List of Subjects in 20 CFR Part 655

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

List of Subjects in 29 CFR Part 501

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

List of Subjects in 29 CFR Part 780

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

List of Subjects in 29 CFR Part 788

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

For the reasons stated in the preamble, the Department Labor amends 20 CFR part 655 and 29 CFR parts 501, 780, and 788 as follows:

Title 20 -- EMPLOYEES' BENEFITS

PART 655--TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

2. Amend part 655 to revise the authority citation for part 655 to read as follows:

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

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

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

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

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103-206, 107 Stat. 2428.

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

Subparts J and K authority repealed.

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

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3. Amend § 655.1 and revise to read as follows:

§ 655.1 Purpose and scope of subpart A.

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

4. Amend subpart B and revise to read as follows:

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

Sec.

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§ 655.90 Purpose and scope of subpart B.

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) to acquire information sufficient to make factual determinations of:

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

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

§ 655.92 Authority of ETA-OFLC.

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Temporary agricultural labor certification determinations are made by the Administrator, Office of Foreign Labor Certification (OFLC) in the Department of Labor's (the Department or DOL) Employment & Training Administration (ETA), who, in turn, may delegate this responsibility to a designated staff member; e.g., a Certifying Officer (CO).

§ 655.93 Special procedures.

(a) Systematic process. This subpart provides procedures for the processing of applications from agricultural employers and associations of employers for the certification of employment of nonimmigrant workers in agricultural employment.

(b) Establishment of special procedures. To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements, the Administrator, OFLC has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for processing certain H-2A applications when employers can demonstrate upon written application to the Administrator, OFLC that special procedures are necessary. These include special procedures in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine crews. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Administrator, OFLC has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates (AEWR) for those occupations for a statewide or other

geographical area. Prior to making determinations under this section, the Administrator, OFLC will consult with employer and worker representatives.

§ 655.100 Overview of subpart B and definition of terms.

(a) Overview (1) Application filing process. (i) This subpart provides guidance to employers desiring to apply for a labor certification for the employment of H-2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employers must file with the Administrator, OFLC an H-2A application on forms prescribed by the ETA that describe the material terms and conditions of employment to be offered and afforded to U.S. and H-2A workers. The application must be filed with the Administrator, OFLC at least 45 calendar days before the first date the employer requires the services of the H-2A workers. The application must contain attestations of the employer's compliance or promise to comply with program requirements regarding recruitment of eligible U.S. workers, the payment of an appropriate wage, and terms and conditions of employment.

(ii) No more than 75 and no fewer than 60 calendar days before the first date the employer requires the services of the H-2A workers, and as a precursor to the filing of an Application for Temporary Employment Certification, the employer must initiate positive recruitment of eligible U.S. workers and cooperate with the local office of the State Workforce Agency (SWA) which serves the area of intended employment to place a job order into intrastate and interstate recruitment. Prior to commencing recruitment an employer must obtain the appropriate wage for the position directly from the ETA National Processing Center (NPC). The employer must then place a job order with the

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SWA; place print advertisements meeting the requirements of this regulation; contact former U.S. employees; and, when so designated by the Secretary, recruit in other States of traditional or expected labor supply with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. The SWA will post the job order locally, as well as in all States listed in the application as anticipated work sites, and in any additional States designated by the Secretary as States of traditional or expected labor supply. The SWA will keep the job order open until the end of the designated recruitment period. No more than 50 days prior to the first date the employer requires the services of the H-2A workers, the employer will prepare and sign an initial written recruitment report that it must submit with its Application for Temporary Employment Certification. The recruitment report must contain information regarding the original number of openings for which the employer recruited. The employer's obligation to engage in positive recruitment will end on the actual date on which the H-2A workers depart for the place of work, or 3 days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first.

(iii) The Application for Temporary Employment Certification must be filed by mail unless the Department publishes a Notice in the Federal Register requiring that applications be filed electronically. Applications that meet threshold requirements for completeness and accuracy will be processed by NPC staff, who will review each application for compliance with the criteria for certification. Each application must meet requirements for timeliness and temporary need and must provide assurances and other safeguards against adverse impact on the wages and working conditions of U.S. workers. Employers receiving a labor certification must continue to cooperate with the SWA by

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accepting referrals -- and have the obligation to hire qualified and eligible U.S. workers who apply -- until the end of the designated recruitment period.

(2) Deficient applications. The CO will promptly review the application and notify the applicant in writing if there are deficiencies that render the application not acceptable for certification, and afford the applicant a 5 calendar day period (from date of the employer's receipt) to resubmit a modified application or to file an appeal of the CO's decision not to approve the application as acceptable for consideration. Modified applications that fail to cure deficiencies will be denied.

(3) Amendment of applications. This subpart provides for the amendment of applications. Where the recruitment is not materially affected by such amendments, additional positive recruitment will not be required.

(4) Determinations (i) Determinations. If the employer has complied with the criteria for certification, including recruitment of eligible U.S. workers, the CO must make a determination on the application by 30 days before the first date the employer requires the services of the H-2A workers. An employer's failure to comply with any of the certification criteria or to cure deficiencies identified by the CO may lengthen the time required for processing, resulting in a final determination less than 30 days prior to the stated date of need.

(ii) Certified applications. This subpart provides that an application for temporary agricultural labor certification will be certified if the CO finds that the employer has not offered and does not intend to offer foreign workers higher wages, better working conditions, or fewer restrictions than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, qualified, and eligible will not be available

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at the time and place needed to perform the work for which H-2A workers are being requested; and that the employment of such nonimmigrants will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) Fees. (A) Amount. This subpart provides that each employer (except joint employer associations) of H-2A workers will pay the appropriate fees to the Department for each temporary agricultural labor certification received.

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

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

(b) Transition of filing procedures from current regulations. (1) Compliance with these regulations. Employers with a date of need for H-2A workers for temporary or seasonal agricultural services on or after July 1, 2009 must comply with all of the obligations and assurances required in this subpart.

(2) Transition from former regulations. Employers with a date of need for H-2A workers for temporary or seasonal agricultural services prior to July 1, 2009 will file applications in the following manner:

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(i) Obtaining required wage rate. An employer will not obtain an offered wage rate through the NPC prior to filing an application, but will complete and submit Form ETA-9142, Application for Temporary Employment Certification no less than 45 days prior to their date of need. The employer will simultaneously submit Form ETA-790 Agricultural and Food Processing Clearance Order, along with the Application for Temporary Employment Certification, directly to the NPC having jurisdiction over H-2A applications.

(ii) Pre-filing activities. Activities required to be conducted prior to filing under the final rule will be conducted post-filing during this transition period. The employer will be expected to make attestations in its application applicable to its future activities concerning recruitment, payment of the offered wage rate, etc. Employers will not be required to complete an initial recruitment report for submission with the application, but will be required to complete a recruitment report for submission to the NPC prior to certification, and will also be required to complete a final recruitment report covering the entire recruitment period.

