for the H-2A program. The very existence of a separate program for temporary guest workers in agriculture demonstrates that the agricultural industry is unique and that temporary foreign agricultural workers, and domestic resident agricultural workers in general, may be

<sup>8</sup> The ability of unauthorized workers to move readily between agricultural jobs and jobs in other industries such as construction may account for the lack of evidence of wage depression. In contrast, workers admitted under the H-2A program are restricted to working only in the agricultural sector, and therefore the wage-depressive effects of the influx of such workers are concentrated.

quite different than workers in other industries subject to the H-1B and H-2B programs. Workers in agricultural labor or services often perform work in remote locations for short periods of time and therefore may have little or no access to community or government resources, decreasing their ability to obtain information about alternative employment opportunities that could enable them to bargain more effectively. In addition, the concentration of foreign temporary workers in a single industry sector amplifies the impact of the employment of guest workers on domestic workers. Therefore, the Department believes that the fact that an AEWR is not used in other programs is not indicative of its appropriateness for the H-2A program.

There is ample evidence that agricultural workers are a particularly vulnerable population. They are often hired on a seasonal basis and are required to move from place to place. In part as a consequence of their low educational attainment, low skills, low rates of unionization and high rates of unemployment, agricultural workers have limited ability to negotiate wages and working conditions with farm operators or agricultural services employers. The Department believes that the limited bargaining power of agricultural workers exacerbates the problem of stagnating prevailing wages and slow adjustment to higher equilibrium wages in the face of labor shortages, justifying the use of an AEWR separate and distinct from local prevailing wages.

The vulnerable condition of U.S. agricultural workers is described in a report by the USDA's Economic Research Service (ERS), available at <http://www.ers.usda.gov/Briefing/LaborAndEducation/FarmLabor.htm>. The report found that in 2006 the average annual unemployment rate for hired farm workers (8.5 percent) was nearly twice the unemployment rate for U.S. workers across all occupations (4.5 percent). High unemployment is in part attributable to the seasonality of farm work. Total employment levels for hired farm workers vary significantly depending on the time of year. As an example of seasonal employment fluctuations, the ERS report pointed to National Agricultural Statistics Service (NASS) data in 2006 which indicated that 1,195,000 hired farm workers were employed in mid-July, compared with only 796,000 in mid-January.

The ERS report also noted the concentration of hired farm workers in the Southwest. According to data from the Current Population Survey (CPS), roughly 40 percent of all hired farm

workers live in the Southwest, and 20 percent live in each of the South and Midwest regions. Almost half of all hired farm workers live in just five States: California, Texas, North Carolina, Washington, and Oregon. The geographic concentration of farm workers suggests that exclusive reliance on the traditional notion of the prevailing wage (*i.e.*, the wage paid for that occupation in area of intended employment) is inappropriate to the unique circumstances of the H-2A program. Moreover, many of the other temporary foreign labor programs administered by the Department are subject to statutory visa caps. Historically, those programs have never involved the influx of large numbers of foreign workers into a particular labor market because the influx of workers is spread throughout several industries. In these other programs, it is realistic to conclude that payment of a prevailing wage to the foreign workers will have no adverse effect on U.S. workers. This assumption is not valid in the H-2A context. The program is uncapped and experience indicates that it can involve large numbers of foreign workers entering a specific labor market. Under these circumstances, there is a heightened risk that the employment of foreign workers may produce wage stagnation in the local labor market. Access to an unlimited number of foreign workers in a particular labor market at the current prevailing wage would inevitably keep the prevailing wage lower than it would have been had it adjusted to an equilibrium wage to dispel the shortage through normal market processes involving domestic labor supply flows in response to equilibrium wage changes. The most effective way to remedy this adverse effect on domestic agricultural workers is to impose a wage floor that approximates the equilibrium wage that would have resulted, and the most effective way to approximate such a wage is to consider a broader geographic area than the local area considered for prevailing wages.<sup>9</sup>

One commenter suggested that the current 66,000 visa cap on the H-2B program would be sufficient to flood any particular labor market anyway, assuming all the positions in that labor market were certified by the DOL. Rather than arguing against the use of an

<sup>9</sup> As mentioned previously, in cases in which the AEWR is not the highest of the prevailing wage, Federal or State minimum wage or collectively bargained wage, use of the AEWR would be a disadvantage to incumbent workers, and the highest wage rate among the listed choices is a closer approximation of the position the workers would have been in, absent the H-2A program.

AEWR to prevent localized wage depression, this comment simply suggests that localized wage depression is theoretically possible under a prevailing wage concept as provided for under the H-2B program. The Department has not found that entry of workers using H-2B visas has adversely affected local labor markets, because in fact, these workers are employed in a wide variety of industry sectors, including landscaping, hospitality, construction, reforestation, and retail trade. Nevertheless, the Department has noted the concentration of agricultural workers in localized areas and therefore the greater likelihood of adverse effects on local agricultural labor markets. Thus, the Department recognizes the usefulness of an AEWR in the context of the H-2A program.

The Department continues to consider valid the justification cited in the 1989 Rule, stating that even though the evidence is not conclusive on the existence of past adverse effect, DOL still believes that its statutory responsibility to U.S. workers will be discharged best by the adoption of an AEWR in order to protect against the possibility that the anticipated expansion of the H-2A program will itself create wage depression or stagnation. See 54 FR 28037, July 5, 1989.

The Department continues to believe that the use of an AEWR is necessary in order to effectuate its statutory mandate of protecting domestic agricultural workers from the possibility of adverse effects on their wages or working conditions. In drawing this conclusion, the Department follows the approach in the 2008 Final Rule. The Department is firmly committed to the principle that the wage rates required by the H-2A program should ensure that the wages of U.S. workers will not be adversely affected by the hiring of H-2A workers, and therefore declines to jettison the AEWR concept. 73 FR 77110, Dec. 18, 2008.

#### b. Determining the AEWR

The Department has chosen to calculate the AEWR for each State within a given region as the annual average combined hourly wage for field and livestock workers derived from the USDA's NASS quarterly FLS. Hourly wage rates are calculated based on employers' reports of total wages paid and total hours worked for all hired workers during the survey reference week each quarter.

The FLS is conducted each year in January, April, July and October, and results are published the following month. Annual average estimates for the

number of all hired workers, hours worked by hired workers and wage rates are included in the October FLS report, which is published in November. Information about the methodology of the FLS is publicly available at: <http://usda.mannlib.cornell.edu/usda/current/FarmLabo/FarmLabo-11-20-2009.pdf>.

The FLS defines work as work done on a farm or ranch in connection with the production of agricultural products, including nursery and greenhouse products and animal specialties such as fur farms or apiaries. It also includes work done off the farm to handle farm-related business, such as trips to buy feed or deliver products to local markets.

The FLS defines hired workers as anyone, other than workers supplied by a services contractor, who was paid for at least 1 hour of agricultural work on a farm or a ranch. Worker type is determined by what the employee was primarily hired to do, not necessarily what work was done during the survey week. The survey seeks data on four types of hired workers: Field workers, livestock workers, supervisors (hired managers, range foremen, and crew leaders) and other workers engaged in agricultural work not included in the other three categories.

The FLS report is based on farmers' gross wages paid to workers grouped into two broad categories: Field workers and livestock workers. Wage rates are not calculated and published for supervisors or other workers, but are for field workers, livestock workers, field and livestock workers combined, and total hired workers. Field workers include employees engaged in planting, tending and harvesting crops, including operation of farm machinery on crop farms. Livestock workers include employees tending livestock, milking cows or caring for poultry, including operation of farm machinery on livestock or poultry operations.<sup>10</sup>

The FLS also collects data on the number of workers and wages of workers performing agricultural services on farms (*i.e.*, workers supplied by services contractors) in California and Florida. California and Florida account for the preponderance of agricultural service contract labor provided to farms.

The target population for the establishment portion of the FLS is all farms that sell, or would normally sell, at least \$1,000 worth of agricultural

<sup>10</sup> To the extent workers receive incentive pay, the average wage rate would exceed the workers' actual wage rate. Because the ratio of gross pay to hours worked may be greater than a workers' actual wage rate, some statistics agencies refer to the ratio as average hourly earnings, and not as hourly wages or wage rate.

products during the year. The target population for the agricultural services survey covering California and Florida is all operations that provide agricultural services to farmers.

The USDA survey is designed to produce statistically reliable estimates of overall hired labor use and costs for California, Florida and Hawaii, and provide data for other States except Alaska under 15 multistate groupings. For California, Florida and Hawaii, the AEWR each year will be set as the annual average of the previous calendar year's four quarterly FLS hourly wage estimates for field and livestock workers (combined) in each of these States. For the other States the AEWR will be set as the annual average of the previous calendar year's four quarterly FLS hourly wage estimates for field and livestock workers (combined) of the FLS multistate crop region to which the State belongs. Every State in the same region will be assigned the same AEWR amount. The State groupings are as follows.

Northeast I .....	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.
Northeast II ....	Delaware, Maryland, New Jersey and Pennsylvania.
Appalachian I	Virginia and North Carolina.
Appalachian II	Kentucky, Tennessee and West Virginia.
Southeast .....	Alabama, Georgia and South Carolina.
Delta .....	Arkansas, Louisiana and Mississippi.
Cornbelt I .....	Illinois, Indiana and Ohio.
Cornbelt II .....	Iowa and Missouri.
Lake .....	Michigan, Minnesota and Wisconsin.
Northern Plains.	Kansas, Nebraska, North Dakota and South Dakota.
Southern Plains.	Oklahoma and Texas.
Mountain I .....	Idaho, Montana and Wyoming.
Mountain II ....	Colorado, Utah and Nevada.
Mountain III ....	Arizona and New Mexico.
Pacific .....	Oregon and Washington.

The selection of the Bureau of Labor Statistics (BLS) Occupational Employment Survey (OES) in the 2008 Final Rule was based on an underestimation of its inadequacies. The OES agricultural wage data has a number of significant shortcomings with respect to its accuracy as a measure of the wages of hired farm labor suitable to be used as the AEWR. Perhaps its most substantial shortcoming in this context is that the OES data do not include wages paid by farm employers. Data is not gathered directly from farmers but from non-farm establishments whose operations support farm production,

rather than engage in farm production. Therefore, the OES results for the farm workers and laborers, crop, nursery and greenhouse occupation category reflects only the subset of farm workers and laborers employed by agricultural support services employers—companies that provide agricultural labor supply to farmers on a contract basis. The survey does not include data on farm workers who are directly hired by farm operators and represent the majority of hired farm labor. According to the latest OES data, the covered agricultural establishments represent employment of 451,770 hired agricultural workers of all types—about one-third of the 1.2 million total number of all hired farm workers of all types identified by the USDA FLS. Given that the employees of non-farm establishments constitute a minority of the overall agricultural labor force, the Department has concluded that these data are therefore not representative of the farm labor supply and do not provide an appropriately representative sample for the labor engaged by H-2A employers.

The adoption of the BLS OES methodology in the 2008 Final Rule was intended to simplify the wage determination process for the H-2A program while maintaining adverse effect wage protection similar to that previously provided by the FLS. It was never the Department's intention to produce a substantial and across-the-board reduction in the level of wage protection provided by the AEWR. The 2008 Final Rule explicitly stated that the decision to adopt the OES method for computing the AEWR does not reflect any belief on the part of the Department that all AEWRs are currently artificially high and that they therefore should all be lowered. Nonetheless, average wage levels certified under the H-2A program have declined by over 10 percent nationwide: On a State-by-State basis, only seven States did not experience a decline (See Table 1; Data based on the full set of H-2A application records received in fiscal years (FY) 2008 and 2009).

Several commenters representing employers and grower associations questioned the conclusion expressed in the NPRM that the change in the AEWR computation method had negatively impacted wage floors set under the H-2A program and asked for more specific data. Accordingly, the Department has analyzed the records for FY 2008 and FY 2009 H-2A certifications. The FY 2008 certifications included records for 5,392 applications that were fully or partially approved in the last full year of AEWR computation under the procedure specified in the 1989 Rule

(relying on the NASS averages for crop and livestock workers). The FY 2009 certifications included 4,857 applications that were fully or partially approved, of which about 40 percent were received before the January 2009 effective date of the 2008 Final Rule and were processed under the 1989 computation method. The fact that in FY 2009 some applications were certified under different methods provides a very useful basis for comparison of the relative impact of the computation method change from the FLS data source to the OES data source. The analysis focused on the applications for hourly paid farm and livestock workers for which the AEWR is most likely to be the wage floor determinant. The analysis excluded 906 applications in FY 2008 and 610 applications in FY 2009 that were applications for custom combine and other specialized equipment operators or cattle or sheep range workers paid on a monthly or weekly basis (the wages for these jobs are determined predominantly by local, crop or livestock specific prevailing wage surveys). The excluded applications had de minimis effect on the comparative averages for FY 2008 and FY 2009 wage comparisons shown below since the excluded observations included approximately equal numbers of applications involving relatively high-paid custom combine operators and relatively low-paid shepherders. Table 1 shows the National and State average wage certifications for FY 2008, for the applications certified under the 1989 Rule in FY 2009 and for the applications certified under the 2008 Final Rule in FY 2009.

The average wage amounts are the average of the certified minimum wages of the approved applications weighted by the number of workers approved for each application. The average wages reflect the combined effects of the AEWR, the applicable local prevailing wage and the applicable legal Federal or State minimum wage, whichever was highest for each application. In some cases the AEWR was the determining parameter for the wage certified and in other cases a local prevailing wage or a legal minimum wage was the determining parameter. The change in the method of calculating the AEWR is reflected in the changes in the share of applications in which the applicable prevailing wage or legal minimum wage was higher than the applicable AEWR and in the average certified wages for applications processed before and after the change.

The change to the OES method of computing the AEWR resulted in the

average certified wage for H-2A workers decreasing nationwide to \$8.02 per hour, an 11.2 percent decrease compared to the \$9.04 per hour average for FY 2009 applications that were received before January 19, 2009 and processed under the prior rules, and a 10.8 percent decrease compared to the \$9.00 per hour average wage rate for FY 2008 applications, for all of which the wage determination was made under the prior rule. The only States that did not see a fall in the average H-2A wage amount following the implementation of the 2008 Final Rule were Alaska,

Delaware, Hawaii, Minnesota, Montana, North Dakota, and South Dakota. These States accounted for 1,252 H-2A workers, less than 2.4 percent of the 52,420 total number of H-2A workers certified under the 2008 Final Rule in FY 2009. It is noteworthy that the decline in average wage certification amounts would have been greater were it not for the significant increase following the implementation of the OES AEWR computation method in the proportion of applications in which the wage floor determination reflects a legal minimum wage or a local prevailing

wage greater than the applicable AEWR level. In FY 2009, for applications processed under the 2008 Final Rule (*i.e.*, applications received after January 19, 2009), 60 percent of the applications were approved at a wage higher than the applicable AEWR because the applicable prevailing or legal minimum wage was higher. This is in contrast to only 10 percent in which the AEWR was not applicable among applications processed in FY 2009 under the prior rule.

TABLE 1—STATE AND NATIONAL AVERAGE CERTIFIED H-2A WAGE RATES FY 2008 AND FY 2009

State	FY 08 average wage level	Pre Jan. 19, 2009 wage level	Post Jan. 19, 2009 wage level	08-09 Change (FY 2008 vs post Jan. 19) chg	09 Change (pre Jan 19 vs post Jan. 19)
AK	\$8.00	\$8.00	\$8.25	\$0.25	\$0.25
AL	8.52	8.53	7.39	-1.12	-1.13
AR	8.25	8.44	7.42	-0.83	-1.03
AZ	8.55	8.73	8.09	-0.46	-0.64
CA	9.44	9.29	8.65	-0.80	-0.64
CO	8.93	9.45	8.15	-0.78	-1.30
CT	9.63	9.60	9.22	-0.40	-0.38
DE	12.67	9.70	13.78	1.11	4.08
FL	8.62	8.82	7.45	-1.17	-1.37
GA	8.52	8.53	7.31	-1.22	-1.23
HI	10.83	10.86	10.90	0.08	0.04
IA	10.42	10.39	7.46	-2.96	-2.93
ID	8.76	8.77	7.95	-0.81	-0.83
IL	10.09	9.90	7.76	-2.33	-2.14
IN	9.90	9.90	8.53	-1.37	-1.37
KS	9.64	9.85	9.78	0.14	-0.07
KY	8.87	9.13	7.38	-1.49	-1.75
LA	8.19	8.47	8.14	-0.05	-0.33
MA	9.66	9.63	8.30	-1.36	-1.33
MD	9.42	9.70	9.07	-0.34	-0.63
ME	9.68	9.70	9.48	-0.20	-0.22
MI	9.90	10.02	8.24	-1.66	-1.78
MN	9.85	10.03	10.03	0.18	0.00
MO	10.14	10.44	9.56	-0.58	-0.89
MS	8.16	8.45	7.51	-0.64	-0.94
MT	8.78	8.75	9.29	0.51	0.54
NC	8.91	8.88	7.40	-1.51	-1.48
ND	9.66	10.89	11.61	1.96	0.73
NE	9.66	9.90	9.54	-0.11	-0.36
NH	9.67	9.70	8.39	-1.28	-1.31
NJ	9.34	9.76	8.48	-0.86	-1.28
NM	8.59	9.00	8.74	0.15	-0.26
NV	9.28	9.42	8.98	-0.30	-0.44
NY	9.64	9.72	9.13	-0.51	-0.59
OH	9.92	9.96	9.26	-0.66	-0.70
OK	9.06	9.13	8.94	-0.12	-0.19
OR	9.93		9.89	-0.04	
PA	9.49	9.70	8.72	-0.77	-0.98
RI	9.63	10.00			
SC	8.51	8.53	7.26	-1.25	-1.27
SD	9.68	9.94	10.11	0.43	0.17
TN	8.89	9.10	7.44	-1.45	-1.65
TX	8.83	9.03	8.75	-0.08	-0.28
UT	9.04	9.45	8.85	-0.19	-0.60
VA	8.95	8.87	7.55	-1.41	-1.32
VT	9.66		9.62	-0.04	
WA	9.93	9.94	8.74	-1.19	-1.20
WI	9.78	10.04	8.44	-1.34	-1.60
WV	8.65	9.13	7.39	-1.26	-1.74
WY	8.73	9.01	8.45	-0.28	-0.56
Nationwide	9.00	9.04	8.02	-0.98	-1.01

Note: Empty cells indicate no applications.

Because of the proportionate size of the decrease and the widespread extent of the decreases, the Department has concluded that the continued use of the OES method to calculate the H-2A AEWR entails a significant risk that U.S. workers may in the future experience wage depression as a result of unchecked expansion of the demand for foreign workers.

Some employers and employer association commenters suggested that the AEWR computed on the basis of OES data is a better reflection of actual agricultural labor market conditions than the average wage based on the FLS. This view is incorrect and reflects a misunderstanding of the role of the AEWR. As already noted, the AEWR is most relevant in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area or over a broader definition of occupation, crop, and/or activity. In this regard, the OES data are inadequate. The OES data does not include any survey observations of wages paid to workers who are employed directly by farm operators. It only includes data from employers who operate farm support operations, including contract suppliers of temporary farm labor. Workers in agricultural crop and livestock occupations who are employed by support services establishments account for about one-third of total hired agricultural crop and livestock employment. The predominant majority are directly hired by farmers.

In the 2008 Final Rule, the Department recognized this deficiency in the OES data, but assumed that earnings in the support services sector reported in the OES data would be equivalent to, and a reasonable proxy for, wages paid by farm employers. Subsequent analysis of empirical data by the Department has shown that this assumption was seriously flawed. The agricultural occupations of workers employed in the agricultural support services sector (the only sector directly represented in the OES survey results) differ significantly from the vast majority of the agricultural occupations performed by workers who are employed directly by farm establishments. These differences range across characteristics that significantly affect potential productivity and earnings. Based on data from the Annual Social and Economic Supplement (also known as the March supplement) of the U.S. Census Bureau's CPS describing annual earnings, weeks worked, and weekly hours worked for persons with any work experience during calendar years 2004

through 2008, hired agricultural laborers employed by agriculture support services establishments were comprised of 59 percent non-citizens and 41 percent U.S. citizens. In contrast, just 37 percent of similar workers directly employed by farm establishments were non-citizens and 63 percent were U.S. citizens. While the legal status of non-citizen workers in the sample is unknown, it has been generally observed across a wide range of industries and occupations that non-citizens tend to earn lower wages than do U.S. citizens. For example, the CPS data we analyzed showed that across all occupations and industries, mean hourly earnings of non-citizens in the 2004–2008 period were 28 percent less than mean hourly earnings of citizens.

Educational attainment is also an important determinant of earnings. Hired agricultural workers tend to have lower-than-average educational attainment compared to the general workforce, but the differences between hired agricultural workers employed by agriculture service sector establishments compared to those employed directly by farm establishments are striking and reflect in part the higher share of non-citizens found in the agriculture service establishment compared to the farm establishments. For agriculture service establishments, 60 percent of workers had completed no more than the 9th grade, compared to 41 percent of hired agriculture workers employed directly by farm establishments. Over 26 percent of workers employed directly by farm establishments had a high school diploma, compared to 19 percent of those employed by agriculture service establishments, and 15 percent of hired farm laborers employed directly by farm establishments had some post-secondary education, compared to only 6 percent for employees of agriculture support service establishments. These differences in characteristics of hired agricultural workers employed by agricultural support service establishments (the only category of agriculture establishments reflected in the OES wage data) compared to workers employed directly by farm establishments helps to explain the large differences in wages between the two sectors. On average over the 2004–2008 period, persons who were employed directly by farm establishments earned on average \$10.87 per hour (median \$8.33 per hour), compared to a mean of \$9.32 per hour (median \$7.15 per hour) for those employed by support service establishments. Whether in terms of mean or median, workers employed in

the support services sector earned 14 percent less. All data are in real 2009 dollar equivalent terms.

The Department's error in the 2008 Final Rule of assuming that the OES data for workers employed by agricultural support services establishments would be a reasonable proxy for wages paid by farm establishments was compounded by a second erroneous assumption. In the 2008 Final Rule, the Department added the option for applicants for H-2A workers to specify a skill level for the job opportunity. These skill levels correspond to points on the percentile distributions of wages below and above the OES median for each occupation. The Department assumed that employers would seek a variety of skill levels in occupations for which workers were sought—some higher and some lower than the occupational median, but that the overall result would likely be balanced and average to the median. The FY 2009 implementation experience revealed a significantly different outcome: 73 percent of applicants for H-2A workers specified the lowest available skill level—corresponding to the wage earned by the lowest paid 16 percent of observations in the OES data. Only 8 percent of applicants specified a skill level that translated into a wage above the OES median. This bias toward low skill job specifications compounded the downward wage bias created by the omission of farm establishment observations from the OES data. Both the shift to the OES data source and the use of skill levels contributed to the downward bias in the AEWR-based wage determinations for the applications in which the wage determination was made using the rule for applications received on or after January 17, 2009.

The FLS is the only annually available data source that actually uses information sourced directly from farmers. This is a strong advantage of the FLS as the AEWR data source compared to all other alternatives. The OES data do not include observations of wages paid by farm establishments. Other potential data sources that do include earnings information for hired farm workers employed by farming establishments include the annual CPS work experience supplement (the Annual Social and Economic Conditions (ASEC) supplement), the CPS monthly (outgoing rotation) earner study supplement and the Census Bureau's American Community Survey (ACS). However, the CPS data (both the ASEC supplement and the monthly earner supplement) contain too few



observations for disaggregation of estimates to State or significant multistate regions; the analysis of CPS work experience data for this rulemaking entailed pooling of 5 years of data to obtain sufficient observations. The sample of the CPS is designed to reliably produce total annual labor force characteristics on a State-by-State basis. State (and, to a greater extent, substate) sub-samples of the CPS generally cannot support reliable estimation on a monthly basis for the relatively small category of agricultural employment. Because of a concern about the statistical significance for tabulations covering less than a full calendar year, the BLS does not regard CPS statewide tabulations covering less than a full calendar year as fit for publication and cannot account for seasonal fluctuations in the sub-national monthly CPS tabulations. Furthermore, the ACS data entail an unacceptable time lag of over a year and do not readily allow for calculation of hourly earnings. On balance, the USDA FLS is the best source available.