(iii) Acceptance of application. Upon receipt, the NPC will provide the employer with the wage rate to be offered, at a minimum, by the employer, and will process the application in a manner consistent with new § 655.107, issuing a notification of deficiencies for any curable deficiencies within 7 calendar days.

(iv) Processing of application. Once the application and job order have been accepted, the NPC will transmit a copy of the job order to the SWA(s) serving the area of intended employment to initiate intrastate and interstate clearance, request that the SWA(s) schedule an inspection of the housing, and provide instructions to the employer to

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commence positive recruitment in a manner consistent with § 655.102(d)(2)-(4). The NPC will designate labor supply States during this period on a case-by-case basis. Such designations must be based on information provided by State agencies or by other sources, and will to the extent information is available take into account the success of recent efforts by out-of-State employers to recruit in that State.

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

Administrative Law Judge (ALJ) means a person within the DOL's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals (BALCA) established by part 656 of this chapter, which will hear and decide appeals as set forth in § 655.115.

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

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator, OFLC has determined must be offered and paid to every H-2A worker employed under the DOL-approved Application for Temporary Employment Certification in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H-2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

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

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

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(2) Is not itself an employer, or a joint employer, as defined in this paragraph (c) of this section with respect to a specific application; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or the Department of Homeland Security (DHS) under 8 CFR 292.3 or 1003.101.

Agricultural association means any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses or transports any worker that is subject to sec. 218 of the INA. An agricultural association may act as the agent of an employer for purposes of filing an Application for Temporary Employment Certification, and may also act as the sole or joint employer of H-2A workers.

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary agricultural labor certification determination from DOL. A complete submission of the Application for Temporary Employment Certification includes both the form and the employer's initial recruitment report.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching

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the worksite, quality of the regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia, and who is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3 or 1003.101. Such a person is permitted to act as an agent or attorney for an employer and/or foreign worker under this subpart.

Certifying Officer (CO) means the person designated by the Administrator, OFLC to make determinations on applications filed under the H-2A program.

Chief Administrative Law Judge means the chief official of the DOL Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Date of need means the first date the employer requires the services of H-2A worker as indicated in the employer's Application for Temporary Employment Certification.

Department of Homeland Security (DHS) means the Federal agency having control over certain immigration functions that, through its sub-agency, United States Citizenship and Immigration Services (USCIS), makes the determination under the INA on whether to grant visa petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the U.S.

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DOL or Department means the United States Department of Labor.

Eligible worker means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

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

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

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship with respect to H-2A employees or related U.S. workers under this subpart; and

(3) Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).

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

Employment Service (ES) refers to the system of Federal and State entities responsible for administration of the labor certification process for temporary and seasonal

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agricultural employment of nonimmigrant foreign workers. This includes the SWAs and the OFLC, including the NPCs.

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

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

Fixed-site employer means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this subpart who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to sec. 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this subpart, person includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

H-2A Labor Contractor (H-2ALC) means any person who meets the definition of employer under this paragraph (c) of this section and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to sec. 218 of the INA or these regulations.

H-2A worker means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

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

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

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

Joint employment means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a joint employer of that employee.

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

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

Positive recruitment means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's job opportunity is located and any other State designated by the

Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing means, with respect to practices engaged in by employers and benefits other than wages provided by employers, that:

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

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

Prevailing hourly wage means the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.

Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.), to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1-1/2 bushels), a bushel of potatoes, and Eastern apple box (1-1/2 metric bushels), a flat of strawberries (twelve quarts), etc.

Representative means a person or entity employed by, or duly authorized to act on behalf of, the employer with respect to activities entered into for, and/or attestations made with respect to, the Application for Temporary Employment Certification.

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Secretary means the Secretary of the United States Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the United States Department of Homeland Security (DHS) or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the United States Department of State (DOS) or the Secretary of State's designee.

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

Strike means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operation. Whether a job opportunity is vacant by reason of a strike or lock out will be determined by evaluating for each position identified as vacant in the Application for Temporary Employment Certification whether the specific vacancy has been caused by the strike or lock out.

Successor in interest means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether

an employer is a successor for purposes of § 655.118, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in a debarment recommendation. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products and services; and

(8) The ability of the predecessor to provide relief.

Temporary agricultural labor certification means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to secs. 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

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

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

United States (U.S.), when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Pub.L. 110-229, Title VII, the Commonwealth of the Northern Mariana Islands.

United States Citizenship and Immigration Services (USCIS) means the Federal agency making the determination under the INA whether to grant petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the U.S.

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

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

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

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

Within [number and type] days means, for purposes of determining an employer's compliance with the timing requirements for appeals and requests for review, a period that begins to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the

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employer sends whatever communication is required by these rules back to the Department, as evidenced by a postal mark or other similar receipt.

Work contract means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, required by the applicable regulations in Subpart B of 20 CFR part 655, Labor Certification for Temporary Agricultural Employment of H-2A Aliens in the U.S. (H-2A Workers), or these regulations, including those terms and conditions attested to by the H-2A employer, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum shall be the terms of the job order, as provided in 20 CFR part 653, Subpart F, and covered provisions of the work contract shall be enforced in accordance with these regulations.

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

(1) Agricultural labor or services, pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA at 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as:

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

(ii) Agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f) Work performed by H-2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the

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provisions of the FLSA as provided therein, including the overtime provisions in sec. 7(a)(29 U.S.C. 207(a);

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

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm where no H-2B workers are employed to perform the same work at the same establishment; or

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

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

(i) Agricultural labor. For purposes of paragraph (d)(1)(i) of this section means all services performed:

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

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

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

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

(2) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (d)(2)(i)(D)(1) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators will be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

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(3) The provisions of paragraphs (d)(2)(i) (D)(1) and (2) of this section do not apply to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

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

(E) For purposes of (d)(2)(i) of this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. See sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g).

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

(iii) Agricultural commodity. For purposes of paragraph (d)(2)(ii) of this section agricultural commodity includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as

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processed by the original producer of the crude gum (oleoresin) from which derived. Gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine. See 12 U.S.C. 1141j(g), sec. 15(g) of the Agricultural Marketing Act, as amended, and 7 U.S.C. 92.

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

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

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

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

(C) On a seasonal or other temporary basis does not include (i) the employment of any foreman or other supervisory employee who is employed by a specific agricultural

employer or agricultural association essentially on a year round basis; or (ii) the employment of any worker who is living at his or her permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his or her employer and is not primarily employed to do field work.

(iii) Temporary. For the purposes of this subpart, the definition of "temporary" in paragraph (d)(3) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position for a limited period of time, including, but not limited to, a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to § 655.110.

§ 655.101 Applications for temporary employment certification in agriculture.

(a) Application Filing Requirements. (1) An employer that desires to apply for temporary employment certification of one or more nonimmigrant foreign workers must file a completed DOL Application for Temporary Employment Certification form and, unless a specific exemption applies, the initial recruitment report. If an association of agricultural producers files the application, the association must identify whether it is the sole employer, a joint employer with its employer-member employers, or the agent of its employer-members. The association must retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation to the CO in the event of an audit.

(2) If an H-2ALC intends to file an application, the H-2ALC must meet all of the requirements of the definition of employer in § 655.100(b), and comply with all the

assurances, guarantees, and other requirements contained in this part and in part 653, subpart F, of this chapter. The H-2ALC must have a place of business (physical location) in the U.S. and a means by which it may be contacted for employment. H-2A workers employed by an H-2ALC may not perform services for a fixed-site employer unless the H-2ALC is itself providing the housing and transportation required by § 655.104(d) and 655.104(h), or has filed a statement confirming that the fixed-site employer will provide compliant housing and/or transportation, as required by § 655.106, with the OFLC, for each fixed-site employer listed on the application. The H-2ALC must retain a copy of the statement of compliance required by § 655.106(b)(6).

(3) An association of agricultural producers may submit a master application covering a variety of job opportunities available with a number of employers in multiple areas of intended employment, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the application and the combination of job opportunities is supported by an explanation demonstrating a business reason for the combination. The association must identify on the Application for Temporary Employment Certification, by name and address, each employer that will employ H-2A workers. If the association is acting solely as an agent, each employer will receive a separate labor certification.

(b) Filing. The employer may send the Application for Temporary Employment Certification and all supporting documentation by U.S. Mail or private mail courier to the NPC. The Department will publish a Notice in the Federal Register identifying the address(es), and any future address changes, to which applications must be mailed, and will also post these addresses on the DOL Internet Web site at

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http://www.foreignlaborcert.doleta.gov/. The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). An association filing a master application as a joint employer may sign on behalf of its employer members. The Department may also require applications to be filed electronically in addition to or instead of by mail.

(c) Timeliness. A completed Application for Temporary Employment Certification must be filed no less than 45 calendar days before date of need.

(d) Emergency situations. (1) Waiver of time period and required pre-filing activity. The CO may waive the time period for filing and pre-filing wage and recruitment requirements set forth in § 655.102, along with their associated attestations, for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO can timely make the determinations required by § 655.109(b).

(2) Employer requirements. The employer requesting a waiver of the required time period and pre-filing wage and recruitment requirements must submit to the NPC a completed Application for Temporary Employment Certification, a completed job offer on the ETA Form 790 Agricultural and Food Processing Clearance Order, and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior agricultural season or whether the request is for other good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the

good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, such things as the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

(3) Processing of Applications. The CO shall promptly transmit the job order, on behalf of the employer, to the SWA serving the area of intended employment and request an expedited review of the job order in accordance with § 655.102(e) and an inspection of housing in accordance with § 655.104(d)(6)(iii). The CO shall process the application and job order in accordance with § 655.107, issue a wage determination in accordance with § 655.108 and, upon acceptance, require the employer to engage in positive recruitment consistent with § 655.102(d)(2), (3), and (4). The CO shall require the SWA to transmit the job order for interstate clearance consistent with § 655.102(f). The CO shall specify a date on which the employer will be required to submit a recruitment report in accordance with § 655.102(k). The CO will make a determination on the application in accordance with § 655.109.

§ 655.102 Required pre-filing activity.

(a) Time of filing of application. An employer may not file an Application for Temporary Employment Certification before all of the pre-filing recruitment steps set forth in this section have been fully satisfied, except where specifically exempted from some or all of those requirements by these regulations. Modifications to these requirements for H-2ALCs are set forth in § 655.106.

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(b) General Attestation Obligation. An employer must attest on the Application for Temporary Employment Certification that it will comply with all of the assurances and obligations of this subpart and to performing all necessary steps of the recruitment process as specified in this section.

(c) Retention of documentation. An employer filing an Application for Temporary Employment Certification must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared to submit this documentation in response to a Notice of Deficiency from the CO prior to the CO rendering a Final Determination, or in the event of an audit. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of the certification. There is no record retention requirement for any application (and supporting documentation) after the Secretary has made a final decision to deny the application.

(d) Positive recruitment steps. An employer filing an application must:

(1) Submit a job order to the SWA serving the area of intended employment;

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

(3) Contact former U.S. employees who were employed within the last year as described in paragraph (h) of this section; and

(4) Based on an annual determination made by the Secretary, as described in paragraph (i) of this section, recruit in all States currently designated as a State of traditional or expected labor supply with respect to each area of intended employment in

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which the employer's work is to be performed as required in paragraph (i)(2) of this section.

(e) Job order. (1) The employer must submit a job order to the SWA serving the area of intended employment no more than 75 calendar days and no fewer than 60 calendar days before the date of need for intrastate and interstate clearance, identifying it as a job order to be placed in connection with a future application for H-2A workers. If the job opportunity is located in more than one State, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites. Where a future master application will be filed by an association of agricultural employers, the SWA will prepare a single job order in the name of the association on behalf of all employers that will be duly named on the Application for Temporary Employment Certification. Documentation of this step by the applicant is satisfied by maintaining proof of posting from the SWA identifying the job order number(s) with the start and end dates of the posting of the job order.

(2) The job order submitted to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.103 and comply with the requirements for agricultural clearance orders in 20 CFR part 653 Subpart F and the requirements set forth in § 655.104.

(3) The SWA will review the contents of the job order as provided in 20 CFR part 653 Subpart F and will work with the employer to address any deficiencies, except that the order may be placed prior to completion of the housing inspection required by 20 CFR 653.501(d)(6) where necessary to meet the timeframes required by statute and regulation. However, the SWA must ensure that housing within its jurisdiction is inspected as

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expeditiously as possible thereafter. Any issue with regard to whether a job order may properly be placed in the job service system that cannot be resolved with the applicable SWA may be brought to the attention of the NPC, which may direct that the job order be placed in the system where the NPC determines that the applicable program requirements have been met. If the NPC concludes that the job order is not acceptable, it shall so inform the employer using the procedures applicable to a denial of certification set forth in § 655.109(e).

(f) Intrastate/Interstate recruitment. (1) Upon receipt and acceptance of the job order, the SWA must promptly place the job order in intrastate clearance on its active file and begin recruitment of eligible U.S. workers. The SWA receiving the job order under paragraph (e) of this section will promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the job order as anticipated worksites. The SWA must also transmit a copy of all active job orders to no fewer than three States, which must include those States, if any, designated by the Secretary as traditional or expected labor supply States ("out-of-State recruitment States") for the area of intended employment in which the employer's work is to be performed as defined in paragraph (i) of this section.

(2) Unless otherwise directed by the CO, the SWA must keep the job order open for interstate clearance until the end of the recruitment period, as set forth in § 655.102(f)(3). Each of the SWAs to which the job order was referred must keep the job order open for that same period of time and must refer each eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

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(3) (i) For the first 5 years after the effective date of this rule, the recruitment period shall end 30 days after the first date the employer requires the services of the H-2A workers, or on the last day the employer requires the services of H-2A workers in the applicable area of intended employment, whichever is sooner (the 30-day rule). During that 5-year period, the Department will endeavor to study the costs and benefits of providing for continuing recruitment of U.S. workers after the H-2A workers have already entered the country. Unless prior to the expiration of the 5-year period the Department conducts a study and publishes a notice determining that the economic benefits of such extended recruitment period outweigh its costs, the recruitment period will, after the expiration of the 5-year period, end on the first date the employer requires the services of the H-2A worker.