Many comments by farm organizations, individual farmers, and elected officials expressed concerns that wages vary across the U.S. by geographic location, by specific agricultural occupation, and by level of skill. Therefore, these commenters argued that an AEWR that does not take into account these variables will adversely affect U.S. workers. Accordingly, a farm association proposed that DOL continue using the BLS data to determine the AEWR because it gives a more accurate picture of market-based wages actually being paid for agricultural jobs being performed at various skill levels.

The Department does not agree with the assertion that the OES data provide a more accurate picture of market-based wages. In addition to the fact that the FLS and not the OES includes data about what farm establishments actually pay for hired labor (as discussed previously), the commenters' focus on localized labor market conditions overlooks the important role of the FLS's broader geographic and occupational coverage in protecting domestic workers from wage depression or stagnation resulting from an influx of foreign workers into the context of small, isolated geographic areas or niche crop markets. The FLS sample is distributed across the entire country, with the geographic detail covering 15 multistate regions and 3 stand-alone States. This broader geographic scope makes the FLS more consistent with both the nature of agricultural employment and the statutory intent of

the H-2A program. Because of the seasonal nature of agricultural work, much of the labor force continues to follow a migratory pattern of employment that often encompasses large regions of the country. Congress recognized this unique characteristic of the agricultural labor market with its statutory requirement that employers recruit for labor in multistate regions as part of their labor market before receiving a labor certification for employing H-2A workers.

A related consideration is the potential inefficiency of labor market information transmission systems. By providing a prevailing wage defined over a broader geographic area and over a broader occupational span (all field and livestock workers, rather than a narrow crop or job description), use of the FLS provides a check on the expansion of foreign labor importation to prevent undermining job opportunities and wages for domestic farm workers. Using the FLS average wage derived from data across a relatively broad geographic and occupational span reflects the view that farm labor is mobile across relatively wide areas and farm laborers' skills are adaptable across a relatively wide range of crop or livestock activities and occupations. The use of the FLS wage average as an AEWR appropriately limits the importation of foreign labor to cases where the value of the labor need is more than marginal; the relatively higher willingness to pay signaled by farmers who do import foreign workers temporarily under these circumstances (because domestic labor was not immediately forthcoming) may serve to mobilize domestic farm labor in neighboring counties and States to enter the subject labor market over the longer term and obviate the need to rely on importation of foreign labor on an ongoing basis. In this way, the AEWR based on the FLS data source balances the needs of both farmers and domestic farm workers. The 2008 Final Rule did not sufficiently account for these labor market attributes and the Department believes that, by returning to an AEWR based on the FLS' regionally-based methodology, that inconsistency will be remedied.

The employer and employer association commenters that argued that precise tailoring of H-2A wages to local labor market conditions is critical to preventing an adverse effect on wages of U.S. workers may not fully understand the dynamics of farm worker labor markets and labor market information flows described above. Furthermore, those who argue that it is essential that the AEWR have as great a degree of

geographic refinement as possible, reflecting market conditions for each locality across the country, miss the essential point that the importation of foreign labor should not serve as an obstacle to normal market adjustment processes and labor mobility in the broader regional market perspective. We have carefully considered the arguments of some commenters that the aggregation of a widely diverse national agricultural landscape into just 15 regions (and 3 stand-alone States) results in extremely broad generalizations that fail to account for specific market conditions at the local level. After due consideration, we conclude that a broadly-based AEWR protects the long-term well-being of domestic workers in terms of wages and access to job opportunities and it also benefits farmers in the long-run by preserving market adjustment processes that encourage efficient allocation of resources, innovation, and adaptation to changing competitive circumstances.

DOL consistently has set statewide AEWRs rather than substate or crop-specific AEWRs because of the absence of data from which to measure wage depression at the local level. To the extent that wage depression does exist on a concentrated local basis, the USDA's aggregation of wage data at broad regional levels immunizes the survey from the effects of any localized wage depression that might exist.

Many employer and association commenters expressed concern that an appropriate AEWR that reflects market realities and labor costs should include wage data relating to the specific occupation and level of skill or experience required for a position.

Several farm organizations and individual farmers expressed concerns that the FLS produces an artificially high wage rate, in part because it includes many occupations which are not related to the jobs H-2A workers are hired to perform. Commenters also argued that the Department's reliance on USDA FLS data does not provide refined data by skill level or experience, occupations, or geographic locales of workers typically sought by agricultural employers in the H-2A program. Commenters also pointed out that the USDA FLS population includes not only the lower-skilled crop field workers typically sought by agricultural employers who turn to the H-2A program for labor, but also inspectors, animal breeding technicians, and trained animal handlers—all occupations that provide a poor basis for determining H-2A wages because they are rarely, if ever, filled by H-2A workers. In response to these comments,

we examined the records of FY 2008 and FY 2009 H-2A applications and found numerous examples of requests for foreign workers to fill jobs as inspectors, animal breeding technicians (inseminators), and other specialized occupations. For example, the FY 2009 applications included requests for 12 equine trainers and breeding specialists, 38 agricultural product inspectors and graders, 5 non-equine animal trainers, 43 operating engineers, 312 beekeepers, 25 artificial inseminators, 23 logging crane operators, 18 farm equipment mechanics and 14 reptile specialists. Therefore, this objection to the use of FLS data is unfounded.

The OES occupational detail is a unique feature of the survey. One State agriculture department noted that this approach allows local farmers and ranchers to reimburse immigrant workers with fair, market-based wages specific to the location of employment. It is also in part the reason that the survey is used in other foreign worker programs administered by the Department, including the H-1B and H-2B programs.

The Department believes that the BLS OES wage survey suffers from higher error rates than the USDA FLS, and is a less reliable source of data about farm workers' wage rates. One study of OES data found that employment in some of the metro and non-metro areas is very small, increasing relative standards errors. For example, for the occupation of farm workers and laborers, crop, nursery, and greenhouse employment numbers may be very small for some States—see Kentucky (200) or West Virginia (190) as compared to California (146,220). As expected, the subsequent relative standard errors for States with few observations is relatively high—meaning that the reliability of the wage statistics is relatively low, which result in data that are not precisely measured. For example, the 90 percent confidence interval for the \$8.28 hourly mean wage for California is from \$8.20 to \$8.36 as compared to the 90 percent confidence interval for the \$11.52 hourly mean wage for Montana which is from \$10.24 to \$12.80. Furthermore, a SWA noted that the OES survey program used in the 2008 Final Rule is a complex, confusing system resulting in multiple H-2A wage rates for various geographical areas within a State.

Several farmers pointed out that another unique feature of OES is that it offers the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty variations within each occupation. The four skill levels for each occupation afford the

employer and the Department the opportunity to more closely associate the level of skill required for the job opportunity to the relevant OES job category and, in turn, the appropriate AEW. R.

The Department has carefully considered these comments and does not find the notion of meaningful skill differences among most agricultural workers to be generally credible. The perception expressed by some commenters that the OES data actually differentiates workers by skill is simply false. The OES wage levels are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula. These are arbitrary percent cut-offs of the distribution of earnings within the occupations. Therefore, the associated occupational skill levels are not well defined, and H-2A wage differences do not accurately reflect meaningful differences in skills or job complexity.

Moreover, the Department finds that the notion of meaningful skill differences among agricultural workers is unfounded. Most of the occupations and activities relevant to the H-2A program involve skills that are readily learned in a very short time on the job,<sup>11</sup> skills peak quickly, rather than increasing with long-term experience, and skills related to one crop or activity are readily transferred to other crops or activities.

The preamble to the 2008 Final Rule states that the Department is statutorily obligated to use the four-tier wage system. Although the relevant statute is not clear on its face, the Department has now concluded that this statement is an incorrect reading of the statute. The legislation establishing the four-tier system was part of the Consolidated Appropriations Act 2005, Pub. L. 108-447 and is contained in a section titled the L-1 Visa and H-1B Visa Reform Act. The specific part of that Act describing the four-tier system, sec. 423, is titled H-1B Prevailing Wage Level. In addition, the legislation specifically identifies the visa categories to which it applies and H-2A visas are not included in the list. While the Department had the discretion to use the four-tier system in the H-2A program if the facts supported that outcome, it is simply wrong to state that the Department is statutorily required to use it. Moreover, for the reasons stated above, the Department has concluded that the OES

four-tier wage system is inappropriate for use in the H-2A program.

#### (i) Survey Frequency and Data Availability

The FLS and publication schedule provide timely data for purposes of calculating the relevant State AEWs. Specifically, the FLS is routinely available and published within 1 month of the survey date. The quarterly gathering of data ensures that the annual averages are more accurately reflective of the fluctuations of farm labor patterns, which are by definition seasonal and thus more subject to fluctuation than other occupations. The scope and frequency of the survey means that all crops and activities now covered by the H-2A program will be included in the survey data and that peak work periods also will be covered. This is in contrast to the OES data, which are published 1 year after collection of the most recent data panel. Furthermore, OES data are only collected in May and November, which are not times of peak work for many crops and activities covered by H-2A.

#### (ii) Accuracy of Data

The Department also weighed concerns over the accuracy of AEWs based on the USDA FLS because the FLS is not based on reported hourly wage rates. Instead, the USDA's FLS asks employers to report total gross wages and total hours worked for all hired workers for the two reference weeks of the survey. Based on this information, the survey constructs annual average earnings for the broad general categories of field workers and livestock workers as the ratio of gross wages to hours worked. The hourly AEW thus is not based on reported hourly wages, but rather on the basis of the numerator (total gross wages for the combined occupations) and denominator (total hours for the combined occupations) derived from the information supplied by employers.

The USDA FLS asks employers about their workers' total earnings and total hours worked to derive average hourly rates. In OES, establishments report the number of workers in a certain occupation earning within each of 12 wage intervals. To calculate the mean hourly wage of each occupation, total weighted hourly wages are summed across all wage intervals and divided by the occupation's weighted survey employment. Furthermore, the mean hourly wage rate for all workers in any given wage interval is not computed using grouped data collected by the OES survey. Rather, the mean wage for each interval is based on occupational wage

<sup>11</sup> According to the Employment Projection Program at BLS, for crop, nursery, and greenhouse farm workers and laborers, the most significant source of post-secondary education or training is short-term on-the-job training. See <http://www.bls.gov/opub/mlr/2007/11/art5full.pdf>.

data collected by the BLS Office of Compensation and Working Conditions for the National Compensation Survey (NCS). Although smaller than the OES in terms of sample size, the NCS program, unlike OES, collects individual wage data. However, agriculture establishments are excluded from the scope of the NCS. Farm worker data is derived from workers employed through companies listing themselves as nonagricultural establishments. Therefore, the Department believes that the FLS is superior to the OES for purposes of computing the H-2A AEW.

(iii) The Department's Decision To Return to the NASS FLS Methodology

Even if one accepted the argument that the geography, occupational, and other attributes of data available from the OES are desirable features, the Department finds that none of these individually or together would offset the disadvantage that the OES does not gather data directly from farmers but from non-farm establishments whose operations support farmer production, rather than engage in farm production. For example, the OES results for the farm workers and laborers, crop, nursery and greenhouse occupation category reflects only the subset of farm workers and laborers employed by agricultural support services employers—companies who provide agricultural labor supply to farmers on a contract basis. The survey does not include data on the majority of farm workers who are directly hired by farm operators. Because the data demonstrate that workers employed by support services establishments are less educated and less likely to be U.S. citizens than employees of farm establishments, and therefore typically have substantially lower wage rates, the OES survey is not an appropriate data source for ensuring that the importation of guest workers does not adversely affect U.S. workers.

For this and all of the other reasons discussed, the Department will return to its 1987 Rule methodology for the formulation of the AEW. The Department will annually publish for each State within a given geographical region the AEW based on the average combined hourly wage for field and livestock workers for the four quarters of the prior calendar year from the USDA's NASS FLS.

c. Collective Bargaining Wage

The Department did not propose adding the term collective bargaining wage in the provision regarding the required wage to be offered. Several commenters, however, suggested that

the Department address the use of collective bargaining wages in required wages. Some commenters suggested that the collective bargaining wage rate be cited as the first wage to be imposed, looking to the highest of the AEW, prevailing, or minimum wages only in the absence of a collective bargaining wage rate, in order to recognize that wages paid under collective bargaining agreements between a union and an employer do not adversely affect the wages of workers similarly employed. Others suggested the Department recognize wages set by collective bargaining agreements as prevailing, in the alternative or as an exception to the AEW.

After consideration, the Department has decided to amend the provision to add the term an agreed-upon collective bargaining wage to the required wage rate options for employers. This amendment requires employers to use a collective bargaining wage if it is the highest wage, thus avoiding the potential payment of a collective bargaining wage that is less than the other wages. At the same time, it acknowledges the role of the collectively bargained wage as a potential legitimate wage.

d. Increase in Prevailing Wage During the Contract Period

In the NPRM, the Department proposed that if the prevailing wage rate is adjusted during the work contract and the new adjusted wage is higher than the required wage at the time of certification, the employer must pay that higher wage upon notification by the Department. We are retaining this requirement with modifications based on (a) above.

The Department received several comments in favor of this proposal. One commenter expressed support for the proposed increase but suggested the Department further amend the requirement to include within the list of applicable wages the hourly wage or piece rate paid to the employer's non-H-2A workers in the current or immediately preceding season for comparable employment. The Department declines to adopt this recommended change as not necessary to fulfill the statutory requirement to ensure that U.S. workers are not adversely affected.

Some commenters opposed the proposed adjustment, contending in one case that the proposal is contrary to current practice in other temporary programs, and that the Department provided inadequate justification for the change. These commenters also indicated that the application in mid-

season of any increase would be detrimental to employers who have already budgeted for the season based on wages in effect at the time of recruitment.

Employers participating in the H-2A program have historically been required to offer and pay the highest of the AEW, the prevailing wage or the Federal or State minimum wage at the time the work is performed. The wage adjustment under this provision is intended to ensure that the workers in the program are consistently receiving at least the highest of the applicable wages. As explained above, the wage adjustment also ensures that the wages reflect the wage in the area of intended employment in those relatively rare cases when that wage exceeds the AEW. Accordingly, this adjustment, as stated in the Final Rule, will only affect a limited number of employers whose OFLC-approved offered wage rate falls below the permissible floor once the new wage rates are issued.

The Department recognizes that these wage adjustments may alter employer budgets for the season. However, the change is intended to ensure workers are paid throughout the life of their contracts at an appropriate wage. Therefore, employers are encouraged to include into their contingency planning certain flexibility to account for any possible wage adjustments.

6. Section 655.121 Job Orders

a. Area of Intended Employment

(i). Submission of the Job Order to the SWA

The Department proposed to continue the longstanding practice of requiring employers to submit job orders to the SWA serving the area of intended employment for intrastate clearance in order to test the local labor market and determine the availability of U.S. workers before filing an Application. The Department further proposed that if the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites to place the job order. The Final Rule also requires that the SWA must forward the job order to the companion SWAs to have it placed in all locations simultaneously.

The Department received several comments on this proposal. A farm worker advocacy association commented that the filing of the job order alone and the elimination of the contemporaneous filing of the Application inappropriately reduces the oversight by the OFLC during the early

stages of the H-2A process. This commenter was concerned about the sufficiency of OFLC oversight during the pre-certification period when OFLC staff previously used this period to address serious deficiencies in the Application that affected material terms of employment and recruitment, including job terms and conditions as publicized to both U.S. and foreign workers.

Several commenters supported the Department's proposed regulation. One noted that it would reintroduce much-needed checks and balances into the process. Others indicated that the submission of the job order and initiation of recruitment prior to certification would increase the potential for hiring local workers. They also suggested that recruitment of U.S. workers may satisfy the need for agricultural labor and eliminate the need for a labor certification. As noted in the NPRM, the INA requires employers to engage in recruitment through the job clearance system, administered by the SWAs. See 8 U.S.C. 1188(b)(4); see also 29 U.S.C. 49 *et seq.*, and 20 CFR part 653, subpart F. Accordingly, the Final Rule retains the language of the NPRM.

(ii). Submission 75-60 Days Prior to Date of Need

The Department proposed to retain the 2008 Final Rule requirement that the employer submit the job order to the SWA no more than 75 calendar days and no fewer than 60 calendar days before the date of need. The Department received several comments about this proposal. The Department received two comments from State agencies supporting the longer recruitment timeframe, one noting that the timeframe will permit the SWA to review the proposed terms and conditions, assure that the wages offered meet the required wage, and commence required recruitment by placing the job order into intrastate clearance.

Most commenters, however, opposed the 75 to 60 day recruitment period. Many of them advocated a return to the 45-day posting of the job order, reasoning that it provides a more appropriate timeframe for employers to assess the local job market as well as to anticipate labor demands of the coming crop. Other commenters explained that growers, particularly small and mid-sized growers, must account for a variety of factors in order to decide what crops to plant and the amount of acreage, and that they do not make those decisions 75 to 60 days in advance. These commenters also expressed the concern that very few local agricultural

workers commit to a job 75 to 60 days in advance and many of those who do commit often do not report for work on the date of need. One of these commenters expressed concern that the longer recruitment period would penalize employers because early hires may no longer be available at the time the work begins, leaving the employer with a labor shortage.

A few commenters echoed the same concerns and argued for a shorter timeframe. These commenters criticized the Department's rationale for extending the recruitment period. The same commenters referenced the Department's statements in the NPRM indicating that the use of the H-2A program since the implementation of the 2008 Final Rule has decreased, arguing that there should be less need for a longer timeframe due to fewer demands on the Department's resources.

Many commenters advocated for the return to the 45-day timeframe because the shorter recruitment period would be counterbalanced by the 50 percent rule that tends to provide longer exposure to H-2A job opportunities for U.S. workers. One commenter argued that the longer recruitment period was more acceptable when it was combined with a shorter 30-day referral period. Another commenter, a State farm bureau, also opposed the proposal, noting that the 15 to 30 days' increase in pre-employment recruiting was initially implemented by the Department in exchange for the elimination of the 50 percent rule and reduction in the referral period to 30 days after the start date.

One commenter noted that the Department presented no evidence indicating that referrals made further from the date of need are more numerous than those closer to the date of need. Another referred to Congressional testimony from a former association executive asserting that in his experience recruiting closer to the date of need produces more applicants and that prospective job applicants in these industries do not look for work 120 or even 45 days in advance.

A law firm representing growers urged the Department to allow growers to file their proposed job orders on the shortest, most administratively feasible timeframe. It also noted that the Department's policies should be designed to allow flexibility and entrepreneurial expansion and development of agricultural production and work opportunities, and not restrict the growth of job opportunities or agricultural products.

Some commenters cited the statement in the NPRM that the Department approves most applications by the 27th

to 29th day before the date of need as evidence that the current system of filing on the 45th day before the date of need and certifying by the 30th day before the date of need is working and need not be changed. The Department is bound by the statute to make a final determination on each temporary agricultural labor certification by the 30th day before the date of need. The fact that the Department is generally able to meet the statutory deadline does not mean that the Department is able to certify based on a robust record of the employer's recruitment efforts. As discussed above, the extension of the recruitment period will enable the Department to make its certification with better information on recruitment.

Based on its long program experience, the Department believes that beginning recruitment 45 days before the date of need is insufficient because it provides the Department with only 15 days to assess the availability of U.S. workers in the relevant job market and to permit them sufficient time to seek and be hired for these jobs. (In fact, since it must first accept the Application and authorize recruitment, the Department has traditionally had only about a week to review recruitment efforts.) The Department has determined that the 75 to 60 day timeframe most adequately balances the Department's statutory duty to ensure that U.S. workers have access to meaningful employment opportunities (and are not adversely affected by the employment of foreign workers), with the agricultural employers' legitimate need to meet labor demands. In response to the commenter's argument that unpredictable factors often affect an employer's labor needs, the Department notes that its Final Rule retains a provision that permits an employer to amend its Application prior to certification to increase the number of workers needed. Giving growers the ability to request additional workers is intended to provide flexibility and account for the contingencies affecting agricultural production. Furthermore, the Department recognizes that some local job applicants who accept an offer of employment in agriculture, as in all other industries, on occasion fail to report for work as agreed. Employers in those circumstances must temporarily re-distribute the workload while seeking to hire a replacement. We reemphasize that while the Final Rule permits the submission of the job order as much as 75 days before the start date, employers are only required to submit their job orders 60 days prior to the start date. The Department believes that this

timeframe enhances the ability of domestic workers to access these employment opportunities.

As discussed throughout this Final Rule, the Department's primary concern with respect to its statutory mandate is restoring necessary protections to U.S. and foreign workers while maintaining a fair and reliable process for addressing legitimate employer needs. As adopted, the 75 to 60 day timeframe is necessary to ensure the orderly and timely administration of the program and provides the necessary flexibility for the Department, the SWAs and employers to meet the program's statutory requirements and objectives. The demand on Departmental resources, although relevant, is not a decisive factor in implementing a workable timeframe.

The Department has determined that in addition to providing U.S. workers with longer exposure to H-2A job opportunities through the reinstatement of the 50 percent rule, the longer pre-filing timeframe will ensure that the job order meets all applicable programmatic requirements. The Department has determined that both a longer recruitment period and a longer referral period are necessary to meet the statutory and policy objectives of the H-2A program. While there had been some discussion about balancing the initiation of recruitment with the termination of the employer's obligation to hire domestic applicants, the two issues are unrelated and deal with different aspects of recruitment. The need to start the recruitment process slightly earlier will also assist the Department to more effectively meet our obligation to make a certification decision 30 days before the start date. This is unrelated to the need to ensure the continued availability of these positions to U.S. workers through post-certification hiring requirements. We have discussed above why recruitment needs to start at least 60 days before the start date. We discuss later in this preamble why the Department has determined that the post-certification hiring is best met through the 50 percent rule.

Having considered the issues raised by commenters, the Department has decided to keep the provision in the Final Rule. Therefore, the Department has determined that the 75 to 60 day timeframe provides adequate time to resolve any pre-filing issues in a way that will not negatively impact the employer's ability to timely meet its labor needs.

#### b. SWA Review

In the NPRM the Department proposed that SWAs review the contents of the job order and address any noted deficiencies. As noted above, it also provided for the involvement of the Certifying Officer (CO) to resolve any issues regarding the placement of job orders in the intrastate clearance system. The Department received a number of comments addressing this provision. Many of the commenters expressed concern over the broad discretion granted to the SWAs to determine the sufficiency of the job order, and the lack of CO involvement to resolve outstanding issues prior to the filing of the Application. These commenters proposed to limit the SWA review to a specified timeframe.

A few expressed support for the retention by the OFLC of ultimate decision-making authority regarding the sufficiency of job orders but expressed concern over what they deemed an inordinate level of decision-making authority in the hands of the SWAs. These commenters were primarily concerned with the resulting lack of uniformity in adjudication and enforcement due to differences between the SWAs in rule interpretation and the likelihood that disparate adjudications will result in confusion for both employers and workers.

One commenter stated that having multiple points of acceptance will cause confusion and disruption in program use for large and small growers because States may differ from one another in their interpretations of the statutory and regulatory requirements and some are not even consistent internally. In addition, the commenter was concerned about the potential for inconsistency between what the SWA accepts at the pre-filing stage and the later determination by the CO regarding the sufficiency of the job order.

Another commenter indicated support for the reduced role of the SWAs in the H-2A labor certification process under the 2008 Final Rule. This commenter contended that most of the delay in processing of H-2A visas has been caused by SWA staff, who it asserted have been slow to perform their duties under the program. This commenter proposed that the Department limit the role of the SWAs to the inspection of worker housing and workplace conditions after approval.

A large growers' association expressed dissatisfaction with the process for placing job orders with the SWA. It asserted that since the filing of the Application is predicated on the acceptance by the SWA, the Department

failed to provide a meaningful relief mechanism for employers to address issues with the SWAs imposing unwarranted requirements.

The Department expressed above its belief that SWAs remain, as they have always been, the arbiters of the acceptability of job orders. The Department also recognizes the need for employers to have an acceptable and timely process by which orders are fully evaluated and issues addressed with each SWA. Therefore, the Department has decided to amend its procedures for SWA acceptance of the H-2A job order to allow for a timely process of the acceptance or rejection of job orders.

Under the INA, the Department has the ultimate responsibility for all labor certification determinations. The Final Rule does not abrogate that authority. However, the Department has determined that the involvement of the SWAs at the outset of mandatory recruitment will benefit the process because, as discussed above, SWAs have unique expertise in assisting employers in preparing job orders and making initial determinations regarding their sufficiency. In addition, SWAs are experienced in providing services to farm workers and helping them navigate the employment process. In order to balance our obligations under the INA with involvement of the SWAs in the process, the Final Rule creates a process so that disagreements between the employer and the SWA about the contents of the job order can be expeditiously resolved. This provision also ensures uniformity of determinations and places the ultimate decision regarding the sufficiency of a job order with the CO.