(ii) Withholding of U.S. workers prohibited. The provisions of this paragraph shall apply so as long as the 30-day rule is in place.

(A) Complaints. Any employer who has reason to believe that a person or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the job site of H–2A workers in order to force the hiring of U.S. workers during the 30-day rule under paragraph (f)(3)(i) of this section may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(B) Investigations. The CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the

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complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(C) Written findings. Where the CO determines, after conducting the interviews required by this paragraph, that the employer's complaint is valid and justified, the CO shall immediately suspend the application of the 30-day rule under paragraph (f)(3)(i) of this section to the employer. The CO's determination shall be the final decision of the Secretary.

(g) Newspaper advertisements. (1) During the period of time that the job order is being circulated by the SWA(s) for interstate clearance under paragraph (f) of this section, the employer must place an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (g)(2) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is accepted by the SWA for intrastate/interstate clearance.

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

(3) The newspaper advertisements must satisfy the requirements of §§ 655.103 and 655.104. The employer must maintain copies of newspaper pages (with date of publication and full copy of ad), or tear sheets of the pages of the publication in which the

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advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute required by paragraph (g)(2) of this section).

(h) Contact with former U.S. employees. The employer must contact by mail or other effective means its former U.S. employees (except those who were dismissed for cause, abandoned the worksite, or were provided documentation at the end of their previous period of employment explaining the lawful, job-related reasons they would not be re-contacted) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. The employer must maintain copies of correspondence signed and dated by the employer or, if other means are used, maintain dated logs demonstrating that each worker was contacted, including the phone number, e-mail address, or other means that was used to make contact. The employer must list in the recruitment report any workers who did not return to the employ of the employer because they were either unable or unwilling to return to the job or did not respond to the employer's request, and must retain documentation, if provided by the worker, showing evidence of their inability, unwillingness, or non-responsiveness.

(i) Additional positive recruitment. (1) Each year, the Secretary will make a determination with respect to each State whether there are other States (“traditional or

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expected labor supply States") in which there are a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State, as well as which newspapers in each traditional or expected labor supply State that the employer may use to fulfill its obligation to run a newspaper advertisement in that State. Such determination must be based on information provided by State agencies or by other sources within the 120 days preceding the determination (which will be solicited by notice in the Federal Register), and will to the extent information is available take into account the success of recent efforts by out-of-State employers to recruit in that State. The Secretary will not designate a State as a traditional or expected labor supply State if the State has a significant number of employers that are recruiting for U.S. workers for the same types of occupations and comparable work. The Secretary's annual determination as to traditional or expected labor supply States, if any, from which applicants from each State must recruit will be published in the Federal Register and made available through the ETA Web site.

(2) Each employer must engage in positive recruitment in those States designated in accordance with paragraph (i)(1) with respect to the State in which the employer's work is to be performed. Such recruitment will consist of one newspaper advertisement in each State in one of the newspapers designated by the Secretary, published within the same period of time as the newspaper advertisements required under paragraph (g) of this section. An employer will not be required to conduct positive recruitment in more than three States designated in accordance with paragraph (i)(1) for each area of intended employment listed on the employer's application. The advertisement must refer applicants to the SWA nearest the area in which the advertisement was placed.

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(j) Referrals of U.S. workers. SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

(k) Recruitment report. (1) No more than 50 days before the date of need the employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted with the Application for Temporary Employment Certification. The recruitment report must:

(i) List the original number of openings for which the employer recruited;

(ii) Identify each recruitment source by name;

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

(iv) Confirm that former employees were contacted and by what means; and

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

(2) The employer must update the recruitment report within 48 hours of the date that is the end of the recruitment period as specified in § 655.102(f)(3). This supplement to the recruitment report must meet the requirements of paragraph (k)(1) of this section. The employer must sign and date this supplement to the recruitment report and retain it for a period of no less than 3 years. The supplement to the recruitment report must be provided in the event of an audit.

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(3) The employer must retain resumes (if provided) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report and the supplemental recruitment report for a period of no less than 3 years, and must be provided in response to a Notice of Deficiency or in the event of an audit.

§ 655.103 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under § 655.102 before filing the Application for Temporary Employment Certification must meet the requirements set forth in this section and at § 655.104 and must contain terms and conditions of employment which are not less favorable than those that will be offered to the H-2A workers. All advertising must contain the following information:

(a) The employer's name and location(s) of work, or in the event that a master application will be filed by an association, a statement indicating that the name and location of each member of the association can be obtained from the SWA of the State in which the advertisement is run;

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

(c) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of services or labor to be performed and the anticipated period of employment of the job opportunity;

(d) The wage offer, or in the event that there are multiple wage offers (such as where a master application will be filed by an association and/or where there are multiple crop activities for a single employer), the range of applicable wage offers and, where a master application will be filed by an association, a statement indicating that the rate(s) applicable to each employer can be obtained from the SWA;

(e) The three-fourths guarantee specified in § 655.104(i);

(f) If applicable, a statement that work tools, supplies, and equipment will be provided at no cost to the worker;

(g) A statement that housing will be made available at no cost to workers, including U.S. workers, who cannot reasonably return to their permanent residence at the end of each working day;

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

(i) A statement that the position is temporary and a specification of the total number of job openings the employer intends to fill;

(j) A statement directing applicants to report or send resumes to the SWA of the State in which the advertisement is run for referral to the employer;

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

§ 655.104 Contents of job offers.

(a) Preferential treatment of aliens prohibited. The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Except where

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otherwise permitted under this section, no job offer may impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers.

(b) Job qualifications. Each job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops.

(c) Minimum benefits, wages, and working conditions. Every job offer accompanying an H-2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) Housing. (1) Obligation to provide housing. The employer must provide housing at no cost to the worker, except for those U.S. workers who are reasonably able to return to their permanent residence at the end of the work day. Housing must be provided through one of the following means:

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

(ii) Rental and/or public accommodations. Rental or public accommodations or other substantially similar class of habitation that meets applicable local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document that the housing complies with the local, State, or Federal housing standards. Such documentation may include but is not limited to a certificate from a State Department of

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Health or other State or local agency or a statement from the manager or owner of the housing.

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

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

(4) Charges for public housing. If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units (but need not pay for optional, extra services) directly to the housing's management.

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

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

(i) An employer must make the required attestation, which may include an attestation that the employer is complying with the procedures set forth in § 654.403, at the time of

filing the Application for Temporary Employment Certification pursuant to § 655.105(e)(2).

(ii) The employer must make a request to the SWA for a housing inspection no less than 60 days before the date of need, except where otherwise provided under this part.

(iii) The SWA must make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under INA sec. 218(c)(3)(A), which is 30 days before the employer's date of need. SWAs must not adopt rules or restrictions on housing inspections that unreasonably prevent inspections from being completed in the required time frame, such as rules that no inspections will be conducted where the housing is already occupied or is not yet leased. If the employer has attested to and met all other criteria for certification, and the employer has made a timely request for a housing inspection under this paragraph, and the SWA has failed to complete a housing inspection by the statutory deadline of 30 days prior to date of need, the certification will not be withheld on account of the SWA's failure to meet the statutory deadline. The SWA must in such cases inspect the housing prior to or during occupation to ensure it meets applicable housing standards. If, upon inspection, the SWA determines the supplied housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer and the CO. The CO will take appropriate action, including notice to the employer to cure deficiencies. An employer's failure to cure substantial violations can result in revocation of the temporary labor certification.

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(7) Certified housing that becomes unavailable. If after a request to certify housing (but before certification), or after certification of housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under paragraph (d)(1)(ii) of this section and for which the employer is able to submit evidence of such compliance. The employer must notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in accordance with the requirements of paragraph (d)(1)(ii) of this section. The SWA must notify the CO of all housing changes and of any noncompliance with the standards set forth in paragraph (d)(1)(ii) of this section. Substantial noncompliance can result in revocation of the temporary labor certification under § 655.117.

(e) Workers' compensation. The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment. The employer must retain for 3 years from the date of certification of the application, the name of the insurance carrier,

the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) Employer-provided items. Except as provided in this paragraph, the employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement will be permitted, provided that the requirements of sec. 3(m) of the FLSA at 29 U.S.C. 203(m) are met. Section 3(m) does not permit deductions for tools or equipment primarily for the benefit of the employer that reduce an employee’s wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

(g) Meals. The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.114.

(h) Transportation; daily subsistence. (1) Transportation to place of employment. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the

employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has departed to the employer's place of employment. For an H-2A worker coming from outside of the U.S., the place from which the worker has departed is the place of recruitment, which the Department interprets to mean the appropriate U.S. consulate or port of entry. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to U.S. workers. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under paragraph (g) of this section.

(2) Transportation from last place of employment to home country. If the worker completes the work contract period, and the worker has no immediately subsequent H-2A employment, the employer must 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. For an H-2A worker coming from outside of the U.S., the place from which the worker has departed will be considered to be the appropriate U.S. consulate or port of entry.

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(3) Transportation between living quarters and worksite. The employer must provide transportation between the worker's living quarters (i.e., housing provided or secured by the employer pursuant to paragraph (d) of this section) and the employer's worksite at no cost to the worker, and such transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, subpart D. If workers' compensation is used to cover such transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation.

(i) Three-fourths guarantee. (1) Offer to worker. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and has been approved by the CO. The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working

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later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect. Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/week = 480-hours x 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total guaranteed. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If the employer affords the U.S. or H-2A worker during the total work contract period less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

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

(3) Failure to work. Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so in accordance with paragraph (i)(1) of this section, and all

hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with paragraph (j)(2) of this section.

(4) Displaced H-2A worker. The employer is not liable for payment under paragraph (i)(1) of this section to an H-2A worker whom the CO certifies is displaced because of the employer's compliance with §655.105(d) with respect to referrals made after the employer's date of need. The employer is, however, liable for return transportation for any such displaced worker in accordance with paragraph (h)(2) of this section.

(5) Obligation to provide housing and meals. Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and subsistence for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the U.S. from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) Earnings records. (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece

rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G-28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph.

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

(4) The employer must retain the records for not less than 3 years after the completion of the work contract.

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

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

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

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

(4) The hours actually worked by the worker;

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

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

(l) Rates of pay. (1) If the worker is paid by the hour, the employer must pay the worker at least the AEWR in effect at the time recruitment for the position was begun, the prevailing hourly wage rate, the prevailing piece rate, or the Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(2)(i) If the worker is paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

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(ii) The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and must be normal, meaning that they may not be unusual for workers performing the same activity in the area of intended employment.

(m) Frequency of pay. The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly.

(n) Abandonment of employment or termination for cause. If the worker voluntarily abandons employment before the end of the contract period, fails to report for employment at the beginning of the contract period, or is terminated for cause, and the employer notifies the Department and DHS in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the Federal Register not later than 2 working days after such abandonment or abscondment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under paragraph (h) of this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section. An abandonment or abscondment shall be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. Employees may be terminated for cause, however, for shorter unexcused periods of time that shall not be considered abandonment or abscondment.

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(o) Contract impossibility. If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination as described in paragraph (i)(1) of this section. The employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2A employer (but only if the worker can provide documentation supporting such employment), whichever the worker prefers. For an H-2A worker coming from outside of the U.S., the place from which the worker (disregarding intervening employment) came to work for the employer is the appropriate U.S. consulate or port of entry;

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

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

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(p) Deductions. The employer must make all deductions from the worker's paycheck that are required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(q) Copy of work contract. The employer must provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract must contain all of the provisions required by paragraphs (a) through (p) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the job order, as provided in 20 CFR part 653, Subpart F, will be the work contract.

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

An employer seeking to employ H-2A workers must attest as part of the Application for Temporary Employment Certification that it will abide by the following conditions of this subpart:

(a) The job opportunity is and will continue through the recruitment period to be open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and those not rejected on this basis have

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been or will be hired. In addition, the employer attests that it will retain records of all rejections as required by § 655.119.

(b) The employer is offering terms and working conditions which are not less favorable than those offered to the H-2A worker(s) and are not less than the minimum terms and conditions required by this subpart.

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

(d) The employer will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the end of the recruitment period as specified in § 655.102(f)(3).

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

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

(2) Provide for or secure housing for those workers who are not reasonably able to return to their permanent residence at the end of the work day, without charge to the worker, that complies with the applicable standards as set forth in § 655.104(d);

(3) Where required, has timely requested a preoccupancy inspection of the housing and, if one has been conducted, received certification;

(4) Provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements of § 655.104(e); and

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

(f) Upon the separation from employment of H-2A worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing (or any other method specified by the Department or DHS) of the separation from employment not later than 2 work days after such separation is discovered by the employer. The procedures for reporting abandonments and abscondments are outlined in § 655.104(n) of this subpart.

(g) The offered wage rate is the highest of the AEWR in effect at the time recruitment is initiated, the prevailing hourly wage or piece rate, or the Federal or State minimum wage, and the employer will pay the offered wage during the entire period of the approved labor certification.

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

(i) The job opportunity is a full-time temporary position, calculated to be at least 30 hours per work week, the qualifications for which do not substantially deviate from the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations or crops.

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(j) The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment except for lawful, job related reasons within 60 days of the date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the application to those laid-off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons.

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

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

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

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

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to sec. 218 of the INA or this subpart or any other Department regulation promulgated under sec. 218 of the INA; or

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

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

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

(n) The employer will inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.111, unless the H-2A worker is being sponsored by another subsequent employer.

(o) The employer and its agents have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees.

(p) The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A).