The Department's Final Rule therefore adopts a process in which the SWA must either accept or reject the job order. After considering comments advocating that the Final Rule include a timeline, the Department has determined that 7 calendar days, rather than the 5 days proposed by some commenters, provides the SWA with adequate time to make a determination on even the most substantial job orders. In the event the SWA and the employer cannot reach a mutually agreeable solution regarding the job order in the timeframe outlined in the revised regulation, the SWA must reject the job order by written notice specifying the reasons for rejection, *i.e.* the deficiencies in the job order, to the employer, and the employer must respond. The Final Rule adds the requirement that once the employer responds to the SWA notification of deficiencies, the SWA must respond to the employer's response within 3

calendar days. If the job order deficiencies still remain unresolved, the Department's regulations permit the employer to use the emergency filing procedures to file its Application (and the job order) directly with the National Processing Center (NPC); such circumstances will constitute the good cause contemplated by that provision. The CO will then follow the procedures for accepting or rejecting the job order as outlined in this revised provision.

The Department's regulations provide for the involvement of the CO in instances where issues with the job order are not resolved between the employer and the SWA. As explained above, the Department's Final Rule adopts a timeframe under which the SWA must either accept or reject the job order within 7 calendar days and respond within 3 calendar days where the employer responds to the notification of deficiencies. If the deficiencies remain unresolved, the Final Rule provides for the filing of Applications on an emergency basis where the employer and the SWA cannot reach a timely resolution regarding the placement of the job order.

The Department does not anticipate significant discrepancies between SWA determinations in various States. In our experience, differences in SWA processing of job orders are often attributable to the differences in experience with the local industries and labor markets, and the resulting distinctions in treatment are legitimate outgrowths of those differences. The Department is relying on the SWAs to apply their broad, historical experience in administering our nation's public workforce system and understanding of the practical application of program requirements to the process of clearing job orders. SWAs process job orders as part of their essential functions and have processed H-2 and H-2A job orders since the inception of the program. Employers are encouraged to work with the SWAs early in the process, including on crafting the requirements of job orders, to ensure that their job orders meet all requirements, and are timely accepted for intrastate clearance. In addition, the Department anticipates that CO determinations about job orders will in most instances agree with those of the SWA. The Department will provide training and on-going guidance for the SWAs and program users, in order to foster a clear understanding of program and other regulatory requirements and ensure uniformity in determinations.

#### c. Intrastate Clearance

The Department proposed to continue the requirement of having the employer whose job opportunity is in more than one State file with only one SWA serving the area of intended employment.

A commenter suggested that each work site be evaluated to determine whether there is more than one area of intended employment for a particular job opportunity. This commenter proposed a change to require that the employer simultaneously submit a job order to each SWA serving an area of intended employment where the job opportunity is located in more than one State.

An individual commenter proposed that the SWA placing the job order in intrastate clearance share the listing with other SWAs in States bordering the State containing the area of intended employment. This commenter argued that State lines should not stand in the way of recruitment of local residents where the area of commuting distance encompasses more than one State. This commenter further argued that permitting the forwarding of job orders to neighboring States would save the employer the costs of applying for an H-2A labor certification if the employer is able to fill the job openings with local workers.

The Department agrees with the intent of these comments and has modified the rule to require the SWA to forward the job order to the other SWAs having jurisdiction over the area of intended employment. However, we believe the requirement for filing with multiple States would be confusing to employers and place an undue burden on them. Since SWAs have existing mechanisms to accomplish this task, this is a more appropriate activity for the SWA, rather than the employer, to undertake.

#### d. Duration of Job Order Posting

The Department is clarifying that Form ETA-790, the *Agricultural and Food Processing Clearance Order*, is to be used for the submission of the job order to the SWA. The Department received one comment opposing duplication in filing and processing arguing that the most substantive and voluminous portion of an application is the Form ETA-790. The Form ETA-790 must be used by all employers seeking to recruit agricultural labor in the U.S., pursuant to the Wagner-Peyser regulations at 20 CFR 653.401. Those regulations were not part of this rulemaking so this comment was not considered.

#### e. Modifications to the Job Order

The Department proposed a process for the modification of job orders. Several commenters expressed concern regarding the proposed provision permitting the CO to direct modification of a job order after SWA acceptance and before the issuance of a labor certification. Some of the commenters argued that there should be finality in the process, including one point of acceptance for a job order. Some commenters further argued that since the employer is held to the terms and conditions offered in the job order, the SWA and the CO should be bound by the acceptance of those terms and conditions. A couple of commenters expressed concern that corrections to the job order after SWA acceptance and placement in intrastate clearance may result in different groups of potential workers being recruited under differing terms, and noted that workers recruited under a particular job order need to be able to rely on the terms and conditions offered. One of these commenters proposed that the Department limit all modifications after acceptance to significant emergency situations such as Acts of God. Another commenter opposed the provision permitting the CO to direct an employer to modify the job order after a finding that the previously accepted terms and conditions fail to fully comply with program requirements. This commenter indicated that this provision violates 8 U.S.C. 1188(c)(2), which requires DOL to state any deficiencies that it finds in a labor certification application within 7 days.

The INA requires the Department to note any deficiencies in the employer's Application within 7 days from receipt. We do not interpret the provision requiring the Department to accept or reject an Application within 7 days to limit the Department from requiring modifications after acceptance. The INA cannot mean that the SWA's acceptance of the Application forces the CO to overlook any apparent violations. To interpret the statute in that way would require the Department to either accept Applications which contain apparent violations or to reject the Applications without giving the employer the opportunity to correct the apparent violation of program requirements. With respect to concerns about worker reliance on a job order that subsequently has been modified, employers will now be required to notify all workers recruited pursuant to that job order of any material change in the terms and conditions of employment, particularly to the extent that the terms of the job

order constitute part of the work contract as described in § 655.122(q).

Another commenter argued that the Final Rule needs to address changes by employers when changes are necessary because of unforeseen business necessities that arise during the time between the beginning of the recruitment period and certification.

The Final Rule retains a provision from the NPRM permitting the employer to request modification of a job order before filing the Application. As discussed above, many commenters noted that at this point, 45 days from the date of need, most employers would have a better idea regarding their plans for the season, including their labor needs. Therefore, the Department's Final Rule retains the limitation on employer modification of job orders.

#### f. Elimination of Requirement That SWAs Must Verify Employment Eligibility (Form I-9, E-Verify)

As explained in the NPRM, the Department proposed to eliminate the requirement that SWAs must complete the employment eligibility verification process (Form I-9 or Form I-9 plus E-Verify) for all workers referred to the employer by the SWA under a job order. The Final Rule follows the NPRM and no longer requires SWAs to verify employment eligibility. This approach is logical and consistent with employers' discretion and duties concerning all new hires—including the checking of references, qualifications, etc. Nothing in the INA or these regulations precludes the States from performing employment verification voluntarily or pursuant to State law, nor do they prevent the employer from relying on verification performed by the SWA so long as it meets certain verification standards as set out in applicable DHS regulations.

In their traditional role, the SWAs are only required to refer candidates whose qualifications match the terms and conditions of the job order to an employer's job opportunity. Requiring one small subset of applicants who apply for H-2A positions to be subject to employment eligibility verification raises the possibility of disparate impact.

A SWA referral does not in itself constitute an offer of employment because the referred individual may be rejected for lawful, employment-related reasons. In addition, the Department believes that SWA resources are most effectively directed to the core functions of the public workforce system, such as clearing job orders. For all the reasons discussed above, the Department has retained the language from the NPRM

and eliminated the requirement that SWAs verify employment eligibility of potential employees referred in connection with an H-2A job order.

The Department received comments both for and against the elimination of employment eligibility verification by the SWAs. Several commenters expressed support for the Department's decision to return to the previous practice of permitting the SWAs to determine for themselves the method by which they would ensure workers were eligible for referral.

Several commenters offered strong support for the Department's proposal to remove the requirement that the SWA verify the employment eligibility of job seekers before referral. Most of these commenters explained that placing the burden of verification on the SWAs in the 2008 Final Rule was inappropriate and that it required States to impose a greater barrier for people seeking H-2A job openings than on others, resulting in disparate treatment of protected classes. One SWA further indicated that people not authorized to work in the U.S. are unlikely to seek work through government-run One-Stop Career Centers. Another SWA noted that the Department simply lacks statutory authority to require SWAs to conduct employment eligibility verification because 8 U.S.C. 1324a permits, but does not require, SWAs to complete I-9 forms with regard to individuals they refer to jobs. One of these SWAs also noted that it will continue to refer eligible job seekers using its current right-to-work verification process, codified in its State law. Another SWA voiced support for the elimination of the requirement and pointed out that States are not funded to provide I-9 verification. Another commenter indicated that freeing the SWAs of verification responsibilities was a positive development given that the proposed regulations call for greater SWA involvement in recruitment.

A few employer organizations objected to the elimination of the verification requirement on the grounds that employers are required to hire referred workers and that the SWAs should not refer workers who are not eligible to be employed.

Other commenters discussed what they characterized as an impermissible shifting of the financial and administrative burden of employment verification back to employers who are already facing difficult times and rising production costs. One commenter, a farm bureau, noted that the resource issue for SWAs is no different than the resource issues that family farmers regularly face but who verify

employment eligibility nonetheless. Another farm bureau described the proposal of reverting to employer verification as contrary to the Administration's commitment to eliminating illegal immigration.

Other commenters opposed the change in the requirement, noting that the elimination of the requirement would burden the employers whose Applications were only partially certified based on the number of referred local workers who later turn out to be ineligible for employment. Another commenter contended that, in the absence of SWA verification, the Department should not count the SWA referrals against the number of workers requested by an employer on an Application.

Other commenters accused the Department of compromising its obligation to protect the jobs of domestic workers by eliminating the employment eligibility verification requirement. One of these commenters further asserted that the Department should take responsibility for the referral activities of its State partners and that the elimination of the employment eligibility verification signifies that the Department condones the employment of illegal aliens, which contributes to low wages, inadequate housing and a shortage of viable job opportunities for U.S. workers. Another commenter noted that the elimination of the verification requirement undercuts the role of the SWA to determine the availability of U.S. workers for employment before the filing of an Application. This commenter asserted that the SWA's inability to determine the work authorization of workers recruited and referred under the job order fails to meet the SWA's legal obligation to determine that sufficient able, willing, and qualified U.S. workers are available.

Several commenters expressed concerns that without SWA verification, at least 75 percent of referred workers will later prove ineligible for employment, with one commenter citing examples from its experience. Most of these commenters further argued that the referral of ineligible workers will place a burden on employers either to continue to employ ineligible workers and run the risk of employer sanctions, or dismiss these workers and find replacement workers in time.

Several commenters opposed the change in the requirement, pointing to the 2008 Final Rule's interpretation that 8 U.S.C. 1324a and DHS regulations at 8 CFR 274a.2 and 274a.6 require the SWA to verify employment eligibility

before referring applicants to the employer. Another commenter challenged the Department's distinction between a referral and an offer of employment, asserting that the distinction is meaningless since the employer has no option to refuse to hire the worker referred by the SWA if that person is willing, able, and qualified for employment. Another commenter argued that the SWA is statutorily required to verify employment eligibility of referrals because 8 U.S.C. 1188(c)(3) lists as one condition for certification a requirement that the employer does not actually have or has not been provided with referrals of qualified, eligible individuals, and 8 U.S.C. 1188(i) defines an eligible individual as being one who with respect to employment, is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3). This commenter further argued that the Department or the SWA must determine if applicants from the pool of local workers are authorized to work in the U.S. because, without this determination, DOL cannot deny any application for labor certification on the basis of there being qualified, eligible individuals.

Another commenter challenged the Department's rationale regarding the disparate impact of employment verification on workers, referring to the 2008 Final Rule rationale that the requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. As explained further below, the Department believes that this position in its 2008 Final Rule was erroneous, and that disparate impact can result from the segregation of H-2A referrals to comply with the verification requirement.

After thorough consideration of these comments, the Department has concluded that it will retain the language of the NPRM. The Department believes that its mandate to protect job opportunities for U.S. workers and ensure that they are not adversely affected by the employment of foreign workers will be best served by a requirement that reflects the intent of Congress that the employer, and not the SWA, is responsible for the ultimate verification that its labor force is comprised of workers legally present and authorized to work in the U.S. Employers are the group that is charged with this function under the statutory verification process and have been since the imposition of employment verification. The previous rule did not in any way relieve employers of ensuring the employment eligibility of their workforce. Similarly, removing the

employment eligibility verification requirement from SWAs also does not relieve employers of that duty.

The statute makes the plain statement that the employer may not hire an unauthorized worker. 8 U.S.C. 1324a(a)(1). The same statute enables employers to rely upon a referral by a State agency with the proper employment verification documentation, but imposes no burden on States to actually do so, in contrast to the burden it affirmatively imposes on employers. 8 U.S.C. 1324a(a)(5).

The SWAs must administer a number of programs and functions, including those related to foreign labor certification. Certain SWA job service functions are funded by formula under the Wagner-Peyser Act and the Workforce Investment Act. Other funding is received directly from the OFLC for services the SWAs provide in connection with the Department's labor certification programs. The Department has decided that imposing the additional requirement of employment eligibility verification of H-2A referrals denies the SWA the flexibility to decide how best to allocate its resources.

Additionally, the Department continues to believe that requiring the SWAs to conduct employment verification of applicants for H-2A job opportunities prior to referral creates the potential for complaints of disparate impact. By requiring this verification of referrals only in job orders in which employers are seeking nonimmigrant workers, some referrals to job orders that are identical with the sole exception of the H-2A component are treated differently. The Department's concern that this could in turn lead to differential treatment of H-2A job orders generally and of referrals to those job orders specifically, provides further cause for concern about continuing the obligation on SWAs.

The suggestion by the commenters that this return to the pre-2008 requirements is unduly burdensome ignores the statutory requirement, with which they have presumably always complied, to undertake verification. The return to employer verification returns H-2A employers to the same position as virtually all employers, including non-H-2A agricultural employers. Thus, H-2A employers are subjected to no greater burden than any other employers, with respect to employment verification.

Traditionally employers are not required to hire each person referred by the SWA, because they may reject potential hires for any lawful, job-related reason. Furthermore, each employer has an obligation to terminate

any worker who upon acceptance of the job offer proves ineligible to work in the U.S.; such grounds are, moreover, a legitimate basis for rejecting the worker for purposes of the recruitment report.

The Department declines to accept the commenters' interpretation of the SWAs' obligations with respect to the verification of SWA referrals. Because SWAs do not perform any activities that would classify them as subject to 8 U.S.C. 1324a(a)(1)(B), the INA does not require SWAs to engage in employment eligibility verification. In addition, 8 U.S.C. 1188(3)(A) does not identify the referring entity that would provide employers with eligible individuals within the meaning of 8 U.S.C. 1188(i). The role of the SWA in the referral of U.S. workers under the H-2A program is solely governed by the Department's regulations, as 8 U.S.C. 1188 does not define the methodology for the recruitment of U.S. workers, nor does it include any references to the SWAs or other State actors. Section 655.155 of this Final Rule directs the SWA to refer to employers only those applicants who have been apprised of all material terms and conditions of employment and have agreed that they are able, willing, qualified, and available by agreeing to be referred to the job opportunity. This provision makes it clear that the SWA is only required to perform its traditional job service functions uniformly across all classes of applicants and employers.

#### 7. Section 655.122 Contents of Job Offers

The job offer sets out the terms and conditions of employment contained within the job order. The employer can give this information to the workers by providing a copy of the job order or a separate work contract. A written job offer is critical to inform potential workers of the material terms and conditions of employment and to demonstrate compliance with all of the obligations of the H-2A program. For H-2A program purposes, the job offer must contain, at a minimum, all of the worker protections that apply to both domestic and foreign workers pursuant to these regulations. The Department considers the job offer essential for providing the workers sufficient information to make informed employment decisions. The work contract, or where there is no written work contract, the job order, which is the document representing the material terms and conditions of the job offer, must be provided with its pertinent terms in a language the worker understands.



The Department proposed to retain much of the 2008 Final Rule requirements on job offers with some minor clarifications. The Department's responses to comments are discussed in more detail below.

**a. Prohibition Against Preferential Treatment**

The NPRM proposed to return to the language in the 1987 Rule about the requirement for the minimum wages and working conditions that must be offered to foreign and U.S. workers.

One commenter proposed that the Department permit employers to require experience for U.S. workers applying for H-2A job openings, to increase the chance that the worker will complete the contract after being reimbursed for transportation and any other allowable costs incurred in the course of recruitment. This commenter justified the proposed revision by stating that no similar mechanism is necessary to keep the H-2A workers tied to the contract as their very status depends on their continued performance under the work contract.

Another commenter noted its experience with employers who prefer an H-2A workforce and therefore subject U.S. workers to conditions intended to displace them, such as coercion, in-person interviews, and production standards that they do not impose on their foreign workers. This commenter indicated that strong protections are needed to protect agricultural job opportunities for the domestic workforce, including regulations that prevent different standards from being applied to foreign and domestic applicants. Furthermore, this commenter urged the Department not to allow an experience requirement proposed by other commenters unless the same requirement applies to foreign workers. Another commenter noted that many employers pay higher wages and provide better benefits to year-round or long-term employees but that those benefits should not result in the preferential treatment of U.S. workers. Another commenter, an H-2A agent, asserted that this proposed provision may have the opposite of the intended effect, particularly with respect to wages, due to a requirement to offer H-2A workers the same minimum level of benefits, wages, and working conditions being offered to U.S. workers.

While the regulatory text did not prohibit employers from paying U.S. workers more than H-2A workers, inartful preamble language caused confusion as to whether U.S. workers can be provided benefits and/or wages exceeding those offered and provided to

H-2A workers. The requirement is that the employer's job offer to U.S. workers be no less than what the employer is offering, intends to offer, or will provide to the employer's H-2A workers. Further, the contents of any job offer under H-2A must contain—at a minimum—the wages and working conditions found in this Final Rule. If a job offer to H-2A workers offers or provides a wage or benefit greater than what is required, then the same must be offered and provided to U.S. workers. Similarly, if the job offer imposes a restriction or obligation (e.g., a productivity standard or experience requirement), then that restriction or obligation is applicable to all workers—both U.S. and H-2A—and no additional or further restriction can be placed on only U.S. workers. (Any such restriction or obligation must be stated in the job offer for it to be applicable to any worker, whether U.S. or H-2A.) This does not, however, preclude an employer from providing additional wages and benefits to U.S. workers that are not being provided to H-2A workers. There is no intention, for example, to require an employer to lower the wages of a long-term or year-round U.S. employee to an H-2A-required wage simply because such U.S. worker is engaged in corresponding employment. Additionally, these regulations are not intended to require an employer to raise the wage rate of all H-2A workers—and then by extension, all other workers in corresponding employment—if a long-term U.S. worker being paid a higher wage is engaged in corresponding employment. The Department, therefore, retains the proposal with clarifying edits.

**b. Job Qualifications and Requirements**

The Department proposed in the NPRM to retain the same requirements with respect to the job qualifications and requirements as in the 2008 Final Rule. In addition, the Department made explicit that the CO or the SWA has the discretion to require that the employer submit documentation to justify the qualifications specified in the job order. Having considered the comments received in response to this proposal, the Department has decided to retain the provision, as proposed.

The Department received several comments in response to this provision. One commenter, a farm worker advocacy association, referred to reports of persistent violations by employers who recruit foreign workers under qualifications and job requirements that are inconsistent with the Application and job order. This organization proposed a revision to require

qualifications and requirements comparable with the employer's non-H-2A workers in the current or immediately preceding season for similar employment.

Several commenters opposed the requirement that the SWA or the CO may require the employer to provide documentation justifying job qualifications or requirements. One asserted that the qualifications or requirements of a job opening are within the purview of the employer's business purposes and that neither the CO nor the SWA have an understanding regarding what is or is not a reasonable qualification. Another commenter indicated that the job requirements and qualifications or other factors making a particular Application unique must be acceptable if they are justified by business necessity. According to this commenter, nothing in the INA requires an employer to perform any job in the same manner as another employer in order to obtain a labor certification. Another employer opposed the imposition of the requirement, arguing that the provision is vague and unjustified and that it contains no guidance on what types of documentation the SWA or the CO would find sufficient, nor does it provide for an appeal process for the employer. Further, the commenter argued, the Department is giving no assurance that the requirement would be applied in a consistent or objective manner.

The Department appreciates the proposal to require qualifications from previous seasons but after careful consideration has determined that it would be difficult to enforce this requirement on both employers who did and those who did not participate in the program during a prior season. Additionally, this requirement would unduly intrude on the employer's discretion to make business decisions, while not enhancing worker protections.

With respect to comments opposing the documentation requirement, 8 U.S.C. 1188(c)(3) provides that in determining questions of whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops. For decades, the Department's regulations have applied this principle to both job requirements and job qualifications. The Final Rule continues that approach.

### c. Minimum Benefits, Wages, Working Conditions

The NPRM proposed this section as an introduction to the section on the contents of the job offer. The Department received comments expressing support for these provisions that strengthen labor protections for temporary foreign agricultural workers, such as wages, housing, and employer-provided transportation.

The regulatory text has been edited to correct an inadvertent error in paragraph designations and to make a minor editorial clarification.

### d. Housing

Because the employer's obligation to provide housing is intertwined with the requirement for housing inspections, issues related to the employer's obligation to provide housing are addressed in this section. Under the NPRM, an employer seeking to use the H-2A program would be required to submit a job order to the SWA in the area of intended employment for intrastate clearance. Concurrent with the filing of the job order, the employer must request a housing inspection and, consistent with the Wagner-Peyser Act regulations, the housing inspection must be completed before issuance of the H-2A certification. This proposal marked a change from the 2008 Final Rule which allowed the NPC, under certain circumstances, to make a certification determination on an Application 30 days before the employer's date of need, even if the housing referenced in the Application had not yet been physically inspected by the SWA.

In addition, the NPRM proposed to clarify that the employer's obligation to provide housing extends both to H-2A workers and to workers in corresponding employment who are not reasonably able to return to their residence within the same day. The Department proposed minor modification to the provision on certified housing that becomes unavailable. While most of the 2008 Final Rule provision remains, the Department proposed that the SWA be required to promptly notify the employer of its obligation to correct deficiencies if the substituted housing is or becomes out of compliance with applicable safety and health standards after inspection. The Department also sought to clarify available remedies for housing safety and health violations to include denial of a pending Application or revocation of a future Application. No changes were proposed to the 2008 Final Rule provisions concerning

housing safety and health standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and provision of family housing. After full consideration of the comments, the Department is adopting all the housing-related provisions as set out in the proposed rule, with minor editorial modifications.

The Department received a number of comments on this proposal from employers, grower associations, SWAs and worker advocates. One employer association commented that the return to the 1987 Rule housing inspection rules would cause delays in certifications, and as evidence of this statement provided certification statistics from 2008 for its members. This commenter asserted that between December 15, 2007 and April 20, 2008, 89 certifications were issued for its members, of which 40 certifications were issued and received within 4 days of due date (40 percent); 37 were received between the 5th day and the 10th day (37 percent); another eight were received between the 11th and 15th days (8 percent); and the rest were received between the 16th and 24th days (13 percent). According to this commenter, the certifications issued in 2008 under the 1987 Rule were on average late by 8.27 days. This commenter also took issue with the Department's assumptions for the time associated with processing and receipt of petition approval from United States Citizenship and Immigration Services (USCIS), the worker obtaining a visa from the Consulate, and transportation from Mexico to the area of intended employment. It concluded that the proposed change to the timing of the housing inspections would have a very significant impact on the association's members. Another employer association similarly stated that its members had seen improvements in processing times as a result of the 2008 Final Rule and predicted certification delays as a result of this provision. The association also criticized the Department for ignoring its own detailed rationale in the preamble of the 2008 Final Rule explaining why it was inappropriate to delay certification determinations because of the SWA's delay in completing housing inspections.