(q) The applicant is either a fixed-site employer, an agent or recruiter, an H-2ALC (as defined in these regulations), or an association.

§ 655.106 Assurances and obligations of H-2A Labor Contractors.

(a) The pre-filing activity requirements set forth in § 655.102 are modified as follows for H-2ALCs:

(1) The job order for an H-2ALC may contain work locations in multiple areas of intended employment, and may be submitted to any one of the SWAs having jurisdiction over the anticipated work areas. The SWA receiving the job order shall promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites, as well as those States, if any, designated by the Secretary as traditional or expected labor supply States for each area in which the employer's work is to be performed. Each SWA shall keep the H-2ALC's job order posted until the end of the recruitment period, as set forth in § 655.102(f)(3), for the area of intended employment that is covered by the SWA. SWAs in States that have been designated as traditional or expected labor supply States for more than one area of intended of employment that are listed on an application shall keep the H-2ALC's job order posted until the end of the applicable recruitment period that is last in time, and may make referrals for job opportunities in any area of intended employment that is still in an active recruitment period, as defined by § 655.102(f)(3).

(2) The H-2ALC must conduct separate positive recruitment under § 655.102(g) through (i) for each area of intended employment in which the H-2ALC intends to perform work, but need not conduct separate recruitment for each work location within a

single area of intended employment. The positive recruitment for each area of intended employment must list the name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site. Such positive recruitment must be conducted pre-filing for the first area of intended employment, but must be started no more than 75 and no fewer than 60 days before the listed arrival date (or the amended date, if applicable) for each subsequent area of intended employment. For each area of intended employment, the advertising that must be placed in any applicable States designated as traditional or expected labor supply States must be placed at the same time as the placement of other positive recruitment for the area of intended employment in accordance with § 655.102(i)(2).

(3) The job order and the positive recruitment in each area of intended employment may require that workers complete the remainder of the H-2ALC's itinerary.

(4) An H-2ALC who hires U.S. workers during the course of its itinerary, and accordingly releases one or more of its H-2A workers, is eligible for the release from the three-quarters guarantee with respect to the released H-2A workers that is provided for in § 655.104(i)(4).

(5) An H-2ALC may amend its application subsequent to submission in accordance with § 655.107(d)(3) to account for new or changed worksites or areas of intended employment during the course of the itinerary in the following manner:

(i) If the additional worksite(s) are in the same area(s) of intended employment as represented on the Application for Temporary Employment Certification, the H-2ALC is

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not required to re-recruit in those areas of intended employment if that recruitment has been completed and if the job duties at the new work sites are similar to those already covered by the application.

(ii) If the additional worksite(s) are outside the area(s) of intended employment represented on the Application for Temporary Employment Certification, the H-2ALC must submit in writing the new area(s) of intended employment and explain the reasons for the amendment of the labor certification itinerary. The CO will order additional recruitment in accordance with § 655.102(d).

(iii) For any additional worksite not included on the original application that necessitates a change in housing of H-2A workers, the H-2ALC must secure the statement of housing as described in paragraph (b)(6) of this section and obtain an inspection of such housing from the SWA in the area of intended employment.

(iv) Where additional recruitment is required under paragraphs (a)(5)(i) or (a)(5)(ii) of this section, the CO shall allow it to take place on an expedited basis, where possible, so as to allow the amended dates of need to be met.

(6) Consistent with paragraph (a)(5) of this section, no later than 30 days prior to the commencement of employment in each area of intended employment in the itinerary of an H-2ALC, the SWA having jurisdiction over that area of intended employment must complete the housing inspections for any employer-provided housing to be used by the employees of the H-2ALC.

(7) To satisfy the requirements of § 655.102(h), the H-2ALC must contact all U.S employees that worked for the H-2ALC during the previous season, except those excluded by that section, before filing its application, and must advise those workers that

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a separate job opportunity exists for each area of intended employment that is covered by the application. The employer may advise contacted employees that for any given job opportunity, workers may be required to complete the remainder of the H-2ALC's itinerary.

(b) In addition to the assurances and obligations listed in § 655.105, H-2ALC applicants are also required to:

(1) Provide the MSPA Farm Labor Contractor (FLC) certificate of registration number and expiration date if required under MSPA at 29 U.S.C. 1801 et seq., to have such a certificate;

(2) Identify the farm labor contracting activities the H-2ALC is authorized to perform as an FLC under MSPA as shown on the FLC certificate of registration, if required under MSPA at 29 U.S.C. 1801 et seq., to have such a certificate of registration;

(3) List the name and location of each fixed-site agricultural business to which the H-2A Labor Contractor expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site;

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

(5) Attest that it has engaged in, or will engage in within the timeframes required by § 655.102 as modified by § 655.106(a), recruitment efforts in each area of intended employment in which it has listed a fixed-site agricultural business; and

(6) Attest that it will be providing housing and transportation that complies with the applicable housing standards in § 655.104(d) or that it has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a written statement stating that:

(i) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable housing standards in § 655.104(d); and

(ii) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and will provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, subpart D, except where workers' compensation is used to cover such transportation as described in § 655.104(h)(3).

§ 655.107 Processing of applications.

(a) Processing. (1) Upon receipt of the application, the CO will promptly review the application for completeness and an absence of errors that would prevent certification, and for compliance with the criteria for certification. The CO will make a determination to certify, deny, or issue a Notice of Deficiency prior to making a Final Determination on the application. Applications requesting that zero job opportunities be certified for H-2A employment because the employer has been able to recruit a sufficient number of U.S.

workers must comply with other requirements for H-2A applications and must be supported by a recruitment report, in which case the application will be accepted but will then be denied. Criteria for certification, as used in this subpart, include, but are not limited to, whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; made all the assurances and met all the obligations required by § 655.105, and/or, if an H-2ALC, by § 655.106; complied with the timeliness requirements in § 655.102; and complied with the recruitment obligations required by §§ 655.102 and 655.103.

(2) Unless otherwise noted, any notice or request sent by the CO or OFLC to an applicant requiring a response shall be sent by means normally assuring next-day delivery, to afford the applicant sufficient time to respond. The employer's response shall be considered filed with the Department when sent (by mail, certified mail, or any other means indicated to be acceptable by the CO) to the Department, which may be demonstrated, for example, by a postmark.

(b) Notice of deficiencies. (1) If the CO determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification in paragraph (a) of this section, the CO will promptly notify the employer within 7 calendar days of the CO's receipt of the application.