Other employers noted that the proposed change would result in less time to make necessary repairs and improvements to housing, which in one grower's view would ultimately work to the detriment of the workers housed there. Other employers commented that requiring that the housing inspection be completed before worker occupancy creates unnecessary financial burdens

by essentially requiring employers to ensure housing is available prior to the actual need. An agricultural employer and H-2A program user stated that inspecting occupied housing can be very difficult for the inspector and has the potential to add huge liabilities for employers; it asked whether the WHD intends to train SWA staff on differentiating between compliance issues connected with occupied housing and those connected with unoccupied housing. This commenter further suggested that employers be given a specific and reasonable time period to correct violations found in inspections of occupied housing, and that penalties only be assessed if the employer fails to correct the violations. Similarly, an association commented that SWAs are not allowed to inspect occupied housing, which creates difficulties if the employer is seeking to augment his or her existing workforce or another grower is utilizing the housing during the H-2A employer's off-season. This commenter also remarked that the Department does not mandate pre-occupancy inspections of farm worker housing outside of the H-2A program and suggested that this is an indication that temporary housing is not a priority for the Department except in the H-2A program.

Several commenters representing employers and employer interests offered that the cost and availability of housing is one of the most serious impediments to the use and expansion of the H-2A program, and many suggested implementation of a system where employers could provide workers a housing voucher instead of the employer directly providing housing. These commenters also noted that the H-2A program is the only employment-based immigrant or nonimmigrant worker program that requires the employer to provide free housing to its workforce and suggested that imposing the housing requirement only on agricultural employers is unwarranted. One employer association stated that until Congress eliminates this requirement on employers, the Department should limit the practice and not expand employers' responsibility to serve as unpaid landlords to their workforce.

In contrast to comments from employers and employer associations, comments received from SWAs and employee advocates were generally supportive of the proposed change. State agencies commenting in favor of the provision represented States in which a significant number of H-2A workers are employed and/or States where agriculture contributes

substantially to the State's economy. One SWA agreed with the proposed change on the basis that it would protect growers by helping them fulfill their housing obligations and ensure protections for workers. Another SWA commented that requiring housing inspections to be completed prior to H-2A certification will confirm that adequate housing is being provided to the temporary foreign workers. Another State agency found the provision consistent with its goal of assuring safe and healthy living for migrant farm workers and stated that one way they accomplish this is through their housing inspection program, stating that eliminating the attestation process and requiring that farm worker housing be inspected prior to occupancy is consistent with their Department of Health's licensing and inspection program.

An employee advocate organization commented that while the proposed provision is an important step in assuring compliance with housing requirements, the proposed regulations still do not adequately address the problem of ghosthousing, wherein employers list housing that is never actually intended to be used to house workers. This commenter explained that when there is no post-certification inspection requirement, the potential exists for abuse by unscrupulous employers who would purposefully arrange for the inspection of housing they have no intention of using. It suggested adding a post-certification inspection requirement for the SWA to inspect housing midway through the certification period. In this commenter's view, such a requirement would discourage the practice of an employer listing housing that either does not exist, or exists but is not used. This commenter also suggested the strengthening of the protections afforded to workers with respect to housing, including an additional requirement for inspection of substitute housing during occupancy; the elimination of references in the regulations to conditional access to the interstate clearance system based on the employer's assurance that housing will be in compliance by a specified date; and the clarification that the strictest standard applies to housing subject to multiple housing standards (e.g., local, State and Federal).

The Department also received a few comments not directly related to its proposed housing provisions. One commenter, a worker-led nonprofit organization that recruits, trains and places H-2A workers, explained that in the border region (e.g., Yuma County,

AZ), many H-2A workers have the option of returning to their homes and families at night, and many prefer to do so rather than stay in employer-provided housing. This commenter suggested establishment of a commission to develop an alternative border-based housing policy for the H-2A program. Although no changes were proposed to the provision of range housing or the standards applicable to range housing, comments from an association representing the sheep and livestock industries and a Federal Lands Council urged the Department to continue to provide special procedures for housing provided to sheepherders and workers engaged in the range production of livestock. A SWA and an employee advocate provided comment on the employer's obligation to provide family housing to workers with families who request family housing when it is the prevailing practice in the area of intended employment and occupation (§ 655.122(d)(5)). Both commenters requested that the Department clarify that if a State statute or court decision applicable to the jurisdiction requires an employer to provide family housing, then the State statute or court decision is to be considered the prevailing practice with respect to the provision of family housing.

The INA requires employers to provide housing in accordance with regulations issued by the Secretary. The employer may meet this obligation by providing housing meeting the applicable regulations. The Department recognizes that this requirement is unique to the H-2A program, but statutory requirements prohibit the Department from providing the flexibility suggested by some employers to authorize a housing voucher in lieu of employer-furnished housing, to limit the practice of H-2A employers providing housing to their workers, or to relieve employers in border regions from this requirement. Likewise, the Department is statutorily prohibited from requiring compliance with the stricter of applicable local, State or Federal standards if multiple standards apply to rental and/or public accommodations or other substantially similar class of habitation.

Instead, the Department is returning to its position contained in the 1987 Rule that employers must provide housing to their H-2A workers and to their workers in corresponding employment who are not reasonably able to return to their residence within the same day. As explained in the section discussing the definition of corresponding employment, the requirement on employers to provide

housing to workers in corresponding employment helps ensure that those workers receive the same level of wages, benefits, and working conditions as the H-2A workers, and therefore that the employment of the H-2A workers does not adversely affect the employment of workers similarly employed.

With regard to the timing of housing inspections, from the 1987 Rule until January 2009, ETA's regulations required that employer-furnished housing be inspected and certified as meeting applicable standards as a condition of the Secretary granting H-2A certification to the employer. This requirement was based on the Department's reading that the INA requires that the Secretary make a certification determination no later than 30 days before the date of need (8 U.S.C. 1188(c)(3)(A)) and that the determination of whether housing furnished by the employer meets the applicable safety and health standards be made no later than the date by which the Secretary is required to make the certification determination (8 U.S.C. 1188(c)(4)). For more than 20 years, the Department read these two provisions in concert and concluded that the certification determination could not be made unless the employer-furnished housing had been inspected and found to meet applicable safety and health standards. The 2008 Final Rule changed the regulation to eliminate the requirement that housing be inspected and approved before certification in all cases.

The INA establishes both the date by which the Secretary must make the certification determination and the date by which the determination of whether employer-furnished housing meets applicable standards must be made. The Department believes the 1987 Rule reading, which is also implemented in this Final Rule, is the more appropriate reading of these statutory requirements and, notwithstanding the Department's earlier statements, is more consistent with congressional intent to ensure that U.S. workers are not adversely affected by the employment of H-2A workers. Reinstatement of this process also benefits employers by reconciling the Department's H-2A certification process with applicable State laws requiring pre-occupancy inspection and certification of worker housing. Contrary to the suggestion of one commenter, the fact that the Department does not require pre-occupancy inspection of housing provided to farm workers outside of the H-2A program is not a reflection of the Department's priorities, but a function of the

underlying statutory requirements and Departmental resources.

The Department also notes that reinstating the provision at § 655.122(d)(1) concerning conditional access to the interstate clearance system under the Wagner-Peyser regulations obviates the need for the conditional certification determinations included in the 2008 Final Rule. Employers whose housing has not yet been inspected may request conditional access to the interstate clearance system under the procedures set forth in 20 CFR 654.403. Likewise, employers whose housing has been inspected and found not to meet the required standards may seek conditional access to the interstate clearance system, thereby allowing the employer an opportunity to make the necessary repairs or improvements without penalizing the employer through denial of access to the interstate clearance system. In either situation, if the employer seeks and is granted conditional access to the interstate clearance system, the continued review and processing of its H-2A Application need not be held up. The Department believes this process appropriately balances the requirement that workers are provided safe and healthy housing while not unduly delaying H-2A certification determinations. In response to the suggestion that the Department eliminate all references to conditional access to the interstate clearance system, this provision exists in the Department's regulations implementing the Wagner-Peyser Act with respect to farm workers, which the Department has not proposed amending at this time.

The Department understands that any delay in H-2A certification determinations is of concern; however, based on the Department's examination of program activity for FY 2007 and 2008, we do not anticipate the inordinate delays assumed by employers and associations. As explained in the proposed rule, certification determinations for FY 2007 and 2008 were made, on average, approximately 27 calendar days before the employer's certified start date of need. That analysis does not reveal the reason for the delay in certification determinations—whether the delay was the result of a delayed housing inspection, the failure of an employer to provide information requested by OFLC and necessary for OFLC to make the certification determination, or for some other reason. See discussion at 74 FR 45932, Sep. 4, 2009. The Department appreciates that an individual H-2A program user or association may have experienced certification determinations made closer to their date of need than

the average cited by the Department, but believes that requiring that the housing be certified as meeting applicable safety and health standards as a prerequisite to making the certification determination is both required by the most reasonable reading of the statute and is proper given the Department's responsibility to protect U.S. and H-2A workers. As noted in the proposed rule, the Department is not responsible for any downstream delays in processing at either USCIS or the U.S. Consulate.

The Department recognizes that there are situations beyond an employer's control which impact the availability of certified housing the employer intended to use for housing workers and therefore has retained the provision in § 655.122(d)(6) for the substitution of rental or public accommodation housing with a clarification that substitute housing must meet applicable standards. Concerns raised by employers that SWA staff may not be authorized to conduct, or may not be sufficiently trained in the conduct of, inspections of occupied housing will be addressed through the Department's current process for providing guidance to SWAs on implementation of Departmental programs. As explained in the discussion of 29 CFR part 501 in this preamble, the Department will continue to exercise its discretion with respect to allowing employers a reasonable opportunity to correct housing safety and health violations before imposition of sanctions, such as revocation and debarment.

Comments suggesting that the Department impose a requirement for post-occupancy inspection of housing midway through the certification period and post-occupancy inspection of substitute housing are outside the scope of this rulemaking. However, the WHD does conduct inspections of occupied housing during all H-2A investigations and during agricultural investigations outside of the H-2A program when housing is owned or controlled by the employer. Post-certification audits also provide the Department with a tool for ensuring H-2A employers provide housing meeting applicable standards to their workers.

The Department will continue to provide guidance to the SWAs with respect to determining whether the prevailing practice in the area of intended employment and occupation includes the provision of family housing. The Department agrees with commenters that where agricultural employers are required by State statute or applicable court decisions to provide family housing to workers with families,

the prevailing practice is to provide family housing.

The Department does not believe that requiring completion of the housing inspection before the certification determination is made will result in negative economic consequences for employers. Some agricultural employers commented that their financial burdens would increase under this provision; however, these commenters provided no evidence of increased financial burden for the Department's consideration.

#### e. Workers' Compensation

The Department proposed to retain the 2008 Final Rule requirements regarding an employer's statutory obligation to provide workers' compensation insurance coverage in compliance with (or equivalent to) State law. However, the Department also proposed to return to requiring employers to provide the CO with proof of workers' compensation insurance coverage, including the name of the insurance carrier, the insurance policy number, and proof that the coverage is in effect during the dates of need. The Final Rule adopts this requirement as proposed.

Several commenters supported the proposed change, while others asserted that the change was unnecessary. They contended that the Department should simply accept the employer's attestation that it had obtained adequate insurance coverage, without any proof. The Department disagrees with that position. In an industry as dangerous as farming, the availability of workers' compensation coverage is absolutely critical. It is essential that the Department be satisfied that the appropriate coverage is in place. Requiring employers to prove the existence of such coverage creates no meaningful additional burden for employers since they would have to retain that documentation in any event.

#### f. Employer-Provided Items

The NPRM proposed to amend the 2008 Final Rule by requiring employers to provide to the worker, without charge, all tools, supplies and equipment necessary to complete the job. The Final Rule adopts this provision without change.

The Department received few specific comments addressing this provision. One commenter expressed general support for the provision. Another commenter suggested the addition of language providing that if any of these items are provided by the worker, the employer will reimburse the worker for the cost of the items. It is not necessary to adopt the additional language

suggested by the commenter, because the rule plainly and unequivocally states that the employer must provide these items without charge. Moreover, as discussed in more detail in the section regarding deductions, employees must receive the required wage rate free and clear. Therefore, unless specifically authorized by these regulations, employees may not provide or have their pay docked for any item that is an employer business expense where doing so would reduce their wages below the required wage rate.

#### g. Meals

The Department proposed a meals provision identical to the 2008 Final Rule requiring the employer to provide three meals a day (which the employer may provide for a charge in accordance with § 655.173) or free and convenient kitchen facilities to the workers enabling them to prepare their own meals. The Department decided to retain this provision without change in the Final Rule.

A few commenters addressed the proposed provision governing meals. One commenter supported the mandatory provision of meals and other benefits provided to workers. This commenter noted that entitlements, such as meals, protect U.S. workers by creating a disincentive to use foreign temporary labor solely because of lower cost.

Another commenter suggested that workers should be provided with food preparation expenses if kitchens are not available. The Department notes that the Final Rule requires that the employer either provide workers with meals or furnish free and convenient cooking facilities and that this is adequate to secure the benefit that was intended by Congress.

#### h. Transportation; Daily Subsistence

The NPRM proposed to require an employer to pay the worker for the reasonable costs incurred for transportation and subsistence from the place from which the worker has come to the place of employment if the worker completes 50 percent of the work contract period and the employer has not previously advanced or provided transportation to the place of employment and subsistence costs. If it is the prevailing practice of non-H-2A agricultural employers to advance such costs, or if the employer extends such benefits to similarly situated H-2A workers, the employer must advance or provide such costs to workers in corresponding employment who are traveling to the worksite. The transportation reimbursement must be

no less than the most economical and reasonable common carrier transportation charges, and the daily subsistence payment must be at least what the employer would charge the worker for providing three meals a day (if applicable), but no less than the amount permitted under § 655.173(a). The NPRM, thus, proposed to return to the language of the 1987 Rule that the transportation reimbursement be for the cost from the place from which the worker has departed. The NPRM also proposed to remind employers that the FLSA applies independently of the H-2A requirements.

Section 655.122(h)(2) of the NPRM proposed to require employers to provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, if the worker completes the work contract period or is terminated without cause (deleting the 2008 Final Rule's definition of the U.S. consulate or port of entry as the place from which the worker departed). Consistent with the 1987 Rule, the NPRM proposed that if the worker has subsequent H-2A employment, the current employer must pay for transportation to that worksite unless the subsequent employer has agreed in the work contract to pay for transportation and daily subsistence. The NPRM added that an employer is not relieved of its obligation if an H-2A worker is displaced as a result of the employer's compliance with the requirement to hire U.S. workers who are referred within the first 50 percent of the contract period.

Section 655.122(h)(3) of the NPRM proposed to continue to require employers to provide transportation between the workers' employer-provided housing and the employer's worksite at no cost to the workers.

Finally, § 655.122(h)(4) of the NPRM also proposed to require that all employer-provided transportation comply with all applicable laws and provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.105, and 29 CFR 500.120 to 500.128. The NPRM thus proposed to extend the 2008 Final Rule's similar requirements, which were applicable only to transportation between the living quarters and the worksite, because such safety requirements already exist elsewhere in other Federal, State or local transportation laws.

The Final Rule adopts § 655.122(h) of the NPRM as proposed, with a technical correction to an internal cross reference.

The vast majority of the comments pertained to § 655.122(h)(1). Numerous employers and their representatives objected to the proposed change regarding the requirement to pay for transportation from the place from which the worker has come, rather than transportation from the consulate or port of entry. They stated that it makes more sense to pay for transportation from the consulate, because that allows an employer to know in advance or to estimate more precisely what its costs will be. Some commenters expressed concern about how an employer will know with certainty where a worker's home is and how much the transportation from there to the consulate costs, and they wondered whether they would be liable for whatever an employee claims his travel costs were. Others stated that their first contact with the worker is at the consulate, where the workers must go through government screening to ensure that they meet the requirements for entry into the U.S., and that there is not an employer-employee relationship until an H-2A visa is issued at the consular office because that establishes the worker's entitlement to enter the country. Several other employer representatives emphasized that their disagreement was not with the proposed regulation, but with the NPRM's inconsistent preamble language, which described the requirement as to pay for the cost to and from the worker's home. These commenters gave an example of an employee whose home is in Hawaii, but who was recruited in New Haven, CT by the Connecticut SWA, and they emphasized that it would be unreasonable to require a Connecticut employer to return the worker to Hawaii. These commenters noted that historically the requirement was to pay for transportation to and from the point of recruitment, which may or may not be the worker's home. They suggested that the Final Rule should eliminate the inconsistency by clarifying that the requirement is the same as it was in the 1987 Rule, which would eliminate the confusion caused by the preamble and bring the costs within the control of the eventual employer. Finally, as discussed in much more detail with regard to § 655.122(p), a number of employers encouraged the Department to follow the FLSA interpretation that had been set forth in the preamble to the 2008 Final Rule, which repudiated the decision in *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002).

These commenters objected to any requirement to reimburse an employee's transportation costs in the first workweek, rather than when the worker has completed 50 percent of the work contract period. They emphasized that the employee benefits from getting a job in the U.S., and so the employer should not be viewed as the primary beneficiary of the transportation.

In contrast, employee representatives approved of the proposed change back to the requirements of the 1987 Rule. Employee commenters noted that employees have suffered economically from the reduced reimbursement only for costs from the consulate and, therefore, welcomed the return to the prior rule. They also stated that U.S. workers will no longer be at a competitive disadvantage regarding this benefit. Other employee representatives stated that the reinstatement of the former requirement is appropriate because the transportation costs impose an undue burden on workers when the expense benefits employers, and they emphasized that employers should be required to bear the full cost of their decision to import foreign workers in order to ensure that they do not prefer H-2A workers over U.S. workers. One employee advocate specifically emphasized that it is important to make clear that the FLSA applies independently of the H-2A requirements with regard to transportation.

The Final Rule adopts § 655.122(h)(1) as proposed. The Department believes that it is appropriate to return to the language of the 1987 Rule requiring employers to reimburse employees for their inbound transportation from the place from which the worker has come to work for the employer. The Department did not intend for the inartful language in the preamble to the NPRM, referring to the worker's home, to indicate a different standard that would be problematic for employers to implement. The Department believes that employers will not have difficulty returning to the standard that they used for more than 20 years. As a number of employer representatives acknowledged, whether with regard to workers in the U.S. or workers recruited in a foreign country, employers will know where they recruited the workers and, thus, can predict and control their ultimate transportation costs. Finally, with regard to the reference to the FLSA, an issue discussed in detail with regard to § 655.122(p), the Department believes that it is important to remind employers of their obligations under other statutes to enable them to ensure

that they are in compliance with all applicable laws.

In addition, a few employers or their representatives commented on the proposal to incorporate the standards used under the MSPA governing vehicle safety, licensure and insurance requirements for all employer-provided transportation, rather than just for transportation between the living quarters and the worksite (as did the 2008 Final Rule). They objected to this requirement, stating that it was inappropriate to apply MSPA standards to H-2A workers, who are statutorily excluded from MSPA. However, the transportation of H-2A workers is an essential part of the H-2A program. Transportation safety standards have been set for H-2A workers in the Department's regulations from the outset of the program, through the incorporation of existing standards. The 1987 Rule, for example, incorporated existing Federal, State, and local transportation laws and regulations. As noted in the preamble to the 2008 Final Rule, the Department does not seek to apply MSPA to H-2A workers and has no authority to do so. Rather, the regulation simply adopts these established safety standards under the Department's H-2A regulatory authority, in order to better assure the safety of H-2A workers.

Finally, one employee representative stated that the current subsistence allowance does not allow workers to purchase nutritionally adequate meals during their journey to the workplace or their return home. The commenter stated that the Department should determine an appropriate dollar figure, such as by surveying meal prices in the types of establishments frequented by charter bus companies and readily available to passengers on common carriers or some other method, and then indexing the amount for inflation. The Department did not propose any changes to the subsistence amount or the methodology for setting it; therefore, it believes that it would be outside the scope of this rulemaking to adopt the suggested change. However, the Department notes that it does update the subsistence amount each year to account for inflation, based on the CPI.

#### i. Three-Fourths Guarantee

The NPRM proposed to retain the three-fourths guarantee from the 2008 Final Rule, which had clarified that the guarantee must offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the contract period, beginning with the first workday after the worker arrives at the place of

employment. The NPRM clarified the three-fourths guarantee requirement to ensure that the guarantee will not have been met if the employer merely offered some work to employees on three-fourths of the days in the contract, if the workday did not consist of the full number of work hours disclosed in the job order (e.g., hours offered on a day in which fewer than the full number of hours stated in the job order have been offered). The Department also proposed to retain the provision addressing displaced H-2A workers, with a clarification that the provision now refers to the reinstated 50 percent requirement. The Final Rule generally adopts the proposal, with a minor clarifying edit.

The Department received several comments on the proposed three-fourths guarantee requirement. Some commenters opposed the requirement by stating that the three-fourths guarantee only benefits workers and is therefore one-sided. Several commenters, including members of Congress, supported the continuation of the three-fourths guarantee. A few commenters noted that the three-fourths guarantee, as proposed in the NPRM, does not go far enough to protect workers, and they offered suggestions to make the requirement more meaningful.

Several commenters asserted that some employers manipulate the period of employment and number of promised work hours in an attempt to minimize the amount of the three-fourths guarantee. One commenter stated its belief that employers purposefully evade the requirement by overstating the hours of work in the job order and artificially prolonging the season beyond the end of available work so that idle workers voluntarily depart before the end of the stated contract period and are no longer entitled to the three-fourths guarantee protection, provided that the employer made the proper required notifications. The commenter suggested that the Department impose on H-2A employment contracts the first week guarantee already available to U.S. workers under the interstate clearance order regulations (20 CFR 653.501(d)(2)(v)(A)), as well as an analogous last week guarantee. As an alternative, this commenter suggested that the three-fourths guarantee be applied to each successive 4-week period rather than once to the entire contract period. Another commenter suggested that if it became clear that the three-fourths guarantee could not be met, the workers should have the option of demanding their three-fourths guarantee and returning home at the expense of the employer. This

commenter also asserted that because job orders that include multiple crops and/or multiple locations often do not have consecutive work periods, workers experience days and sometimes weeks of down time with no way of knowing whether they will be offered enough work to earn the three-fourths guarantee. To address this uncertainty, the commenter suggested that the monetary amount of the minimum three-fourths guarantee be stated in the job order and job offer. The commenter urged that if a job order exceeds a 3-month period and includes work to be performed for consecutive periods in more than one type of crop or for more than one fixed-site agricultural business, the three-fourths guarantee should be calculated for the work period corresponding to each crop and each area of intended employment. Lastly, this commenter suggested that the proposed three-fourths guarantee requirement be included in each contract for which an H-2ALC is providing workers and that anticipated delays between jobs be disclosed so that potential employees, both U.S. and foreign, have a clear idea of the amount of work that will actually be offered.

Several commenters advocated requiring that all offered days of work be at least 8 hours. Another commenter agreed, stating that the three-fourths guarantee could be made a meaningful protection for farm workers by requiring employers to guarantee each worker at least 8 hours of work per day over the course of the season. The commenter asserted that such a requirement would prevent employers from overestimating the number of workers needed to perform the job. This commenter also suggested that the Department reinforce that job orders must accurately reflect the applicant's true labor needs and that the requirement for full-time employment means that the employer must offer at least 35 hours per week to all workers under the job order throughout the entire contract period. Additionally, several employer commenters noted that the inclusion of a 35-hour full-time employment requirement in the proposed definition of job offer would have an impact on the amount of hours required to meet the three-fourths guarantee.

The Department is aware that certain circumstances or events beyond the control of the employer may make the fulfillment of the contract impossible, and the Final Rule includes a provision that, upon a finding of contract impossibility by the CO, the employer is relieved of the full three-fourths guarantee obligation and is instead permitted to reduce the guarantee to the

time period from the start of the work until the time of the contract's termination. The Department has determined that the contract impossibility provision strikes an appropriate balance between ensuring fairness to workers and flexibility to employers.

Although many of these suggestions would further strengthen the three-fourths guarantee requirement, the Department believes that it would be inappropriate to implement such significant changes to a fundamental and longstanding requirement of the program, without affording the regulated community the opportunity to formally comment on such proposals. Nevertheless, WHD will continue to carefully evaluate the facts when it conducts investigations to evaluate whether there has been any fraud with regard to dates of need specified in the job order and will pay close attention to evidence of fraud or other issues that may emerge over time. Moreover, the WHD plans to do increased outreach to workers to ensure that they understand their rights with regard to the three-fourths guarantee. Therefore, the Department retains the requirement as proposed with a minor editorial clarification.

#### j. Earnings Records

The NPRM proposed to require employers to retain payroll records for not less than 5 years. Numerous comments objected to this extension of the 2008 Final Rule's 3-year record retention requirement. The Department has decided to return to the 3-year requirement. Discussion of the comments can be found in the preamble section regarding document retention requirements at § 655.167.

#### k. Hours and Earnings Statements

Employers are required to provide earnings statements to workers each pay period. The Department proposed that these statements include the beginning and ending dates of the pay period, and the employer's name, address and Federal Employment Identification Number. The Final Rule retains these requirements as proposed. Several commenters objected to this addition, stating that it would apply the requirements of the MSPA to H-2A workers. The commenters noted that MSPA does not include H-2A workers within its protections. See 29 U.S.C. 1802(8)(B)(ii) and (10)(B)(iii). The Department has determined that this information, which is easily ascertainable by the employer, and may be added to the existing earnings statement, is essential to the employee's

understanding as to whether he or she has been paid correctly, as well as the identity of the employer. Employees will also need this information if they are to report violations of the H-2A provisions to the Department. Accordingly, this information is important to assuring that the wages and working conditions of H-2A workers do not adversely affect U.S. workers. While it is true that this information is also required by MSPA regulations, that requirement is not a reason to exclude it from earnings statements where it is necessary to fulfill the H-2A statutory purpose.

#### l. Rates of Pay

The Department proposed to return to the approach taken in the 1987 Rule with respect to employer productivity standards. This Final Rule retains the proposed language although the provision has been modified to reflect the additional agreed-upon collective bargaining wage rate factor discussed above. Under that provision employers must apply the productivity standard that was normally required the year they first used H-2A workers unless they entered the system prior to 1977. For those employers who entered the system before that time, the 1977 standard applies. In either case, the OFLC Administrator may approve a higher minimum. A number of employer associations objected to the proposal on a number of grounds including questioning the need for any regulation of productivity standards, expressing concerns about the use of a 1977 baseline and noting the need to consider how technological changes might impact productivity. We have carefully evaluated these comments and believe that they do not reflect an appreciation of the history surrounding this requirement or acknowledge the flexibility built into the proposal.

The Department's regulations have reflected a concern about productivity standards for more than 30 years. 43 FR 10313, Mar. 10, 1978. The concerns arose from program experience in which employers that paid on a piece rate basis when facing rising hourly guarantees would increase productivity standards rather than raise piece rates. Initial efforts to address this issue by regulating piece rates were unsatisfactory and the 1987 Rule took the alternative approach of simply freezing productivity standards, subject to the employer making a showing that technological developments justify higher standards. That approach served the program well for 20 years and the comments offer no compelling reasons to adopt a different approach. Nothing

negates our historic concern that rising hourly guarantees will encourage employers to raise productivity standards rather than piece rates. Likewise, the regulation has proven flexible enough to address legitimate productivity increases. For example, apple growers were allowed to raise productivity standards to reflect the introduction of dwarf trees.

In addition, the Final Rule adds references to a collectively bargained wage as one of the potential highest required wage rates, for the reasons discussed above.

#### m. Frequency of Pay

The Department proposed to return to the 1987 Rule with regard to the frequency of pay. The Final Rule provides that workers shall be paid at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. In addition to stating the frequency of pay in the job order, the rule adds a clarification that employees must actually be paid at the time specified in the job order (*i.e.*, when wages are due).

Commenters objected to the requirement that employees be paid when the wages are due, stating that this is an MSPA requirement, and therefore inapplicable to H-2A workers. The idea that an employer must pay its workers based on its statement in the job order is not novel. Courts have recognized that a prompt payment requirement is inherent in the FLSA, and that employers must pay employees their wages on the day their paycheck is ordinarily due. See, *e.g.*, *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994). The promise to pay a required wage is worth little if there is no requirement as to when the wage should be paid.

#### n. Abandonment of Employment or Termination for Cause

The Department proposed to retain the requirements of the 2008 Final Rule on the abandonment of employment or termination for cause. The Department has decided to adopt this provision as proposed, with clarifying edits. Under the Final Rule, a worker is deemed to have abandoned employment after he or she fails to report for work for 5 consecutive working days.

The Department received a few comments addressing this provision. One commenter argued that this provision is one-sided because it permits the employer, but not the employee, to be relieved of the contract requirements in case of a material breach. The commenter proposed a

revision to the regulations to exclude circumstances where the worker abandons employment because of the employer's material breach of a term or condition of the contract.

The Department has decided against including this suggested revision. The issue of an abandonment based on a material breach by the employer is a fact-based scenario that is subject to inconsistent interpretation and one over whose consequences (status of the H-2A worker) the Department has no control. The issue of workers who justifiably abandon employment can be best addressed through normal Department enforcement processes against the offending employer. WHD and/or ETA will address matters within each agency's purview, and make appropriate referrals to other agencies, including DHS.

A few commenters argued that the requirement to report to DOL and DHS within 2 days after discovering that a worker has abandoned employment is not reasonable. The commenter proposed a change in the requirement to permit the employer to wait until 2 days after the end of the pay period during which the worker failed to report for work for 5 consecutive working days. The Department is not making this recommended change because the Department believes it is important for its regulations to mirror the DHS regulations on this point.

The NPRM clarified that notice for both H-2A workers and workers in corresponding employment needs to be made to the NPC and notice concerning an H-2A worker needs to be made to DHS. We note that the regulatory language is specific to a worker voluntarily having abandoned employment or having been terminated for cause. The factual basis underlying any notification provided is subject to review during an audit or investigation. If an audit or investigation finds that fraud, misrepresentation or other violations were present, the employer would not be relieved from the three-fourths guarantee requirement nor from the obligation to provide outbound transportation.

The Department also made minor clarifications in the Final Rule to reflect that the notification requirement relieving the employer of its obligation for the three-fourths guarantee and outbound transportation applies to both H-2A workers and workers in corresponding employment as it had in previous rules.

#### o. Contract Impossibility

In the NPRM, the Department proposed to retain the 2008 Final Rule

requirements regarding contract impossibility and included an additional obligation from the 1987 Rule that requires employers to make efforts to transfer the worker to other comparable employment acceptable to the worker in the event the employer is prevented from fulfilling the requirements of the work contract. One commenter stated that it believed that any transfer of a worker to other comparable employment due to contract impossibility should be mutually acceptable to the employer and the worker since both have a vital interest in the worker's future employment and neither should be allowed unreasonably to impede the other from future employment opportunities. The Department believes, however, that if it were to require that such transfers be mutually acceptable, the employer could object to any comparable employment opportunity. The purpose of this section is to protect the worker and maximize the worker's employment opportunities—and not to create a means for an employer to protect its labor supply for future seasons. Accordingly, the Department has retained the same requirement in the Final Rule as proposed in the NPRM.

In addition, the Department has edited the section to eliminate the requirement that the employer receive documentation of the new assignment from the worker. This was removed to clarify that the first employer is not the arbiter of the worker's status beyond employment with the first employer.

#### p. Deductions

Section 655.122(p) of the NPRM proposed to require employers to make all deductions required by law and to specify all other deductions in the job offer. Further, it proposed that if an employer paid the employee's transportation and daily subsistence expenses to the place of employment, the employer could deduct those expenses from the worker's paycheck, but the job offer had to state that the worker would be reimbursed the full amount of the deduction upon the worker's completion of 50 percent of the work contract period. Additionally, an employer subject to the FLSA may not make deductions that would violate the FLSA. The Final Rule generally adopts the rule as proposed, with a new paragraph to more fully describe what is meant by the term reasonable.

A large number of commenters addressed this provision. Numerous employee advocates emphasized that farm workers' wages have been reduced by inappropriate wage deductions. Some employee advocates and



Congressional representatives suggested that the Department should do more to protect employees' wages from deductions for employer business expenses, and to ensure that workers receive the full required wage rate, by forbidding all deductions not required by law. Other employee advocates stated that the regulation should clearly delineate which deductions are permissible and which are not, rather than just requiring that deductions be reasonable. Some also suggested that the Department should strengthen the regulation by adding language incorporating the free and clear principle found in the FLSA and Service Contract Act regulations, thereby prohibiting any deductions or de facto deductions for expenses that primarily benefit the employer if the deductions would bring the employees' wages below the required wage. These commenters noted that the higher wage rates guaranteed by the requirements of the H-2A program can be subverted by unreasonable or unauthorized deductions, just as the FLSA minimum wage can be subverted. One farm worker advocacy organization specifically emphasized that H-2A workers are among the poorest and most vulnerable workers and should not be required to wait until they have completed 50 percent of the contract period to be reimbursed for their transportation and transit meal expenses. Others stated that the regulations should expressly forbid employers from recouping these expenses in any later workweek.

In contrast, numerous employers and their representatives stated that the requirement to reimburse employees for their inbound transportation and subsistence at the 50 percent point is appropriate, asserting that these costs are not for the primary benefit of the employer. They commented that employers, therefore, should not be required to reimburse these expenses in the first workweek under the FLSA. Specifically, several employer associations stated that the Department should return to the FLSA interpretation set forth in the preamble to the 2008 Final Rule, repudiate the decision in *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002), and conclude that transportation and subsistence are not for the primary benefit of the employer. Under that analysis, refusing to reimburse such costs would not be a de facto deduction from the first week's wages that could constitute a minimum wage violation under the FLSA. These commenters emphasized that employers should not have to reimburse such costs in the first

workweek under the FLSA, since the H-2A regulations provide that they must be reimbursed after the employee completes 50 percent of the job period. They also commented that the balance struck by requiring reimbursement at the 50 percent point works well, because both parties have an investment in the employment. A few of these commenters predicted that the rate at which workers leave their H-2A employment and stay in the U.S. out of visa status will increase if the FLSA requires reimbursement in the first workweek. One employer representative stated that while there may be some concern that withholding reimbursement until the middle of the contract period may go to the other extreme, the Department's final policy choice should reflect the mutual benefits to both the employer and the employee.

The Department concludes that the Final Rule should mirror the proposed rule, with additional clarifying language. The Department believes that, in order to avoid confusion, it is important for this regulation to continue to remind both employers and employees that, where an employer is covered by the FLSA, the requirements of that statute also will apply. As the WHD explained in Field Assistance Bulletin 2009-2 (Aug. 21, 2009), which addressed the application of the FLSA to employers utilizing the H-2B visa program, employers that are covered by more than one law must always determine their wage requirements under each applicable statute and then apply the highest requirement in order to satisfy all laws. See *Powell v. United States Cartridge Co.*, 399 U.S. 497, 519 (1950). That Bulletin noted that an employer may participate in the H-2B visa program only when it demonstrates both that there are not sufficient U.S. workers available and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employers who want to bring in H-2B guestworkers must first comply with numerous requirements related to the recruitment of U.S. workers in order to satisfy the Department that there are not sufficient U.S. workers available. Any foreign workers who ultimately are brought in under the program are permitted to work only on a temporary basis, with no possibility of the job becoming permanent no matter how well the employees perform or what skills they acquire. Moreover, the employees may work only for the employer who received the labor certification for the H-2B visa program.

At the conclusion of the specified work period, the workers must leave the country and they are not permitted to seek subsequent work from another U.S. employer, unless that subsequent employer also is certified under the H-2B program. In that context, the WHD concluded in the Bulletin that, under the FLSA, the transportation expenses and visa fees of H-2B employees are for the primary benefit of the H-2B employers.

As the Bulletin noted, the H-2A visa program is similar to the H-2B program, because it also provides for the temporary employment of nonimmigrants only when there are not sufficient U.S. workers available for the jobs and the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The H-2A program also involves special recruiting requirements directed at locating any available U.S. workers, and the H-2A workers who enter the country are similarly limited to temporary employment for the qualifying employer, and must leave the country at the end of the work contract period unless they go to another qualifying employer. Because of the similar statutory requirements and similar structure of the H-2A and H-2B programs, the same FLSA analysis applies to the H-2A program as was set forth in the Field Assistance Bulletin. Therefore, an H-2A employer covered by the FLSA is responsible for paying inbound transportation costs in the first workweek of employment to the extent that shifting such costs to employees (either directly or indirectly) would effectively bring their wages below the FLSA minimum wage.

The Bulletin also noted that, under the FLSA, there is no legal difference between deducting a cost from a worker's wages and shifting a cost to the employee to bear directly. Thus, employers may not make deductions from employees' wages for employer expenses or require employees to pay for such costs out of pocket, if that would bring them below the minimum wage, because the minimum wage is received only when wages are paid free and clear. The Department concludes that it is appropriate to continue to remind employers and employees in the H-2A regulations of the simultaneous applicability of the FLSA; otherwise, the H-2A requirement that an employer reimburse transportation only after the employee completes 50 percent of the contract period could result in confusion regarding the FLSA requirement to ensure payment of at

least the minimum wage in the first workweek.

Furthermore, in order to provide additional clarity, the Final Rule describes what is meant by the statement that deductions must be reasonable. The Department's regulations implementing the FLSA provide that the reasonable cost of an item may not include a profit to the employer or any affiliated person, 29 CFR 531.3(b), and that the cost of furnishing any facility found to be primarily for the benefit or convenience of the employer is not reasonable and cannot be counted in computing wages. See 29 CFR 531.3(d)(1). This is so even if the employer asserts that the employee has voluntarily agreed to bear such costs. Moreover, wages cannot be considered to have been received unless they are paid finally and unconditionally or free and clear, without any kickback, directly or indirectly. See 29 CFR 531.35. Thus, for example, if an employee must purchase a uniform with the employer's logo, there would be a violation of the FLSA in any workweek when the cost of such a uniform purchased by the employee cuts into the required minimum or overtime wages. The same principles also apply under the SCA. See 29 CFR 4.168. The Department believes that the same principles also must apply to the H-2A required wage rate, in order to ensure that the employee receives the legally required wage free and clear without any inappropriate, unauthorized deductions. Therefore, the Final Rule adds language similar to that found in the FLSA and SCA regulations, with a cross-reference to the FLSA regulations.

However, the FLSA regulations recognize that an employer may make a deduction from wages where the employee has voluntarily assigned a sum to another, such as a creditor, donee, or other third party (*e.g.*, for insurance, union dues, or charitable donations), provided that neither the employer nor any person acting in his behalf or interest derives any benefit or profit from the transaction. See 29 CFR 531.40. Therefore, the Final Rule does not prohibit all deductions or identify the specific deductions that are permissible. Of course, § 655.122(f) of this Final Rule requires employers to provide all tools, supplies and equipment required to perform the job, without charge to the worker, so no deductions for those items are permitted.

Finally, because the NPRM proposed to allow an employer to deduct any inbound transportation and subsistence costs that the employer paid directly,

and to retain the longstanding requirement that an employer must reimburse an employee for such expenses only when the employee has completed 50 percent of the work contract period, the Final Rule does not require an employer to reimburse an employee in the first workweek up to the level of the H-2A required wage. The Department does not believe that requiring reimbursement of inbound transportation and subsistence expenses up to the H-2A required wage in the first workweek would be appropriate, because the NPRM did not propose to modify the longstanding requirement to reimburse these expenses only after an employee completes 50 percent of the work contract period. Rather, the Final Rule provides with regard to inbound transportation and subsistence expenses that employers must comply with the FLSA, where applicable, which means that their reimbursement obligation in the first workweek for these expenses is limited to the FLSA minimum wage level. However, all other deductions must be reasonable, as discussed above, and other deductions are tested against the required H-2A wage rate, not just the FLSA minimum wage. The requirement that all deductions must be disclosed is retained as proposed; therefore, deductions that are not disclosed are not permissible. The Department understands the concerns expressed by the commenters regarding the requirements of this regulation and will carefully monitor the experiences of workers and growers under the new rule to determine whether it is appropriate to revisit this issue in the future.

#### q. Disclosure of Work Contract

The 2008 Final Rule and earlier rules have required that a copy of the work contract be provided to the worker and that the copy be provided no later than on the day work commences. The NPRM proposed that this disclosure be made, as necessary and reasonable, in a language understood by the worker. This provision has been retained. Some comments asserted that this requirement would require translations into regional and village-specific dialects. The Department intends for employers to make translations into major languages, and not every dialect. The Department believes that employers should provide the terms and conditions of employment to a prospective worker in a manner that permits the worker to understand the nature of the employment being offered, as well as the worker's commitment and rights under that employment.

In addition, we received comments that suggested that the copy of the work

contract be provided on the day the worker's visa is issued or at the time of recruitment. These comments stated that it is unfair to allow a worker to travel hundreds or thousands of miles before learning the terms and conditions of employment, and that far too often workers are not accurately apprised of the terms of the work contract until they are in the U.S. The Department agrees. Accordingly, the Final Rule requires that a written copy of the work contract be provided to an H-2A worker no later than the time at which the H-2A worker applies for the visa in a language understood by the worker (as discussed above). The written copy can be provided at any point in the hiring process prior to this point to ensure that the H-2A worker has written notice of the terms and conditions of employment prior to departing the worker's home country. A written copy of the contract need not be provided to each foreign worker who is a potential candidate for employment during the process of recruiting or soliciting. However, when the employer and the worker have reached a stage in discussing employment that has gone beyond the recruiting or solicitation stage and an offer of employment has been made, a copy of the work contract has to be provided. For a worker in corresponding employment, a copy needs to be provided no later than the day on which work begins, although employers may be obligated to provide written disclosure sooner to migrant or seasonal agricultural workers covered by MSPA. Recognizing that some H-2A workers may move to subsequent approved H-2A employment, the regulations provide in such situations that the copy be provided no later than the time an offer of employment is made by the subsequent H-2A employer. Finally, the requirement to provide a copy of the work contract was already contained in the proposal, and this change only modifies when the copy is to be provided. Therefore, any additional costs would be negligible.

As discussed above, the Final Rule clarifies that employers who have an approved modification of a job order must provide the revised job order to the workers in the language understood by the workers. If the modification of the job order is approved after the workers receive the original job order or contract, disclosure of the revised terms and conditions must occur as soon as practicable.

## Application Filing Procedures

### 8. Section 655.130 Application Filing Requirements

#### a. What To File

The Department proposed to require employers to file an Application with a copy of Form ETA-790. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM with minor clarifying edits.

#### b. Timeliness

The Department proposed to accept Applications no less than 45 days from the date of need in order to assure compliance with its statutory mandate to certify all applications within 30 days from the date of need. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM.

#### c. Location and Method of Filing

The Department proposed to accept Applications by U.S. mail or private mail courier to the NPC. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM.

#### d. Signatures

The Department proposed, consistent with the 2008 Final Rule, to require applicants to submit original forms and signatures. However, the NPRM clarified that this requirement also applies to associations filing as agents for their members, and requires them to obtain signatures of all their employer-members before submitting the Application to the Department. The Department clarified the existing requirement to ensure that all employer-members are on notice of the obligations each is assuming and must adhere to under the Application. The Department is retaining this requirement.

The Department received comments opposing the signature requirement and indicating that it would be both time consuming and burdensome for associations. The commenters also objected to an alleged lack of justification offered by the Department for imposing the requirement.

In order to foster fair play and full disclosure, the Department has determined that it must require individual signatures of all employers applying for a temporary labor certification. The Department expects that this practice will result in better compliance and more individual involvement by employers to assure that program requirements are met and that

both U.S. and foreign workers are treated fairly.

### e. Other Comments on Application Filing Requirements

One commenter proposed that all documents filed with the SWA and OFLC be made readily available to U.S. workers and their representatives through the Freedom of Information Act (FOIA) or an electronic means through a publicly accessible Web site. This comment was addressed under the section dealing with the electronic job registry, on which the Department intends to post, when the system is available, all open and pending job orders.

### 9. Section 655.131 Association Filing Requirements

The Department proposed to continue allowing associations to file on behalf of their members. The NPRM clarified the role of associations as filers (sole employer, joint employer or agent), in order to assist the association and employer-members in understanding the obligations each party is undertaking with respect to the Application. As in the past, an association will be required to identify in what capacity it is filing, so there is no doubt as to whether the association is subject to the obligations of an agent or an employer (whether individual or joint). This requirement is a continuation from both the 1987 Rule and 2008 Final Rule that required an association of agricultural producers to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members. The Department is retaining this provision with a change related to the filing of master applications, as discussed more fully below.

One commenter generally opposed the provision indicating that it should be dropped because it requires associations, agents and FLCs to provide to DOL confidential and/or proprietary business information. The Department notes that neither the NPRM nor the Final Rule requires that program users submit information that is confidential or constitutes proprietary business information. The Final Rule simply requires that the association retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation in response to a Notice of Deficiency from the CO prior to issuing a Final Determination or audit. While we do not believe that information submitted in response to a Notice of Deficiency or an audit request

would be confidential business information, we want to reassure employers and associations that information identified as confidential will be protected consistent with Departmental regulations.

#### a. Individual Applications

As discussed above, the Department proposed to continue permitting associations to file as individuals and is retaining this provision in the Final Rule. The Department received no comments on this proposal.

#### b. Master Applications

As explained in the NPRM, master applications filed by associations are clearly contemplated by the INA, and the Department has permitted master applications as a matter of practice. In the 2008 Final Rule, the Department recognized their use. The NPRM proposed to continue the use of master applications but in a more limited fashion. The Department is retaining the NPRM provision addressing master applications with several changes. In response to many comments received on this issue, the Department has reconsidered the one-State limitation and has expanded the area of intended employment for associations filing master applications to at most two contiguous States. In addition, the Department is clarifying that a master application may cover the same occupations or comparable agricultural employment.

The Department received a number of comments in response to its proposed regulations governing master applications. One commenter expressed full support for the proposed changes indicating that they will allow for better accountability in the advertising and referral process.

Numerous commenters asserted that the proposed changes to the provision governing the use of master applications will prove more difficult for employers, without sufficient justification by the Department for the changes. Many of these commenters noted that there is no reason to limit the use of the master applications to only one State, some noting that many farms cross over State lines.

Similarly, many asserted that a limitation to a single occupation and comparable work is not justified because many farmers perform different types of work on their farms, and forcing them to duplicate the Application process for each type of job would greatly increase the cost of meeting their labor needs, and in some cases negatively offset the cost sharing

among the employers covered by a master application.

Several commenters opposed the single-State, single-occupation and comparable work limitations, asserting they will incur greater financial and administrative burdens due to a sudden increase in the number of master applications they will be required to prepare and file to cover all employers, workers and job occupations that would have been covered by the same master application under the 2008 Final Rule. These commenters proposed that the Department permit the bundling of job orders and master applications to reach across State lines so long as the jobs are similar and the wages are the same. The same commenters opposed the increased paperwork burden.

Many commenters claimed that the changes appear unjustified and that the Department failed to offer a justification based on instances of violations or data indicating that master applications are being abused in a way that would be addressed by proposed changes. Some commenters asserted that this change, along with other changes in requirements, will increase the cost of compliance and force some employers out of the program.

One commenter indicated that narrowing the scope of master applications that are essential for many H-2A employers will particularly affect smaller employers or those with shorter seasonal needs. According to this commenter, the one-State limitation fails to account for weather patterns and climate that govern the seasons and therefore drive most agricultural activities. Further, it is reasonable to permit employers and workers in regions where similar activities take place at the same time to increase efficiency and effectiveness by working together through the use of master applications.

Another of these commenters noted that both labor and management understand that multi-employer Applications offer a benefit to farm workers by providing job opportunities. The same commenter contended that the Department should provide employers with additional flexibility rather than impose restrictive requirements. In addition, it asserted that an additional benefit of the expanded availability of master applications would result in greater work opportunities for workers, lower costs for employer participation, and a higher level of compliance among the participating farmers.

The Department agrees with the commenters regarding the benefits of master applications and has therefore

retained their use, as intended in the INA. The Department's changes to the regulatory requirements are not intended to discourage employers from utilizing master applications but are rather designed to preserve program integrity and foremost, aim at greater protections for U.S. and foreign workers. In addition, the Final Rule continues to require a single date of need as a basic element for a master application, as well as a longstanding requirement that master applications may only be filed by an association acting as a joint employer with its members. The Department highlights joint responsibility of the association and its employer-members by requiring that the association identify all employer-members that will employ H-2A workers. The Application must demonstrate that each employer has agreed to the conditions of H-2A labor certification.