(2) The notice will:

(i) State the reason(s) why the application fails to meet the criteria for temporary labor certification, citing the relevant regulatory standard(s);

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(ii) Offer the employer an opportunity to submit a modified application within 5 business days from date of receipt, stating the modification that is needed for the CO to accept the application for consideration;

(iii) Except as provided for under paragraph (b)(2)(iv) of this section, state that the CO's determination on whether to grant or deny the Application for Temporary Employment Certification will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the application within 5 business days and in a manner specified by the CO;

(iv) Where the CO determines the employer failed to comply with the recruitment obligations required by §§ 655.102 and 655.103, offer the employer an opportunity to correct its recruitment and conduct it on an expedited schedule. The CO shall specify the positive recruitment requirements, request the employer submit proof of corrected advertisement and an initial recruitment report meeting the requirements of § 655.102(k) no earlier than 48 hours after the last corrected advertisement is printed, and state that the CO's determination on whether to grant or deny the Application for Temporary Employment Certification will be made within 5 business days of receiving the required documentation, which may be a date later than 30 days before the date of need;

(v) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ, of the Notice of Deficiency. The notice will state that in order to obtain such a review or hearing, the employer, within 5 business days of the receipt of the notice, must file by facsimile or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may

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submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(vi) State that if the employer does not comply with the requirements under paragraphs (b)(2) (ii) and (iv) of this section or request an expedited administrative judicial review or a de novo hearing before an ALJ within the 5 business days the CO will deny the application in accordance with the labor certification determination provisions in § 655.109.

(c) Submission of modified applications. (1) If the CO notifies the employer of any deficiencies within the 7 calendar day timeframe set forth in paragraph (b)(1) of this section, the date by which the CO's Final Determination is required by statute to be made will be postponed by 1 day for each day that passes beyond the 5 business-day period allowed under paragraph (b)(2)(ii) of this section to submit a modified application.

(2) Where the employer submits a modified application as required by the CO, and the CO approves the modified application, the CO will not deny the application based solely on the fact that it now does not meet the timeliness requirements for filing applications.

(3) If the modified application is not approved, the CO will deny the application in accordance with the labor certification determination provisions in § 655.109.

(d) Amendments to applications. (1) Applications may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing,

the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(2) Applications may be amended to make minor changes in the total period of employment, but only if a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity. If a request for a change in the start date of the total period of employment is made after workers have departed for the employer's place of work, the CO may only approve the change if the request is accompanied by a written assurance signed and dated by the employer that all such workers will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

(3) Other amendments to the application, including elements of the job offer and the place of work, may be approved by the CO if the CO determines the proposed amendment(s) are justified by a business reason and will not prevent the CO from making the labor certification determination required under § 655.109. Requested amendments will be reviewed as quickly as possible, taking into account revised dates of need for work locations associated with the amendment.

(e) Appeal procedures. With respect to either a Notice of Deficiency issued under paragraph (b) of this section, the denial of a requested amendment under paragraph (d) of

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this section, or a notice of denial issued under § 655.109(e), if the employer timely requests an expedited administrative review or *de novo* hearing before an ALJ, the procedures set forth in § 655.115 will be followed.

§ 655.108 Offered wage rate.

(a) Highest wage. To comply with its obligation under § 655.105(g), an employer must offer a wage rate that is the highest of the AEWR in effect at the time recruitment for a position is begun, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.

(b) Wage rate request. The employer must request and obtain a wage rate determination from the NPC, on a form prescribed by ETA, before commencing any recruitment under this subpart, except where specifically exempted from this requirement by these regulations.

(c) Validity of wage rate. The recruitment must begin within the validity period of the wage determination obtained from the NPC. Recruitment for this purpose begins when the job order is accepted by the SWA for posting.

(d) Wage offer. The employer must offer and advertise in its recruitment a wage at least equal to the wage rate required by paragraph (a) of this section.

(e) Adverse effect wage rate. The AEWR will be based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey. The NPC will obtain wage information on the AEWR using the On-line Wage Library (OWL) found on the Foreign

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Labor Certification Data Center Web site (http://www.flcdatacenter.com/). This wage shall not be less than the July 24, 2009 Federal minimum wage of $7.25.

(f) Wage determination. The NPC must enter the wage rate determination on a form it uses, indicate the source, and return the form with its endorsement to the employer.

(g) Skill level. (1) Level I wage rates are assigned to job offers for beginning level employees who have a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy.

(2) Level II wage rates are assigned to job offers for employees who have attained, through education or experience, a good understanding of the occupation. These employees perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

(3) Level III wage rates are assigned to job offers for employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. These employees perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or

educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be an indicator that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as lead, senior, crew chief, or journeyman would be indicators that a Level III wage should be considered.

(4) Level IV wage rates are assigned to job offers for employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees receive only minimal guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

(h) Retention of documentation. An employer filing an Application for Temporary Employment Certification must maintain documentation of its wage determination from the NPC as required in this subpart and be prepared to submit this documentation with the filing of its application. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of the certification. There is no record retention requirement for applications (and supporting documentation) that are denied.

§ 655.109 Labor certification determinations.

(a) COs. The Administrator, OFLC is the Department's National CO. The Administrator, OFLC, and the CO(s) in the NPC(s) (by virtue of delegation from the Administrator, OFLC), have the authority to certify or deny applications for temporary

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employment certification under the H-2A nonimmigrant classification. If the Administrator, OFLC has directed that certain types of temporary labor certification applications or specific applications under the H-2A nonimmigrant classification be handled by the National OFLC, the Director(s) of the NPC(s) will refer such applications to the Administrator, OFLC.

(b) Determination. No later than 30 calendar days before the date of need, as identified in the Application for Temporary Employment Certification, except as provided for under § 655.107(c) for modified applications, or applications not otherwise meeting certification criteria by that date, the CO will make a determination either to grant or deny the Application for Temporary Employment Certification. The CO will grant the application if and only if: the employer has met the requirements of this subpart, including the criteria for certification set forth in § 655.107(a), and thus the employment of the H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

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

(d) Approved certification. If temporary labor certification is granted, the CO must send the certified Application for Temporary Employment Certification and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney. The Final Determination letter will notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office and to continue to cooperate with the SWA by accepting all referrals of eligible U.S. workers who apply (or on whose behalf an application is made) for the job

opportunity until the end of the recruitment period as set forth in § 655.102(f)(3). However, the employer will not be required to accept referrals of eligible U.S. workers once it has hired or extended employment offers to eligible U.S. workers equal to the number of H-2A workers sought.

(e) Denied certification. If temporary labor certification is denied, the Final Determination letter will be sent to the employer by means normally assuring next-day delivery. The Final Determination Letter will:

(1) State the reasons certification is denied, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing benefits, wages, and working conditions of similarly employed U.S. workers in the occupation and/or any applicable special procedures;

(3) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the denial. The notice must state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, must file by facsimile (fax), telegram, or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within the 7 calendar days, the denial is final

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and the Department will not further consider that application for temporary alien agricultural labor certification.

(f) Partial certification. The CO may, to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise. The number of workers certified shall be reduced by one for each referred U.S. worker who is qualified, able, available and willing. If a partial labor certification is issued, the Final Determination letter will:

(1) State the reasons for which either the period of need and/or the number of H-2A workers requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation;

(3) Offer the applicant an opportunity to request an expedited administrative review, or a *de novo* administrative hearing before an ALJ, of the decision. The notice will state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, will file by facsimile or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within the 7 calendar days, the denial is final

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and the Department will not further consider that application for temporary alien agricultural labor certification.