The Department has modified the provision governing master applications to expand the area of intended employment. The modification strikes a balance between the programmatic goals of protecting job opportunities for U.S. workers and ensuring uniform enforcement of the terms and conditions and the need to provide flexibility for employer associations. Monitoring program compliance becomes more difficult and the potential for violations increases when workers under a single application are dispersed across several States. Limiting the area of intended employment to two contiguous States will make it more likely that employers under the same application will learn of and have the ability to correct potential problems and avoid liability.

The Department has determined that limiting the master applications to a single occupation or comparable work provides necessary protections for both U.S. and foreign workers by providing a disincentive to employers to overestimate job opportunities or timeframes. Such limits also provide greater incentives to the domestic U.S. workforce. Recruiting workers under a master application, with many different job openings that may be located at different sites and subject to different terms and conditions, may discourage some U.S. workers from responding. This may also make the recruitment and retention of U.S. workers more difficult because some workers may not want to perform diverse activities. This requirement will also assist employers in working together to ensure that terms and conditions are met with respect to each set of workers employed under a specific master application. The Department expects that the nature of the job opportunities that can be

included in a master application will largely mirror how master applications were treated under the 1987 Rule. We further note that the regulatory text has been changed to substitute the word or for the word and in the phrase "single occupation and comparable work."

Although associations may be required to prepare greater numbers of applications, the requirement is intended to make it easier for them to track compliance with the terms and conditions. As applications become more specialized, the associations may find that the number of their participating members increases for each application, therefore preserving the cost-sharing benefits. Similarly, the need for efficiency in processing applications is far outweighed by the anticipated improvement in the process, and the increased protections for both U.S. and foreign workers that will result.

The Department is supportive of the use of master applications by employers (large and small) as a means to meet seasonal needs and believes that the commenters' concerns regarding the impact of limitations are exaggerated. The Final Rule returns to the traditional use of master applications as operated between 1987 and 2009. The Final Rule, with its expansion of the use of master applications beyond a single State, preserves the flexibility inherent in the use of master applications while ensuring that they are not vehicles for abuse or a way to skirt program requirements. Nothing in the Final Rule impacts employers with shorter seasonal needs.

#### 10. Section 655.132 H-2A Labor Contractor (H-2ALC) Filing Requirements

The NPRM revised the provision by providing an introductory paragraph that explained what other provisions of the regulations H-2ALCs are subject to and deleted the redundant sections in the H-2ALC section. The Final Rule adopts these changes as proposed, with minor editorial clarifications.

The Department received many comments addressing the need for the regulation of H-2ALCs. Most commenters agreed with the proposal that specific obligations for H-2ALCs are necessary. However, a majority felt that the Department did not go far enough to regulate H-2ALCs, asserting that H-2ALCs are the most egregious violators of the H-2A program. They pointed out that some H-2ALCs recruit workers when they do not have actual jobs to offer; therefore, these commenters were pleased that the Department is now requiring additional

documentation about their contracts and that the WHD has more enforcement authority. One commenter contended that H-2ALCs exaggerate their labor needs in order to maximize their profits by creating something close to a Ponzi scheme in which foreign workers pay exorbitant recruiting fees abroad. This commenter suggested that the Department create a form for the contract between an H-2ALC and fixed-site employer in order to ensure that all necessary information is provided to the Department such as the legal name of the farm, its address, number of workers needed, dates of need, tasks to be performed, and the remuneration that the fixed-site employer intends to pay an H-2ALC. One commenter requested that the Department explicitly acknowledge State and Federal protections provided to all workers during recruitment and employment including those related to discrimination and retaliation. This same commenter requested that we require an H-2ALC to provide a recruitment plan. Additionally, a commenter recommended the creation of a Federal H-2ALC licensing and continuing education requirement.

The Department believes that the proposed regulations provide sufficient protections to address these commenters' concerns, and no additional restrictions or forms or licensing requirements are necessary at this time. The proposed protections, including the requirements to submit proof of the H-2ALCs' work contracts, will help eliminate these egregious abuses and therefore were retained.

#### a. Scope of H-2ALC Applications

As stated previously, the NPRM proposed to eliminate multiple areas of intended employment in one Application and substituted a requirement that each Application be limited to worksites in only one area of intended employment. The Department received several substantive comments on this particular provision.

A legal aid organization commended the Department for forbidding multiple areas of employment in a single application. The commenter claimed that U.S. workers are harmed because positive recruitment takes place only at the initial area of intended employment and by the time the itinerary reaches some of the later areas of intended employment, the 50 percent rule has lapsed and the U.S. workers lack access to the work opportunities. The commenter also asserted that the H-2A workers incur unnecessary expense because there may be weeks of downtime between areas of intended

employment so they travel back home to Mexico at their own expense. The commenter stated that this would not be the case if the job order accurately reflected the actual work activities.

The Department believes that the enhanced restrictions on H-2ALCs serve to address this issue and retains the provision as proposed in the NPRM.

#### b. Required Information

##### (i) Identify Name and Location of Fixed-Site Employers and Crop Activities

The requirement to list the name and location of each fixed-site employer to which an H-2ALC expects to provide H-2A workers, including the beginning and ending dates of when the workers are needed and a description of the activities the workers are expected to perform and crops upon which they will work, is the same in both the 2008 Final Rule and the NPRM. The Department received several comments, all in support of this provision. One farm worker advocacy group suggested that the Department add an additional requirement to include the monetary value of the three-fourths guarantee for the applicable work performed at each fixed site. The three-fourths guarantee is not calculated by each fixed-site employer; therefore, the Department cannot implement this suggestion.

##### (ii) Required Information and Submissions

The Department did not receive any comments on this section of the proposed rule. Therefore, the Department is adopting the provision as proposed with minor editorial changes.

##### (iii) H-2A Labor Contractor (H-2ALC) Bond Requirements

The Department proposed to continue to require that an H-2ALC obtain a bond to demonstrate its ability to meet its financial obligations to its employees. This permits the Department to ensure that labor contractors can meet their payroll and other obligations contained in the terms of the job order and the H-2A program obligations. The Final Rule requires that an H-2ALC submit the original surety bond (and any extensions thereof) to the Department with the Application. This change is not expected to place any additional burden on an H-2ALC applicant since such applicants were previously required to submit fundamental information from the bond that most applicants accomplished by providing a copy of the bond. This requirement to provide the bond itself will ensure that the Department has legal recourse to make a claim to the surety against the bond

following a final order finding violations.

Several farm worker advocates suggested that H-2ALCs should have the option of joint employment with each fixed-site employer in lieu of the bond requirement. They noted that in that situation, fixed-site employers would be held jointly responsible for the treatment of the farm workers. The Department believes that the increased surety bond amounts provide better protections.

##### (iv) Provide Copies of Work Contracts

The NPRM proposed to add a provision requiring H-2ALCs to provide copies of their work contracts. The comments were generally in favor of this requirement. One commenter requested that additional language be added to this provision, specifically, that each contract disclose the fact that an H-2ALC intends to employ H-2A workers in connection with the contract and that workers employed at the same site at the same time in any work included in the job order are employed in corresponding employment. One commenter opined that we are requiring H-2ALCs to provide too much confidential and proprietary business information and that those provisions should be dropped.

The Department has determined that the requirement to include proof of work contracts is appropriate for protecting agricultural workers, and does not believe additional language is necessary. Additionally, as stated above, the Department intends to protect any material identified as confidential in accordance with Departmental regulations.

##### (v) Housing/Transportation

The NPRM required housing and transportation to comply with the standards in § 655.122, and relevant comments are addressed in the preamble for that section. The Final Rule adopts the NPRM as proposed.

#### 11. Section 655.133 Requirements for Agents

The NPRM proposed to require agents to provide, as a part of the Application, copies of agreements demonstrating representation—in the form of a contract, agency agreement, or other proof of the relationship and the authority of the agent to represent the employer. In addition, the Department proposed to require agents who are required to register as FLCs under MSPA to provide proof of registration. The Department is retaining this provision as proposed.

The Department received several comments discussing the enhanced requirements for agents. One commenter objected to the changed requirements arguing that agents, associations and labor contractors should not be required to provide confidential/proprietary business information.

Some commenters opposed the requirement arguing that the current Form ETA-9142 *Application for Temporary Employment Certification* (Form ETA-9142) already contains a section where the employer may authorize another to act as an agent on its behalf and that providing the agency agreement creates a redundancy in the application process. One of these commenters indicated that both the employer and agent are required by law to personally attest with original signatures to the accuracy of all representations made in the Form ETA-9142, and knowingly misrepresenting constitutes a felony criminal offense punishable by \$250,000 fines and up to 5 years in jail. In light of such severe penalties, this commenter did not see the necessity for additional information ascertaining the validity of the representation.

One commenter claimed that employers hire agents simply to assist them with the paperwork and asserted that the scope of such representation in most cases never involves activities that would require the agent to register as a FLC. In addition, the commenter posited that enhanced requirements are unnecessary because the Department already imposes separate requirements on H-2ALCs and FLCs.

An association of employers opposed the enhanced requirements for agents arguing that the proposed changes are punitive and the Department did not provide justification for the new restrictions and did not explain how they will correct or prevent any program abuses. This commenter specifically opposed the requirement to submit agency agreements and noted that this requirement will simply result in more paperwork and cost for employers. The commenter further asserted that the Department has no need for private contract information and should be solely concerned with employer compliance with program requirements. One commenter expressed concern about the possibility that its proprietary information may be subject to public release under FOIA.

One commenter offered support for the enhanced requirements for agents, including that agents obtain a bond and licensure.

The Final Rule adopts the provision as proposed. The Department is

requiring agents to supply copies of the agreements defining the scope of the agency relationship in addition to completing all relevant portions of the Application to ensure that there is a bona fide agency relationship to ensure program integrity. The requirement, however, in no way obligates either the agent or the employer to disclose any trade secrets, or other proprietary business information. For example, the Department has no interest in or need to know the amount of the fee that the agent is charging the employer. The Final Rule only requires the agent to provide sufficient documentation to clearly demonstrate the scope of the agency.

Preserving program integrity requires the Department to ascertain the validity and scope of the agency relationship. The current application procedures require both the employer and the agent to attest under penalty of perjury that all information provided on the Form ETA-9142 is true and correct. It further includes a declaration by the agent or employee of the employer that it is authorized to act on its behalf in connection with the Application. This attestation, however, simply evidences an existing relationship; unlike the actual agency agreement, it does not define the scope of the agency relationship and consequently the scope of employer's or agent's liability. For these reasons, the Department is retaining the provision as proposed.

In addition, the Department wishes to assure all commenters and stakeholders that it will continue to follow all applicable legal and internal procedures for complying with FOIA requests that ensure the protection of private data.

The Department agrees with the commenter supporting the need for enhanced requirements for agents. The Department, however, does not feel that it is appropriate at this time to impose a bonding requirement on agents unless the Department determines on a case by case basis that they are more appropriately classified as H-2ALCs.

#### 12. Section 655.134 Emergency Situations

The Department proposed to retain the criteria for accepting and processing Applications filed less than 45 days before the date of need on an emergency basis. The Department received no comments on this proposal and retains it in the Final Rule, with minor editorial clarifications.

#### 13. Section 655.135 Assurances and Obligations of H-2A Employers

##### a. Non-Discriminatory Hiring Practices

The Department proposed to require employers to make certain assurances as a condition for certification. The first of these assurances was that the job opportunity remain open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and that rejections of U.S. workers must be only for lawful, job-related reasons.

The Department received a few comments on this provision. The Department received a comment that this provision is not necessary and should be deleted because the employer is already required to comply with all applicable laws. Another commenter suggested adding the phrase and as otherwise provided by State law to the end of the first sentence.

The Department does not agree with suggested deletion. The provision is intended to be specific to the hiring practices of H-2A employers, such that the jobs, even those filled by H-2A workers prior to the end of the recruitment period, remain available to U.S. workers. The Department declines to add the suggested phrase here because this concept is addressed elsewhere in the regulation. Therefore, the Final Rule contains the language proposed in the NPRM, with an edit clarifying that the employer's obligations continue through the 50 percent point of the work contract.

##### b. No Strike or Lockout

The NPRM proposed that employers be required to assure the Department that there was no strike or lockout in the course of a labor dispute at the worksite.

The Department received several comments from various groups who requested that the Department return to the language of the 1987 Rule and the 2008 Final Rule which limited such assurance to strikes or lockouts involving the specific job opportunity sought to be filled. These commenters claimed that the proposed wording can leave too much room for mischief among those who would seek to block the hiring of H-2A workers. They expressed concern that the proposed language was broad and would allow one or two workers to claim that they walked off the job over a labor dispute and in such a situation the employer's Application would be denied. They also pointed out that the National Labor Relations Act does not cover agricultural employment, which means that there is no official process for determining the existence of a labor

dispute. These commenters state that the 1987 Rule language was carefully crafted to make it clear that if a worker walks off the job claiming a labor dispute, only the job opportunity vacated by that worker, and not the entire Application, is barred from certification. One of the commenters pointed out that the Department provided no justification for the proposed change. Several of the commenters opined that the proposed definition of strike in the definition section does not alleviate this problem because concerted stoppage of work by employees as a result of a labor dispute still allows two employees to act in concert to prevent an Application from being certified.

The Department is concerned that narrowing the provision as recommended by the commenters would unjustifiably limit the freedom of agricultural workers to engage in concerted activity during a labor dispute. This would be inconsistent with Congress' broad prohibition against granting labor certifications where there is a strike or lockout in the course of a labor dispute. The Department believes that revising the language based on these comments would result in H-2A workers performing not only the jobs identified in the certification, but also the jobs performed by those workers engaged in the labor dispute. Therefore, the Final Rule retains the language as proposed.

#### c. Recruitment Requirements

The Department proposed to require an assurance from the employer that it had and would continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply, or on whose behalf an application is made, for a job through 50 percent of the contract period including all extensions, and would conduct recruitment activities as set forth in the regulation. The Department received no comments on the section dealing with the assurance. Therefore the Final Rule generally adopts the NPRM provision as proposed with minor clarifying edits. This includes the deletion of the "whichever occurs first" language regarding the end date of the positive recruitment. We have modified this language to impose clarity that one date, if known, will overrule the other. For a full discussion of this provision refer to the preamble discussion under § 655.158.

#### d. Fifty Percent Rule

The Department proposed reinstatement of the 50 percent rule, which requires employers to hire U.S.

workers through 50 percent of the contract period, as outlined in 8 U.S.C. 1188(c)(3)(B)(i). We received many comments for and against this proposal, and for the reasons discussed below, the Department is retaining the provision as published in the NPRM.

Several Congressional commenters supporting the rule noted that the 50 percent rule played a crucial role in the reservation of these jobs for U.S. workers. Another commenter noted that the 50 percent rule was not only an essential protection for U.S. workers, but a significant inducement for employers to make serious attempts to recruit U.S. workers as a condition of H-2A certification. Several commenters cited the role that the rule plays in the continued opportunities for U.S. workers for the jobs, close to and even beyond the start date of the contract. Other commenters who supported a return to the 50 percent rule noted that the longer referral period provides essential access to U.S. workers with respect to H-2A jobs. Even some employer commenters opposed to the reinstatement of the 50 percent rule recognized the Department's statutory need to strike a balance between the priority given to U.S. workers and the right of an employer, when it has met its legal obligations, to employ H-2A workers.

Several employer commenters opposed to the rule focused on the complications the H-2A employer faces in hiring an H-2A worker, only to have the pattern of employment potentially disrupted by a domestic worker. Other commenters asserted that U.S. workers are not well served by the 50 percent rule when the employer does not want to hire them because the foreign workers have arrived. A number of commenters stated that there was not sufficient evidence that the rule worked as intended. Many commenters referred to the alternative 30-day rule imposed in the 2008 Final Rule as a preferred alternative.

Many commenters focused on the unreliability of the domestic workforce referred during the 50 percent period. They noted that referred workers were unlikely to even show up for interviews, and that many of those who are hired last for no more than a few days. Others noted that most employers receiving referrals during the 50 percent period choose not to release the H-2A worker but retain that worker, either in a superfluous position or as the potential replacement worker for when the U.S. worker either does not show up for work or quits employment. One commenter noted that, in its State, referrals more than doubled in 2009 yet

very few actually showed up for interviews and ultimately they saw no increase in domestic workers accepting job offers.

Some commenters objected to the cost of interviewing U.S. workers, particularly for small farmers. One commenter questioned the return to the 50 percent rule, noting what this commenter considered to be the small number of workers (11,000) referred by One-Stop Career Centers nationwide.

A commenter stated there is no evidence that the adoption of the 30-day rule in the 2008 Final Rule (as opposed to the 50 percent rule) has adversely impacted U.S. workers. Another asked whether the Department had come across new or different information regarding the effectiveness of the 50 percent rule to merit its reinstatement.

The 50 percent rule predates the H-2A program; it was originally created as part of the predecessor H-2 agricultural worker program in 1978. See § 655.203(e); 43 FR 10316, Mar. 10, 1978. In 1986, IRCA added the 50 percent rule to the INA as a temporary 3-year statutory requirement, pending the findings of a study that the Department was required to conduct and review other relevant materials, including evidence of benefits to U.S. workers and costs to employers, addressing the advisability of continuing a policy which requires an employer as a condition for certification to continue to accept qualified, eligible U.S. workers for employment after the date the H-2A workers depart for work with the employer. 8 U.S.C. 1188(c)(3)(B)(i). In the absence of the enactment of Federal legislation prior to the end of the 3-year period, Congress instructed the Secretary to publish the findings immediately and promulgate an interim or final regulation based on the findings.

The study conducted during that time period included the two States determined to have had the highest number of U.S. workers who responded to referrals during the 50 percent period; it sought only to determine the costs to employers that hired workers referred under the 50 percent rule and the concomitant benefits to the U.S. workers hired under the rule. Accordingly, in 1990, pursuant to what is now 8 U.S.C. 1188(c)(3)(B)(iii), ETA published an Interim Final Rule to continue the 50 percent requirement. 55 FR 29356, Jul. 19, 1990. The perceived shortcomings of the study were cited by the Department in calling for comments regarding the 50 percent rule in 2008, and in conducting another study that attempted to secure additional information regarding the effectiveness of the 50 percent rule. That

study, however, also was focused to meet the needs of the 2008 Final Rulemaking process.<sup>12</sup> It selected only 9 participants from each of three stakeholder groups—farm employers, SWAs, and farm worker advocates. Despite the protests of at least one commenter that this study plainly demonstrates the ineffectiveness of the provision, the study did not constitute a comprehensive analysis of the effectiveness of the rule.

The Department had a clear statutory obligation to determine if there was a need to require employers to continue the longstanding practice of accepting referrals from the time of departure of the H-2A workforce until 50 percent of the contract period has elapsed. The Department's obligation continues and must be implemented in furtherance of the Congressional policy that aliens not be admitted under this section unless there are not sufficient workers in the U.S. who are able, willing, and qualified to perform the labor or service needed and that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. 1188(c)(3)(B)(iii). The Department's promulgation of a different timeframe in 2008 Final Rule as an alternative to the 50 percent rule was not in accordance with the Department's Congressional mandate to ensure that foreign workers are not admitted unless sufficient U.S. workers are unavailable and their wages and working conditions will not be adversely affected.

We have considered the commenters' anecdotal concerns about the unreliability of the domestic workforce referred during the 50 percent period. However, the potential costs that may be incurred as a result of U.S. workers leaving shortly after they are hired are outweighed by the benefit to U.S. workers and the Department's statutory responsibilities to ensure that U.S. workers continue to have access to these jobs.

The Department believes the opportunity provided U.S. workers by the 50 percent rule is not insignificant and notes that SWAs have a duty through the labor exchange system to refer qualified individuals. The States have within their grasp a variety of ways to ensure referrals are coordinated and integrated to make sure that those most in need of and desiring access to these opportunities are given the required

access through the 50 percent period. States are reminded of their responsibility to use these tools to the fullest extent. Staff-assisted referrals are one significant mechanism by which SWAs can ensure that those seeking these particularized positions have access to them. The Department notes that over the 20 years during which the 50 percent rule was in operation employers did not raise significant concerns with regard to this policy.

With regard to the comment concerning new or different information about the effectiveness of the 50 percent rule, the Department does not rely on new information as the basis for the reinstatement of the 50 percent rule. The information that is available through these comments is in conflict. While employers argue that this rule presents obstacles to their effective operation, worker advocates and some SWAs contend with equal vigor that the existence of the 50 percent rule is essential to ensuring that agricultural job opportunities are available to domestic workers. The 2008 study, which was based on employers that employed only 12 percent of the H-2A workers, was an inadequate basis upon which to change the Department's longstanding rule. The Department finds the lack of definitive data to be the very reason to protect the vulnerable domestic workforce, rather than deny it access to these jobs.

The Department has accordingly determined it must protect the needs of the U.S. worker population, even if there is potential uncertainty for the employer in terms of managing labor supply and labor costs during the life of the contract. Moreover, we note that this benefit, if employers' comments are correct, is one very few U.S. workers avail themselves of—thus making the cost to employers negligible.

With regard to comments that SWAs refer a small number of workers under this rule, the Department does not believe that 11,000 job opportunities for U.S. workers are inconsequential, particularly when compared to the approximately 70,000 H-2A workers admitted. Moreover, with respect to small farmers specifically mentioned as being unduly burdened in this process, Congress provided the option of non-compliance with the 50 percent rule in what is now 8 U.S.C. 1188(c)(3)(B)(ii), as implemented in the Final Rule.

#### i. Small Farm Exemption

The Department proposed a return to the 1987 Rule's small farm exemption from the 50 percent rule. Most of those supporting the proposal to reinstate this exemption further requested that the

Department eliminate the provisions limiting its application to those small farms that are not members of an association filing a master application (or otherwise associated with other employers). The Department cannot accommodate this request. This limitation was not regulatory, but statutory. See 8 U.S.C. 1188(c)(3)(B)(ii). In that provision, Congress specifically excluded small employers who are members of associations from the small-employer exemption to the 50 percent rule. The association, however, can assign any workers referred under the 50 percent rule to employers who need additional workers or who can more easily accommodate the referred workers, thus minimizing or eliminating the burden on small farmers.

#### ii. Other Comments on the 50 Percent Rule

Another commenter asked whether the Department would reinstate policy guidance addressing the referral of U.S. workers to an H-2A employer after the arrival of the H-2A workers. The Department issued guidance in 1993 and 2007 instructing SWAs to refer U.S. workers to an H-2A employer whose H-2A workers have already arrived only if there is no suitable alternative employment available or if the worker expresses a preference for an H-2A employer's job opening. The Department does not believe it is appropriate to include such guidance in the context of the regulation.

#### e. Compliance With Applicable Laws

In the NPRM, the Department proposed to require employers to comply with all applicable Federal, State and local laws and regulations, including health and safety laws, during the period of employment that is the subject of the labor certification. This proposal expanded the scope of the prior guarantees which, under both the 1987 Rule and the 2008 Final Rule, limited the required compliance to employment-related laws. In addition, the proposed regulations made explicit that H-2A employers may be subject to the provisions of the FLSA. The Department has decided to retain the enhanced requirement in order to emphasize and ensure that both H-2A and U.S. workers are provided all of the protections to which they are entitled.

One commenter supported the expanded proposal, asserting that the new assurance would assist State and local governments in curbing illegal immigration and exploitation of foreign agricultural workers, and it would also grant more uniform protections to all workers. Another commenter supported

<sup>12</sup> See "Findings from Survey of Key Stakeholders on the H-2A 50 Percent Rule," HeiTech Services, Inc. Contract Number: DOU069A20380, April 11, 2008.



the enhanced provision but suggested a change to expand the protections to the period of recruitment, as well as the duration of the work contract.

The Department agrees that emphasis on compliance with all applicable laws and regulations is intended to bolster protections for both U.S. and foreign workers. The provision puts employers on notice that they must comply with all applicable laws specifically as a condition of program participation. In addition it provides State and local agencies with an incentive to work together with the Department to identify violators and address issues related to the employment of temporary foreign agricultural workers.

As to the comment suggesting an expansion of the protection to the period of recruitment as well as the duration of the work contract, we believe that the prohibition against discrimination during the period of recruitment provides adequate protection. Additionally, several commenters requested that the Department prohibit employers from holding or confiscating workers' passports, visas, or other immigration documents. The Department recognizes the worker's right not to relinquish possession of his or her passport to the employer. Therefore, the Department is adding a provision to this section to require employers to comply with existing Federal law that prohibits confiscation of such documents (William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a)).

#### f. Job Opportunity is Full-Time

The NPRM proposed to require employers to offer only full-time temporary employment of at least 35 hours per work week, an increase from the 30 hours per week in the 2008 Final Rule. The Department made this change on the basis that a 35-hour work week more accurately reflects agricultural work patterns and also strikes a more appropriate balance between the employers' needs and the employment and income needs of both U.S. and foreign workers.

The Department received a number of comments on this requirement. Some of these comments addressed the increased requirement in the context of the three-fourths guarantee which is also discussed elsewhere in this preamble.

One commenter offered unqualified support for the proposed 35-hour per week proposal. Another commenter, a legal aid organization, proposed changes to the provision that would define a full-time job opportunity as constituting 8 hours per day and no less than 40

hours per week. Another commenter suggested that the Department adopt a 37-hour per week requirement instead, because it would more accurately reflect the reality in the field. As part of its justification, this commenter argued that an increase in the hours would bolster the three-fourths guarantee and ensure that workers are actually employed for the duration of the contract.

Several commenters opposed the new definition of full-time employment. Some commenters asserted that the increased hourly requirement increases the obligation of the employer to meet the minimum hour requirement and thus increases the number of hours for purposes of the three-fourths guarantee. Another commenter indicated that this would drive up costs for H-2A employers. Other commenters asserted that the proposed change in the requirement would drive labor costs up 16 percent because the requirement and the three-fourths guarantee are now applicable not only to H-2A workers but also to U.S. workers in corresponding employment. One commenter also argued that this change is compounded by the change in the AEW method resulting in prohibitive costs for employers.

Some commenters suggested the Department retain the 30-hour per week requirement because it provides farmers with more flexibility in meeting the three-fourths guarantee when they are faced with unforeseen circumstances such as inclement weather, etc. Several commenters argued that the Department offers no justification for increasing the requirement or statistical data indicating that 35 hours, instead of 30, strikes a more appropriate balance between employers' needs and the needs of U.S. and foreign workers. One of these commenters argued that farmers do not have the flexibility to set the sale prices in order to absorb costs associated with the new proposal, which will result in many family farms going out of business and loss of employment for U.S. workers.

The Department's experience in program administration and enforcement has shown that the 30-hour requirement does not adequately reflect the reality of agricultural production and that most employers over the course of the season offer well in excess of that number of hours. Although the Department believes that agricultural employers need some flexibility to account for the unpredictable factors affecting agriculture, the Department's primary responsibility is to ensure the availability and viability of job opportunities for U.S. workers. The Department has determined that

requiring employers to use 35 hours as the minimum threshold for full-time employment will strike a more appropriate balance between the reality in the field, the workers' needs for meaningful hours and wages, and the farmers' need for flexibility. The Department is therefore retaining the 35-hour work week, as proposed.

#### g. No Recent or Future Layoffs

The Department proposed to require an employer to assure that it has not laid off and will not lay off any similarly employed U.S. worker in the occupation in which the employer is seeking to hire H-2A workers within 60 days of the date of need. The Department has modified the provision in response to comments and has clarified the circumstances under which a layoff would not be improper.

The Department received a number of comments addressing the proposal. One commenter expressed concern that the layoff provision could create confusion and complications for certain employers with long seasons; coupled with the longer recruitment provisions, the employer may be required to begin recruitment of U.S. workers (and the application process for H-2A workers) before or at the time that it is dismissing workers associated with the prior work contract/prior season. This commenter further argued that offering to re-hire these workers may not remedy the situation because many of them may not commit to a job opportunity until a later date. This commenter recommended that the Department adopt a shorter recruitment period, and/or a shorter layoff protection period and/or require employers to attest to their intent to rehire all qualified U.S. workers who have been laid off due to the season ending. Another commenter argued that it and other employers in the industry regularly dismiss their year-round employees between December and February. This commenter proposed that the Department change the provision so it does not bar such employers from using the program.

One commenter proposed changes to the provision to impose the requirement on both the employer and the fixed-site business (to the extent they are not one and the same). In addition, this commenter proposed additional language to prohibit the employer or fixed-site business from causing the layoff in addition to actually laying off the workers.

In response to the concerns of employers with long seasons or who dismiss their employees between December and February that they would be barred from the program the Final

Rule clarifies that layoffs are permissible when H-2A workers are laid off before any U.S. workers in corresponding employment are laid off. We have previously made this point in 29 CFR 501.19(e) and have moved it to this provision. Moreover, we note that the employer is required to offer employment to all U.S. workers employed in the prior season. The Department continues to believe that offering the maximum job opportunities to U.S. workers is critical to the Department's responsibilities under the H-2A program.

The Final Rule does not extend the concept of joint employment to H-2ALCs and fixed-site employers at the same location for purposes of the no layoff provision, where the fixed-site employer does not qualify as a joint employer. Only an employer may lay off its own employees and therefore each employer is individually responsible for ensuring that it does so only for lawful, job-related reasons. Adding the proposed language to the provision would create confusion regarding joint employment and the ultimate responsibility for the workers under the program.

#### h. No Unfair Treatment

The Department proposed to prohibit employers from intimidating, threatening, coercing, blacklisting, discharging or in any manner discriminating against workers or former workers who file a complaint against the employer, or who institute any proceeding against the employer, or testify in any proceeding against the employer, or consult with an employee of a legal assistance program or an attorney on matters related to a proceeding against the employer, or exercise or assert any right or protection under the H-2A program. This provision supplements existing provisions in these regulations requiring compliance with Federal, State and local laws, and provisions which prohibit unfair treatment. The Department is retaining the provision as proposed.

Some commenters expressed unqualified support for the provision. Other commenters proposed to add into this provision new language that would include protections for workers who file complaints with the SWA or assert rights or institute actions based on State employment or housing law or regulations. A Congressional commenter proposed that the Department consider additional protections, including visa extensions, to prevent retaliation against foreign workers who file complaints alleging unlawful conduct.

The Department believes that its provision requiring compliance with all applicable Federal, State and local laws already provides for the additional State-related protections proposed by one of the commenters.

The Department supports providing protections to workers so that they may complain of violations without fear of retaliation. However, the Department does not have the authority to provide for an extension of status or stay for a foreign worker; this authority rests exclusively with DHS and the Department can take no action with respect to extending the status of any individual worker.

#### i. Notify Workers of Duty To Leave United States

The NPRM proposed to continue to require an employer to inform H-2A workers that they are required to depart the U.S. at the end of the certified work period, or if they become separated from the employer before the end of that period. The requirement that the workers depart applies to all H-2A workers who do not have a subsequent offer of employment, approved by USCIS in a subsequent nonimmigrant worker petition, from another H-2A employer. This continues a requirement in the program which parallels DHS regulations. The Department received no comments addressing this provision, and is retaining this provision as modified.

#### j. Comply With the Prohibition Against Employees Paying Fees

The NPRM proposed to prohibit the employer or its agent from seeking or receiving payment of any kind (including, but not limited to, monetary payments, wage concessions, kickbacks, etc.) from an employee for any activity related to obtaining the H-2A labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs, but not costs that are the responsibility of the workers, such as passport fees. The proposed rule deleted the reference in the 2008 Final Rule to visa fees as a cost that is the responsibility of the workers. The preamble to the NPRM explained that visa fees, border inspection fees, and other government-mandated fees are directly related to the employer's need for the workers to enter the U.S. to work for the employer. The Final Rule generally adopts the language as proposed, with the removal of the reference to the FLSA as unnecessary.

Employee advocates generally endorsed the proposed prohibitions on cost shifting. For example, one employee advocate stated that

exorbitant recruitment fees imposed on H-2A workers, including transportation fees, passport and visa expenses, require workers to bankrupt themselves and their families just to enter the U.S. This commenter suggested, as did others, that the Department should further clarify that fees are the responsibility of the employer and, because they primarily benefit the employer, may not be recouped in a later workweek. Another employee advocate suggested that the Department should go further to eliminate employers' incentive to prefer H-2A to U.S. workers and prevent employers from shifting to others the costs of importing H-2A by expressly requiring the reimbursement of passport fees, hotel costs while waiting in the consular city to interview for and receive the work visa, and visa processing fees.

A number of employers and their representatives objected to the requirement that employers pay the workers' visa fees. For example, some commenters emphasized that consulate, border crossing and visa fees should remain the responsibility of the workers, stating that workers also benefit from the employment relationship and should have some investment in the relationship. They predicted that there would be increased absconding from the job upon arrival if employees did not have a financial stake in their decision to enter the country. Other employers and their representatives similarly commented that visa fees should remain the responsibility of the worker, both in order to control employers' costs, and because they are a natural cost of the decision to go to another country for a job, from which the employee also benefits. Others emphasized that facilitation of the visa application process by foreign agents, compensated by the foreign beneficiaries, is a longstanding practice, which eases the process at the consulate; they stated that using such facilitators is not a condition of employment, but a voluntary choice by the workers. Moreover, they stated that some applicants will require such assistance because they are not literate in English, do not have access to a computer, or lack the ability to navigate the various Department of State (DOS) forms, yet all of this assistance is outside the control and knowledge of the employer. Another employer representative expressed concern that if it fronted the worker money for the visa appointment fee, the visa application fee and the visa printing fee, its costs would be higher and the worker could simply take the money and disappear. On the other hand, another employer

association acknowledged that many employers already advance these costs or reimburse them in the first workweek as a result of the decision in *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), which held that such visa-related costs are an employer business expense. Moreover, several employer associations stated that they strongly supported the prohibition on collecting fees from workers, stating that it was an essential protection for foreign workers, who are often subject to exploitation in their home countries. A farm bureau similarly supported the concept that workers should not be required to pay these fees, but it expressed concern about liability for cross-border payments that it had no knowledge of and therefore suggested deleting words like kickback, bribe, and tribute.

The Final Rule generally adopts the provision as proposed. Government-mandated fees such as visa application, border crossing and visa fees (including those imposed by the DOS or other government contractors) are integral to the employer's choice to use the H-2A program to bring foreign workers into the country. Such expenses provide no benefit to the employee other than for that particular limited employment situation. As the Department recognized in the preamble to the 2008 Final Rule, requiring employers to bear the full cost of their decision to import foreign workers is a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers. Moreover, as one employer association acknowledged, many employers already are advancing or reimbursing these costs in the first workweek.

As to employer concerns that some unscrupulous individuals may take money that the employer advances and never report for work, the Department notes that employers are not obligated to advance such fees to employees. Employers may wait and reimburse such fees in the employee's first paycheck. Furthermore, the Department is not adopting the suggestion of one employee advocate to require employers to reimburse employees for their passport costs, because employees may use their passport for personal purposes unrelated to their H-2A employment with a particular employer. See Wage and Hour Division Field Assistance Bulletin 2009-2, [http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009\\_2.pdf](http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf). Finally, as noted in the preamble to the 2008 Final Rule, employers are not responsible for an employee's voluntary choice to use the services of an

independent facilitator, such as to assist the employee in obtaining access to the internet and in dealing with the DOS, so long as such fees are not made a condition of access to the job opportunity. However, as was also noted in that preamble, the Department will monitor such activities to attempt to ensure that any such charges are not de facto recruitment fees charged for access to the H-2A program.

The Department does not believe it is appropriate to identify the border crossing, visa, and other government-mandated fees that must be paid by the employer with more specificity, as those fees may change over time. Moreover, there is no need to repeat that such fees may not be recouped in a later workweek, as the discussion of deductions under § 655.122(p) makes clear that deductions for such employer business expenses may not be made if they bring the worker below the required H-2A wage rate.

#### k. Contracts With Third Parties Comply With Prohibitions

The NPRM proposed to require an employer to assure that it has contractually forbidden any foreign labor contractor or recruiter that the employer engages in the international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees, except as allowed under the DHS regulation at 8 CFR 214.2(h)(5)(xi)(A). The proposal clarified that the contractual prohibition must extend to any agent of the foreign labor contractor or recruiter, and that the employer must make the documentation available upon request. The Final Rule adopts this provision as proposed, with minor clarifying corrections.

Employee representatives favored the proposed provision. For example, one employee advocate applauded the proposal, which carries forward the current rule's prohibition on shifting recruitment costs, noting that recruitment fees are a burden on foreign H-2A workers and their families. Another employee representative similarly expressed approval of the prohibition against employers and their agents seeking or receiving payments from prospective employees. Several unions commented that farm workers often come to the U.S. as the indentured servants of the recruiters and middlemen to whom they have promised to pay thousands of dollars. Other commenters stated that more must be done to protect vulnerable H-2A workers during recruitment abroad, with the ultimate employers being made responsible for the recruiters they use.

One commenter suggested that the Department should require employers to compensate their recruiters to eliminate the incentive for them to charge fees to H-2A workers.

Some farmers expressed concern that they might be required to reimburse employees who claim that they were forced to pay a foreign recruiter a fee, even though the farmer's agent prohibited fees, and they wanted the rule to be clear on what the farmer must do to comply. Others similarly wondered how the Department would investigate workers' claims of alleged payments abroad to verify whether they were paid, and they wanted a clearer explanation of how the provision would be enforced, with objective standards for compliance and a safe harbor if the required contractual terms were in place. One employer representative emphasized that the *Arriaga* decision did not require an employer to pay recruiter fees if the employer is not in a position to know of or exercise control over such payments. And one foreign recruiter stated that it wanted to be able to charge employees a fee, because farmers are not willing to pay recruiters until the employees have worked for some time. Another labor recruiter stated that the prohibition against charging workers for recruiter fees was a respectable decision by the Department. However, it wanted some assurance that the Department would enforce the prohibition, so that responsible employers are not disadvantaged if unscrupulous parties continue to charge workers fees.

As the preamble to the 2008 Final Rule emphasized, the Department is adamant that recruitment of the foreign worker is an expense to be borne by the employer and not by the foreign worker. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported. The Department is concerned that workers who have heavily indebted themselves to secure a place in the H-2A program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.

For the same reasons, the Department continues to believe that employers should be required to assure that they have contractually forbidden their foreign labor contractors or recruiters from seeking or receiving payment from prospective employees, and that the prohibition should extend to their

agents. Contrary to the concerns expressed by some employer commenters, as the 2008 Final Rule preamble recognized, the rule does not require farmers to pay all costs that employees may claim that they paid to recruiters abroad. Rather, the employer must contractually prohibit its foreign labor recruiters and their agents from charging or receiving such fees. In other words, paying such fees cannot be made a condition of access to the job. In response to a recruiter's concern that the Department enforce this requirement to ensure that responsible employers are not disadvantaged while unscrupulous agencies continue to charge workers fees so they can provide workers more cheaply, the Department emphasizes that it will monitor these activities to the extent possible to ensure that the required contractual terms are bona fide. While the Department's power to enforce regulations across international borders is constrained, it will attempt to ensure the bona fides of such contracts and will work together with DHS, whose regulations also preclude the approval of an H-2A petition and provide for potential revocation if the employer knows or has reason to know that the worker has paid, or has agreed to pay, fees to a recruiter or facilitator as a condition of gaining access to the H-2A program. As the 2008 preamble stated, when employers use recruiters, they must make it abundantly clear that the recruiter and its agents are not to receive remuneration from the alien recruited in exchange for access to a job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or continued to use a recruiter about whom the employer had received numerous credible complaints, could be an indication that the contractual prohibition was not bona fide. Finally, we have deleted language referring to the DHS regulations since those regulations defer to DOL regulations to the extent that such costs and fees relating to transportation and certain government mandated fees are prohibited by DOL.

#### 1. Notice of Worker Rights

The Department proposed for the first time to require employers to post and maintain in conspicuous locations at the worksite a poster provided by the Department describing the rights and protections for workers employed pursuant to the INA. The posting is required to be in English and, to the extent necessary, in any language common to a significant portion of the workers if they are not fluent in English. A number of commenters stated that

while they thought that having to provide a written job contract or a copy of the job order was already adequate, they did not object to the requirement to display a poster as long as any necessary translations were provided by DOL. We note that the posting of this notice will provide information not only to H-2A workers but will also provide information to U.S. workers, including workers who otherwise may not know that they may be engaged in corresponding employment and be entitled to the terms and conditions of H-2A employment.

Providing such notification of their rights to workers through a worksite poster of their rights is consistent with other programs administered and enforced by the Department. It ensures that both U.S. and H-2A workers are aware of their rights and are provided with resources (in the form of phone numbers or contact information) which they may use to notify the Department of any issues at the worksite or report employers who fail to meet their obligations under the program. The Department is retaining this requirement, with clarification that the poster be in any language common to a significant portion of workers, as made available by DOL.

One commenter expressed opposition to this requirement, indicating that farm operations have limited available space for posting information and that posting may become nonproductive based on the quantity of information posted.

One commenter proposed that the Department adopt a notification requirement whereby the H-2A employer would have to notify the SWA within 2 work days that the H-2A workers have arrived. This commenter argued that this requirement would facilitate outreach by SWAs to H-2A workers and facilitate an understanding by both H-2A and U.S. workers of the work contract terms. It would also give the H-2A workers notice of available resources should any challenges arise. The commenter noted that State resources will also be better used if SWAs are not left to guess or conduct various trips to see whether or not the H-2A workers have arrived.

The Department has determined that requiring the posting of rights specific to workers in the H-2A program is necessary to ensure worker protections and program integrity. Although workers may have access to other information or recourse for violations, directly providing them with knowledge about their rights under the program is intended to ensure timely reporting of violations. It further provides employers with an additional incentive to fully

comply with the assurances and obligations under the program.

Several commenters requested that the Department prohibit employers from holding or confiscating workers' passports, visas, or other immigration documents. Some of these commenters noted that this practice deters workers from leaving abusive situations or challenging unfair employer conduct, and that employers use this practice to control and exploit workers.

As required by the Trafficking Victims Protection Reauthorization Act, the Department recognizes the need to inform a foreign worker of his or her right not to relinquish possession of his/her passport to the employer. Although the regulations already incorporate this protection under the provision that requires employers to comply with all applicable laws, the Department is adding a provision under the Assurances section expressly to require employers to comply. The Department anticipates that adding explicit references in these provisions to these requirements will provide the necessary additional worker protections.

The Department declines to adopt the requirement that an employer notify the SWA within 2 working days that the H-2A workers have arrived. The role of the SWAs under these regulations consists of various activities involving the employer related to the recruitment of H-2A workers, including placement of job orders and referring U.S. workers to employers for the designated time period, and conducting housing inspections. Arrival of the H-2A workers is not a key event in these activities.

#### Processing of Applications for Temporary Employment Certification

##### 14. Sections 655.140–655.145

The Department received no specific comments on the application review process (§ 655.140), the Notice of Acceptance process (§ 655.141), the Notice of Deficiency process (§ 655.143), and submission of modified applications (§ 655.144). However, the Department did receive a comment from a law firm that made it clear to the Department that the organization of this section created confusion. The commenter thought that the Notice of Deficiency would be sent out after the Notice of Acceptance. In reviewing this comment, the Department decided that it would be best to reorganize the order of the sections, delete a misplaced section, and make minor word changes to facilitate a better understanding of the process. Thus, the Notice of Deficiency section will be renumbered and become

§ 655.141 and the first sentence will begin with if the CO determines the Application is incomplete instead of when the CO determines the Application is incomplete. The submission of modified applications will be renumbered and become § 655.142 because only Applications that were returned to the employer with a Notice of Deficiency need to be modified; therefore, it is logical that it must follow the Notice of Deficiency section. The Notice of Acceptance will become § 655.143 and the electronic job registry, which is used only after any deficiencies have been cured and a Notice of Acceptance has been issued, will become § 655.144.

In addition, § 655.141(c)(5) has been changed to state that the employer must seek administrative review within 5 business days or submit a modified application pursuant to § 655.142. The language in the NPRM which required that an application be denied unless the modified application was received within 5 days would have negated the purpose of § 655.142.

#### 15. Section 655.142 (now § 655.144) Electronic Job Registry

The NPRM proposed for the first time the creation of an electronic job registry. The comments received were almost equally divided between those who supported it and those who opposed it. The major concern of those who were against creating a new registry was that the Department did not explain the concept in detail and it was hard for them to understand why it would be any different from America's Job Bank. Several growers' associations and a U.S. Senator declared that this proposal is a waste of taxpayer dollars because the information is already available through the SWAs. They believe that the only justification for such a new database would be the elimination of all the other recruitment requirements. Several of the commenters thought the registry raises privacy issues. They feared that confidential business information would be available on the Internet and would allow advocacy litigators to harass the employers or simply subject the employers to random non-legitimate referrals from across the country, which require the employer to expend time and money responding to such inquiries and referrals.

The NPRM proposed to create this registry for two reasons. One was for public disclosure and transparency. The other was to have an additional tool through which U.S. workers can be matched with employers. A few of the commenters, including SWAs, who agreed with the concept of the registry

applauded the Department for more open public disclosure of the information and admitted that the current systems are not uniform and that it will be easier for them to track H-2A job orders and enhance the efforts to match workers with jobs. One of the SWAs thought the public disclosure would help relieve the SWA from the time currently spent responding to inquiries from the media and interest groups. The Department's experience has been that SWA information is not uniform, and that the creation of the job registry will greatly assist the dissemination of this information to the public; that it will save tax dollars through the elimination of numerous requests through the FOIA rather than cost them for what the Department believes is not a redundant system.

A legal aid bureau commended the Department for proposing the registry because it will alleviate the current frustrations experienced by the public and stakeholders who must wait for responses to FOIA requests. The Department also aims to reduce the substantial number of the FOIA requests it receives each year by publishing the job orders online.

Most of the other commenters who agreed with the registry also acknowledged their hope that this Federal registry would become the only electronic registry of H-2A job opportunities and be used in lieu of either the newspaper advertisement or the SWA posting. Some SWAs thought the idea was good in principle, but thought that the Department should use an existing registry such as JobCentral. JobCentral is a partnership between the National Association of State Workforce Agencies and Direct Employers Association. SWAs can use the system at no cost. The Department examined the option of using an existing registry but found that the costs would impose an additional burden on employers. Therefore, the Department has decided not to adopt this proposal.

The NPRM did not provide a great deal of detail on how the registry would operate. Those details are provided here. The Department will announce through a notice in the **Federal Register** when the registry is operational. After creating the infrastructure for the registry, the Department plans to scan the Form ETA-790 after redacting confidential information, as it would for a FOIA request. The redacted image of the Form ETA-790 will be posted on the registry. This should alleviate commenters' concerns about the public dissemination on the Internet of confidential business information. The same search functions that are available

to currently search PDF files will be available to search the postings on the registry. The Department believes this will be an effective mechanism to make this information available to workers, employers and advocates.

#### Post-Acceptance Requirements

##### 16. Sections 655.150–655.158

The NPRM proposed both pre- and post-filing recruitment. The SWA would, as always, be responsible for placing the job order. If the initial test of the labor market did not yield enough U.S. workers, the employer would file an Application with the Department. Once the CO accepted the Application, the CO would direct the SWA to place the job order in its interstate clearance system and send the job order to any States designated by the CO to be traditional supply States. The employer would be directed to place the newspaper advertisements where the CO determines appropriate. As in both the 1987 Rule and the 2008 Final Rule, the NPRM requires that newspaper advertisements direct applicants to report or apply for the job opportunity at the nearest office of the local SWA where the ad appears.

The 1987 Rule contained very specific additional recruitment requirements that an employer had to perform in order to comply with the positive recruitment requirements of the regulations, such as radio advertising, contacting FLCs, migrant workers and other potential workers by letter and/or telephone, or contacting such entities as schools, business and labor organizations, or fraternal and veterans' organization. The 2008 Final Rule changed the additional recruitment requirements by eliminating many of these steps and by requiring employers to contact former U.S. employees. The NPRM proposed a hybrid of the two earlier rules. The NPRM kept the 2008 Final Rule requirement to contact former employees but proposed to give the CO discretion to order additional recruitment as determined necessary, which could include newspaper or radio advertising, contacting local unions or FLCs or any other method used by non-H-2A employers, depending on the prevailing practice in the area of intended employment.

The requirement to recruit in traditional or expected labor supply States is a statutory requirement in 8 U.S.C. 1188(b)(4). The 1987 Rule required the OFLC Administrator to ascertain the normal recruitment practices of non-H-2A agricultural employers in the area to determine what recruitment efforts, if any, should be

required of the employers in other traditional or expected labor supply States. The 2008 Final Rule mandates that the Secretary publish a **Federal Register** notice each year that specifies which States are considered traditional or expected supply States and which newspapers in those States are to be used for advertising. The NPRM eliminated the **Federal Register** notice requirement and put the burden of determining the places and methods of recruitment on the CO at the NPC. The NPRM did not mention mandated newspaper advertising in the traditional or expected supply States.

#### 17. Section 655.150 Interstate Clearance of Job Order

One commenter misunderstood the proposed role of the SWA, thinking that the NPRM proposed to return recruitment oversight to the SWA. In fact, under the NPRM the NPC would take on that role. Another commenter misunderstood the role of the SWA under the 2008 Final Rule by saying that it does not require the SWA to place interstate job orders, when in fact it does. Other commenters were against maintaining the requirement for placing job orders through the interstate clearance system. These commenters thought the interstate clearance system was an antiquated process that does not produce enough U.S. workers. An association of growers provided anecdotal evidence about how few referrals are received by the growers in the commenter's State from the interstate clearance system. This commenter contended that because the number of referrals added up to less than 3 percent of the total number of workers needed by its grower members, the system is a failure. The Department recognizes that growers cannot, in all cases, meet their labor needs through the domestic labor force. However, the Department's objective is to make sure that every U.S. worker who wants a job in agriculture is made aware of the opportunity. Use of the interstate clearance system is also required by statute at 8 U.S.C. 1188(b)(4). Congress specifically directed the Department to make sure that employers' job orders are circulated in the interstate employment service system. Therefore, the Department is not able to eliminate this provision, and it is retained in the Final Rule with minor editorial modifications.

#### 18. Sections 655.151–655.152 Newspaper Advertisements/Advertising Requirements

The Department proposed to require employers to engage in newspaper advertisement as part of their positive

recruitment efforts. The Department removed proposed § 655.151(b) because it was inconsistent with the requirements of the CO to direct recruitment, but has otherwise adopted the proposed provision with clarifying modifications.

The Department received several comments, with only one in favor of the newspaper advertising requirement. The vast majority requested that the Department abolish this form of recruitment because it is both too costly and ineffective. Several commenters, including one U.S. Senator, requested that the Department justify the requirement for newspaper advertising with statistical evidence of its efficacy.

The 2008 Final Rule eliminated a number of recruitment steps whose value was questionable, difficult to monitor and burdensome on the employer, such as mandatory contact with FLCs, schools, fraternal and veterans' organizations, and nonprofit organizations. As commenters pointed out during the comment period in this rulemaking and in the rulemaking for the 2008 Final Rule, agricultural workers usually find out about agricultural jobs by word of mouth. The Department agrees but, as pointed out in the 2008 Final Rule, it is almost impossible to mandate and enforce such a recruitment step. What the Department has found over more than 20 years of H-2A program experience is that even though the agricultural workers themselves may not frequently buy and read the newspapers, their friends and relatives often do, as do job placement agencies and those who advocate on behalf of, and provide services to, such workers. None of the commenters presented the Department with a viable alternative for getting notice of job opportunities to interested constituencies. Therefore, the Department declines to remove this requirement.

Some commenters specifically objected to the Sunday edition requirement because it is more expensive to place the ad in the Sunday edition and because that edition is more expensive to buy. Commenters also pointed out that newspapers are going out of business because of all of the new electronic media available. The Department does not disagree with the commenters on these points. However, newspapers are still the best medium in which to advertise low-skilled jobs, and Sunday is still the most popular day for job listings. Therefore, the Department declines to eliminate this requirement.

One comment requested that the Department allow associations of agricultural producers acting as agents

for their members and filing master applications to advertise their master applications in lieu of an individual advertisement for each member, and allow the association to name itself in the advertisement instead of requiring it to list every individual employer associated with the Application. The NPRM did not change the master application concept. Master applications can only be filed by associations who will be joint employers with their members. The association only needs to place one advertisement on behalf of itself and its members. Each member does not need to place an individual ad. Likewise, the NPRM did not propose to require associations filing master applications to list all of the members in the advertisement. Quite the contrary, the language in § 655.152(a) requires only a statement that the names and locations of its members can be obtained at the local SWA in the State where the advertisement appeared. However, if the association wishes to file an Application as an agent, it may do so only on an individual basis for each of its members separately, and the advertisements would need to be run by each individual member. The wording of the regulation in this particular instance is very clear, and we decline to make any changes in the Final Rule.

The Department received numerous comments on the new requirement that advertisements should direct applicants to report or apply at their local SWA. The NPRM included a provision requiring that where the worksite is remote relative to the population most likely to apply for the job opportunity, an accessible alternative location for any required interviews must be provided by the employer.

One commenter, a SWA, agreed with this requirement. All of the other SWAs that commented on the issue were against this provision, because they thought it was an added cost burden that would require farmers to rent and staff offices. Some of the commenters did point out that a SWA would probably have space available for interviewing, but that it still would force the farmer to lose valuable time on the farm to travel to the interview site. Several asked why the Government is requiring farmers to have face-to-face interviews when the virtual office now exists allowing so many people in other professions to conduct such interviews over the phone or other virtual means, the Government is requiring farmers to conduct face-to-face interviews.

The Department agrees with these comments. The provision was proposed because of the practice of some

employers to demand face-to-face interviews in remote places that cost the worker not only transportation costs to arrive at the location, but even an entrance fee to get on the property, such as a National Forest.

However, several farmers stated that if the workers cannot even find their way to the worksite for an interview, then it is likely that they will be unable to get themselves to the job site each day to report to work or it is an indication that they are not interested. The Department categorically disagrees with this assessment. The statute requires that the job be advertised in other States and territories of the U.S. where U.S. workers are willing to travel once offered the job, such as to a remote job site.

After considering all of the comments, the Department has decided to amend its regulation to resolve the problem identified by the commenters. In-person interviews cannot play a significant role in the H-2A process since numbers of domestic applicants, and all of the prospective H-2A workers, are hired at locations distant from the area of intended employment. Domestic applicants generally are interviewed, if at all, by telephone. Potential H-2A workers are interviewed, if at all, by an employer's representative overseas. The Final Rule reflects these realities by requiring that employers who conduct interviews must do so by telephone or establish a means by which applicants may be interviewed in the location in which they are applying. We have also continued the prohibition on employers requiring employees to pay fees to apply for the job for which they are sought and on other fees such as testing fees. The Department views entrance fees or access fees to property where the interview is to be conducted as indicating a lack of good faith in the recruitment of such workers. The interview process must be one that represents little or no cost to the worker.

Some of the commenters claimed that the Department did not account in our cost-benefit analysis for the cost to the employer of having access to a place in which to conduct interviews. However, because we are not and never have required in-person interviews of workers, and because we also assumed employers who wanted face-to-face interviews would use the free services of the One-Stop Career Centers, we need not factor in any costs. Employers who wish to require more costly interview methods do so by their own choice, not from any requirement of these regulations.

#### 19. Section 655.153 Contact With Former U.S. Employees

The 2008 Final Rule listed specific methods for contacting former employees and methods of recording responses. The NPRM proposed to simplify the procedures for contacting these former employees. A few commenters opined that the new, less specific language meant that the employer now had to send all correspondence to former U.S. employees by certified mail. The NPRM allowed employers to continue to use the methods described in the 2008 Final Rule, such as maintaining copies of correspondence signed and dated by the employer or maintaining dated logs demonstrating that each worker was contacted, including the phone number, e-mail address, or other means used to make contact. However, if it is easier for the employer to print out a list of previous employees and attach a telephone bill that shows calls placed to all of the employees, then the Department will not require that employer to rewrite the entire contact list into a formal log. The 2008 Final Rule also specifically required the employer to enter the data a second time into the recruitment report. The recruitment report requirements are clear in § 655.156, and do not need to be repeated in this section. All workers who apply or respond to solicitations must be listed in the recruitment report.

A worker advocate group commended the Department on keeping the requirement to contact former employees; however, it pointed out that this provision has been very poorly enforced because many former employees report being refused re-hire by companies using H-2A workers. The Department believes the text of the rule provides clear and appropriate requirements with which employers should be able to comply; therefore the Final Rule adopts the NPRM language with minor editorial changes.

#### 20. Section 655.154 Additional Positive Recruitment

The requirements for positive recruitment and for recruitment in traditional or expected labor supply States are mandated by statute. Specifically, the statute requires that positive recruitment efforts be made within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed.

The NPRM cited the statute and gave the CO discretion to determine if any additional recruitment is necessary in such States. The CO would order recruitment efforts that are normal for similar and smaller employers in the area of intended employment.

Some commenters opined that the 2008 Final Rule was more specific on how the traditional or expected labor supply States will be determined than was the NPRM. The majority of commenters did not think that giving the CO discretion to determine what the additional recruitment should be and where was a good idea. These commenters asserted that the NPRM lacks any objective and transparent standards, which means that employers will be subject to inconsistent, arbitrary, or contradictory directions from COs. Another commenter felt that the Department did not have the right to delegate the Secretary's statutory obligations to COs. Several commenters opined that the Department did not explain how the States would be identified or how many would be required.

One commenter went into great detail about the lack of rationale in the NPRM for changing to a discretionary model from a specific model. According to this commenter, the 2008 Final Rule contained an extensive analysis of the rationale behind the requirements in the section in its preamble and the Department failed to justify its reasons for departing from the rationale. This commenter stated that the Department failed to explain the basis for changing course and has provided so little description of what the employers might expect that the Department failed to provide the necessary notice and opportunity for comment to the employers. This commenter requested that the Department return to the 2008 Final Rule language.

An agricultural service provider concurred with many of the comments mentioned above, citing its experience with current processing procedures and noting the cost and futility of the advertising currently required by the CO. Another commenter contended that employers must be advised of the requirements and costs they will incur before they decide to enter the program. We acknowledge this concern and have accordingly sought to limit the expense to employers while still satisfying the Department's statutory obligation to ensure recruitment of U.S. workers in traditional labor supply States.

A U.S. Senator was concerned that there was no set limit on the number of traditional or expected labor supply States that could be designated whereas

before the Department had promised that there would never be more than three States designated. The Department did not plan to designate more than three but, in light of all the comments, has added that explicit provision to the regulatory text. The Senator also opined that if the Secretary believes that sufficient workers can be found in other States, then the Secretary should expend the time and resources necessary to find them instead of the employers having to do so.

One commenter believed that the Department was going to require advertising in ethnic newspapers in the traditional or expected labor supply States. The NPRM does not contain such a requirement. The NPRM mentions ethnic newspapers only in the document retention requirements, simply stating that if advertisements were run in an ethnic newspaper, the employer must maintain proof of publication along with the other documents listed in that section.

The Department has determined to retain the proposed requirement with one modification that clarifies that the employer will not be required to conduct positive recruitment in more than three States for each area of intended employment.

First, commenters who suggested that the Department is affirmatively obligated to locate domestic workers before a certification can be denied are incorrect. Under 8 U.S.C. 1188(b)(4), employers seeking to use H-2A workers must conduct positive recruitment outside the local area.

In the NPRM, the Department moved from the rigid model imposed by the 2008 Final Rule to one in which the CO has more discretion in order to allow the Department more flexibility in gathering information to determine where available workers may be found, even within a single growing season. Since many farm workers migrate over the course of the year and since the time it takes to perform various farm work activities varies from year to year, the more flexible model proposed in the NPRM gives the CO the opportunity to use current information to determine the States to which to refer an employer to conduct positive recruitment. The designation model of the 2008 Final Rule required the Secretary make such designations on an annual basis by formally soliciting and then reviewing information supplied from States, employers, and worker organizations. The annual designation process was an ambitious and unnecessarily formalized process of collecting information from a wide range of sources, and then making a decision for each State which three

other States, if any, would be designated as States in which positive recruitment must be conducted. This process ties the CO's hands and prevents the CO from using later information which may show that workers are available in a State different from one of the pre-designated States or from using information that shows that workers are not available in one of the pre-designated States. The Department believes it can accomplish the same collection of information through less formal means, and use that information more effectively by allowing the CO some discretion in the selection of the methods and areas in which they are employed based on the best and most recent information available. The NPC already receives information on the availability of workers from SWAs and will welcome, although not require, information on labor supply from those same entities identified previously to assist in its decisions on the best sources of labor to be required of employers.

The types of recruitment used in the program have not varied tremendously through the decades. The Department intends to continue to rely on newspaper advertising. While not as important a recruitment tool as it may have been in the past, we believe it remains valuable and imposes no additional costs over what has been required since the 1987 Rule.

Finally, the Department did not plan to designate more than three States but, in light of the comments, has added an explicit provision to the regulatory text limiting to three the number of States in which an employer will be required to conduct positive recruitment.

#### 21. Section 655.155 Referrals of U.S. Workers

The NPRM proposed to eliminate the requirement that SWAs verify employment eligibility and return to the standard of the 1987 Rule requiring applicants to indicate that they are qualified. The Department received numerous comments on this proposal, which are discussed above.

#### 22. Section 655.156 Recruitment Report

The NPRM proposed to have the employer submit the recruitment report only once on a date certain as specified by the NPC in its letter of acceptance. The NPRM preamble inadvertently included two submissions of the recruitment report to the CO. The Department received comments noting that submitting the report twice was an unnecessary burden. The Department agrees and because the regulatory text only required one submission, the

Department clarifies its intent to require only one submission of the recruitment report in this preamble and does not make any changes to the Final Rule.

One commenter requested that the Department eliminate the need to continue updating the recruitment report throughout the 50 percent rule period because the employer's obligation to recruit ends when the H-2A worker leaves to come to the U.S. While the employer's positive recruitment obligation ends when the H-2A workers depart for the job site, the obligation to continue to accept referrals or to process potential gate hires continues throughout the period of the 50 percent rule. The Department needs to be able to determine whether the employer has met its obligations. Thus, the employer must continue to log those referrals into the recruitment report and explain whether or not they were hired and if not, what the lawful job-related reason was. Therefore, the Department declines to change the requirement to update the recruitment report and has made one minor editorial change to this section.

#### 23. Section 655.157 Withholding of U.S. Workers Prohibited

The statute prohibits the willful withholding of U.S. workers until the beginning of the contract period in order to force the employer to send the H-2A workers home under the 50 percent rule. One commenter expressed support for the Department's inclusion of these provisions in the proposed regulation. Another commenter requested that the Department make a minor change to the section by inserting the words "if possible" after the requirement that the employer clearly identify the person or entity that withheld the workers. This commenter asserts that it is sometimes difficult for the employer to know who the actual person or entity is. The Department declines to make this change and retains the proposed language, because without identifying the actual person or entity allegedly withholding U.S. workers the Department has no facts upon which to investigate the complaint. Additionally, the Department corrected a typographical error in this provision.

#### 24. Section 655.158 Duration of Positive Recruitment

The NPRM proposed, consistent with the INA, that positive recruitment end on the date H-2A workers depart for the employer's place of business.

One commenter claimed that the Department provided no rationale for requiring recruitment up to and including the day the H-2A workers



depart for the employer's place of business and requests that the Department remove this requirement. The same commenter also requested that the Department adopt the additional provision from the 2008 Final Rule of stopping the recruitment 3 days before the first date of need. The Final Rule clarifies that unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.

#### Labor Certification Determinations

##### 25. Sections 655.160–655.167

The Department did not receive any comments that were within scope for §§ 655.160–.162. One commenter did suggest that we add requirements for training new crew leaders and field supervisors to § 655.160, which only deals with the 30-day requirement for the Department to adjudicate an Application. The Department does not believe this suggestion is appropriate for this section and training of employees of an H-2A employer, particularly in the H-2ALC context, is dealt with more specifically in the H-2ALC section. The Department has also made minor editorial changes to §§ 655.164–.165, deleting language believed to be unnecessary.

##### 26. Section 655.163 Certification Fee

The NPRM did not propose to change the certification fee and received one comment agreeing with the fee structure. The Department is adopting the provision as proposed.

##### 27. Section 655.166 Appeal Procedures (Now Determinations Based on Unavailability)

The Final Rule simplifies the regulatory text by centralizing the information about appeals in § 655.171. A commenter identified one type of determination for which appeal rights did not appear to be included in the provision. Specifically, the commenter was referring to the right to appeal a denial or partial denial, where U.S. workers were found to be available, but later became unavailable. The INA requires that this particular right to appeal must be adjudicated within 72 hours, while § 655.171 only provides for 5-day turnarounds. Therefore, the Department has added procedures similar to those in the 2008 Final Rule that provided the process for requesting such redeterminations.

##### 28. Section 655.167 Document Retention Requirements

The NPRM proposed a document retention requirement of 5 years. A number of comments opposed the proposed increase to 5 years, from the 3-year requirement in the 2008 Final Rule. The reasons varied from simply that the requirement being too burdensome on employers to the need for consistency with other less onerous statutory document retention requirements such as the FLSA and MSPA. In light of all the comments, the Department has reconsidered its position on this issue and changed the Final Rule to reflect a 3-year retention requirement.

#### Post-Certification Activities

##### 29. Sections 655.170–655.174

The Department proposed certain post-certification activities. These included the allowance and process for short-term extension requests; appeals of denial of submitted Applications; employers' obligations in the event of withdrawal of a job order; the setting of (and process for appealing) meal charges; and the creation of public disclosure data of H-2A applicants. The Department received comments on most of these provisions.

##### 30. Section 655.170 Extensions

The Department received one comment noting that the Department eliminated the right to appeal denials of extension requests. The commenter pointed out that the Department did not cite any relevant statistics about extension requests, number of denials, number of appeals, and number of unsuccessful appeals, nor did it provide any justification for removing the right to appeal in the NPRM. The Department agrees and has provided for appeal rights in these cases. Additionally, the Department has included a requirement that employers provide a copy of the approved extension to workers in accordance with the disclosure requirements.

##### 31. Section 655.171 Appeals

The Department has modified the provision concerning de novo hearings to require that such hearings be held in 5 business days after the Administrative Law Judge (ALJ) receipt of the administrative file. While no comments were received on this provision, our administrative experience has shown that the 5 calendar day provision was not workable.

##### 32. Section 655.172 Withdrawal of Job Orders and Application for Temporary Employment Certification

The Department received no comments on this proposed section. It is accordingly adopted as proposed.

##### 33. Section 655.173 Setting Meal Charges, Petition for Higher Meal Charges

The NPRM did not propose any changes to the section addressing meal charges for workers. The Department received a comment from a farm worker advocacy group that requested we include a statement that the maximum meal charge set by these regulations is subject to applicable State law and an employer may deduct only the lesser of the two. This same commenter also wanted us to amend this section to prohibit employers from deducting for days that the employers offered the workers no work or less than 8 hours. This commenter contends that some employers combine several crops into one job order and have such lengthy down times as to cause workers' wages for a week to have a zero balance once the meal charges are deducted.

With respect to meals, the employer must either provide three meals a day (with an allowable charge) or must furnish free and convenient cooking and kitchen facilities that will enable the workers to prepare their own meals during the entire contract period. The commenter's suggested language that an employer should be prohibited from charging employees for meals consumed on days where no work was provided was not proposed in the NPRM and it would not be appropriate to make this change without the opportunity for public notice and comment. With regard to meal charges and State law, the regulations elsewhere specifically require the employer to comply with applicable State laws. Therefore, the Department declines to make any changes to this provision.

##### 34. Section 655.174 Public Disclosure

The 2008 Final Rule did not discuss public disclosure. The Department has been providing publicly accessible information about users of the H-2A program on its Web site for several years now at <http://www.flcdatcenter.com/>. The NPRM proposed to codify a longstanding practice of disclosing this information.

The Department received several comments on this proposal. Several thought it was duplicative of the electronic job registry proposed in § 655.142; however, it is not. The electronic job registry will be a

temporary posting of scanned copies of the job order and other pertinent documents for the duration of the recruitment and 50 percent referral periods. Then those documents will be removed. The public disclosure data will continue, as it is now, to be in a spreadsheet format with only the most basic information, such as the name of the employer, attorney, and agent, address of the employer, case number, decision and date, contract period certified, number of workers requested and number certified, occupation of certified workers, number of work hours a week, wage rate, and the State where the foreign workers will perform the work. This disclosure data will remain on the OFLC Web site for at least 3 years.

Some commenters requested that the Department add language to this section to clarify and reiterate that States must disclose all information such as housing inspection reports, and other pertinent documents when requested to do so under a FOIA. These commenters state that the States are refusing to provide information under the guise of protecting privacy. However, States are not subject to FOIA, which governs Federal agencies. Therefore, the Department declines to add any text to the regulatory language.

One farm worker advocacy group requested that we mandate employers to contract with non-profit groups to provide "Know Your Rights" training to all first-time H-2A workers during paid work hours. This request is beyond the scope of the NPRM. The cost associated with such a requirement was not accounted for in the cost-benefit analysis and employers did not have a chance to comment on such a requirement. The Department believes that the new requirement that was proposed in the NPRM and is in the Final Rule requiring employers to post a Department-provided worker's rights poster will be sufficient to apprise foreign workers of their rights.

### Integrity Measures

#### 35. Section 655.180 Audits

The Department proposed to make minor changes to the audit process established in the 2008 Final Rule. The proposed section retains the Department's discretion to choose which labor certifications requests it will audit. The Department is retaining the proposed provision with additional minor changes.

One commenter proposed a change to the language of the provision substituting the word will for the word may in order to clarify that the

Department has the discretion to audit a particular Application, not that it will necessarily audit each Application. The Department agrees and made the requested change.

A few commenters contended that the audit procedure is a duplicative process since both WHD and OFLC have concurrent enforcement authority enabling each to separately audit an Application. These commenters asserted that only WHD should have the enforcement authority under the final regulations governing the H-2A program, because duplicative enforcement will unnecessarily expend government resources and create confusion and a burden for employers.

Several commenters contended that the 2008 Final Rule more justifiably included the audit procedure because of its reliance on self-attestations by employers, and that the NPRM proposed a full-adjudication model, therefore eliminating the justification for using the audit process. This commenter further argued that after certification, the Department should have only one investigative process—WHD investigations—and suggested that the Department eliminate the audit procedures.

One commenter argued that should the proposed Audit procedures be included in the final regulations, the Department should extend to 30 days the minimum time for a response to a Department audit request.

Two commenters, a national farm bureau and a grower's association, opposed the requirement that the CO refer any findings of discrimination to the Department of Justice (DOJ), arguing that such a finding may or may not have merit considering the relative complexity of discrimination law. These commenters argued that the Department's proposed regulations attempt to deputize COs to make findings about violations of law for which they have no mandate or expertise.

The Department disagrees with the commenters. The Department's audit responsibilities rest solely with OFLC. These responsibilities are distinct from its revocation and debarment authorities and therefore are not duplicative. OFLC's authority to conduct audits is an integral part of ensuring that both U.S. and foreign workers are provided the full scope of protections available under the H-2A program. The audit gives OFLC an opportunity to assess compliance and instruct the employer to make changes or adjustments in its compliance with the regulations and program requirements. OFLC focuses on the issuance and denial of labor

certifications, while WHD focuses on whether employers have complied with the obligations to U.S. and H-2A workers. While audits may lead to revocation and/or debarment, they also allow OFLC to determine whether the certifications it has granted have been correctly adjudicated so that it can adjust its processes to more accurately adjudicate Applications.

The Department disagrees with those commenters who called for a longer response period. The Final Rule provides for a timeframe of no more than 30 days for an employer to respond to an audit letter. The Department has concluded that the proposed timeframe strikes a balance between the employer's need for sufficient time to prepare its audit response and the Department's need to ascertain the level of compliance in time to address any potential violations affecting U.S. and H-2A workers.

Both the 2008 Final Rule and this Final Rule include the provision requiring the CO to refer findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices. The Department wishes to clarify that it is not undertaking a new or separate mandate to conduct audits for the purpose of identifying employers engaging in alleged discriminatory hiring practices. Rather, the Final Rule documents an existing practice under which the Department assists the Office of the Special Counsel to carry out its responsibilities under 8 U.S.C. 1324B prohibiting unfair immigration-related employment practices. Under the Final Rule, employers are placed on notice that engaging in a practice to discourage U.S. workers from applying for H-2A job opportunities or similar discriminatory practices may lead to additional liability under the INA and the DOJ regulations at 28 CFR part 44.

#### 36. Section 655.181 Revocation

The NPRM proposed to expand the grounds upon which the Department may revoke an approved labor certification. It also proposed to change the revocation procedure so that the Department no longer sends a Notice of Intent to Revoke. We received a number of comments on these proposals. The Department has retained the provision with some modifications. One edit clarifies throughout that it is the OFLC Administrator, rather than the CO, who exercises the revocation authority. The