(g) Appeal procedures. If the employer timely requests an expedited administrative review or *de novo* hearing before an ALJ under paragraphs (e)(3) or (f)(3) of this section, the procedures at § 655.115 will be followed.

(h) Payment of processing fees. A determination by the CO to grant an Application for Temporary Employment Certification in whole or in part under paragraph (d) or (f) of this section will include a bill for the required fees. Each employer of H-2A workers under the Application for Temporary Employment Certification (except joint employer associations, which shall not be assessed a fee in addition to the fees assessed to the members of the association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the application (in whole or in part), as follows:

(1) Amount. The application fee for each employer receiving a temporary agricultural labor certification is $100 plus $10 for each H-2A worker certified under the Application for Temporary Employment Certification, provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than $1,000. There is no additional fee to the association filing the application. The fees must be paid by check or money order made payable to "United States Department of Labor." In the case of H-2A employers that are members of an agricultural association acting as a joint employer applying on their behalf, the aggregate fees for all employers of H-2A workers under the application must be paid by one check or money order.

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

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by the date that is 30 days after the issuance of the certification will be considered a substantial program violation and subject to the procedures in § 655.115.

§ 655.110 Validity and scope of temporary labor certifications.

(a) Validity period. A temporary labor certification is valid for the duration of the job opportunity for which certification is granted to the employer. Except as provided in paragraph and (d) of this section, the validity period is that time between the beginning and ending dates of certified employment, as listed on the Application for Temporary Employment Certification. The certification expires on the last day of authorized employment.

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

(c) Scope of validity--associations. (1) Certified applications. If an association is requesting temporary labor certification as a joint employer, the certified Application for Temporary Employment Certification will be granted jointly to the association and to each of the association's employer members named on the application. Workers authorized by the temporary labor certification may be transferred among its certified employer members to perform work for which the temporary labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary agricultural labor certifications to

associations may be used for the certified job opportunities of any of its employer members named on the application. If an association is requesting temporary labor certification as a sole employer, the certified Application for Temporary Employment Certification is granted to the association only.

(2) Ineligible employer-members. Workers may not be transferred or referred to an association's employer member if that employer member has been debarred from participation in the H-2A program.

(d) Extensions on period of employment. (1) Short-term extension. An employer who seeks an extension of 2 weeks or less of the certified Application for Temporary Employment Certification must apply for such extension to DHS. If DHS grants the extension, the corresponding Application for Temporary Employment Certification will be deemed extended for such period as is approved by DHS.

(2) Long-term extension. For extensions beyond 2 weeks, an employer may apply to the CO at any time for an extension of the period of employment on the certified Application for Temporary Employment Certification for reasons related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will grant or deny the request for extension of the period of employment on the Application for Temporary Employment Certification based on the available information, and will notify the employer of the decision in writing. The employer may appeal a denial for a request of an extension in accordance with the procedures contained in §

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655.115. The CO will not grant an extension where the total work contract period under that application and extensions would be 12 months or more, except in extraordinary circumstances.

(e) Requests for determinations based on nonavailability of able, willing, available, eligible, and qualified U.S. workers. (1) Standards for requests. If a temporary labor certification has been partially granted or denied based on the CO's determination that able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or available, the employer may request a new temporary labor certification determination from the CO. Prior to making a new determination the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (e)(2) of this section) is received, make a determination on the request. An employer may appeal a denial of such a determination in accordance with the procedures contained in § 655.115.

(2) Unavailability of U.S. workers. The employer's request for a new determination must be made directly to the CO by telephone or electronic mail, and must be confirmed by the employer in writing as required by this paragraph. If the employer telephonically or via electronic mail requests the new determination by asserting solely that U.S.

workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

(3) Notification of determination. If the CO determines that U.S. workers have become unavailable and cannot identify sufficient specific able, willing, eligible, and qualified U.S. workers who are or who are likely to be available, the CO will grant the employer's request for a new determination. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.111 Required departure.

(a) Limit to worker's stay. As defined further in DHS regulations, a temporary labor certification limits the authorized period of stay for an H-2A worker. See 8 CFR 214.2(h). A foreign worker may not remain beyond his or her authorized period of stay, as established by DHS, which is based upon the validity period of the labor certification under which the H-2A worker is employed, nor beyond separation from employment prior to completion of the H-2A contract, absent an extension or change of such worker's status under DHS regulations.

(b) Notice to worker. Upon establishment of a program by DHS for registration of departure, an employer must notify any H-2A worker that when the worker departs the

U.S. by land at the conclusion of employment as provided in paragraph (a) of this section, the worker must register such departure at the place and in the manner prescribed by DHS.

§ 655.112 Audits.

(a) Discretion. The Department will conduct audits of temporary labor certification applications for which certification has been granted. The applications selected for audit will be chosen within the sole discretion of the Department.

(b) Audit letter. Where an application is selected for audit, the CO will issue an audit letter to the employer/applicant. The audit letter will:

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

(2) Specify a date, no fewer than 14 days and no more than 30 days from the date of the audit letter, by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process may result in a finding by the CO to:

(i) Revoke the labor certification as provided in § 655.117 and/or

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

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

(d) Audit violations. If, as a result of the audit, the CO determines the employer failed to produce required documentation, or determines that the employer violated the

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standards set forth in § 655.117(a) with respect to the application, the employer's labor certification may be revoked under § 655.117 and/or the employer may be referred for debarment under § 655.118. The CO may determine to provide the audit findings and underlying documentation to DHS or another appropriate enforcement agency. The CO shall refer any 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.

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

(a) Referral for investigation. If the CO discovers possible fraud or willful misrepresentation involving an Application for Temporary Employment Certification the CO may refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) Terminated processing. If a court or the DHS determines that there was fraud or willful misrepresentation involving an Application for Temporary Employment Certification, the application will be deemed invalid. The determination is not appealable. If a certification has been granted, a finding under this paragraph will be cause to revoke the certification.

§ 655.114 Setting meal charges; petition for higher meal charges.

(a) Meal charges. Until a new amount is set under this paragraph an employer may charge workers up to $9.90 for providing them with three meals per day. The maximum

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charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12 month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the Administrator, OFLC, as a Notice in the Federal Register. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206 (FLSA), the charge or deduction must meet the requirements of 29 U.S.C. 203(m) of the FLSA, including the recordkeeping requirements found at 29 CFR 516.27.

(b) Filing petitions for higher meal charges. The employer may file a petition with the CO to charge more than the applicable amount for meal charges if the employer justifies the charges and submits to the CO the documentation required by paragraph (b)(1) of this section.

(1) Required documentation. Documentation submitted must include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay

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period must be retained and must be available for inspection by the CO for a period of 1 year.

(2) Effective date for higher charge. The employer may begin charging the higher rate upon receipt of a favorable decision from the CO unless the CO sets a later effective date in the decision.

(c) Appeal. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief Administrative Law Judge. ALJs will hear such appeals according to the procedures in 29 CFR part 18, except that the appeal will not be considered as a complaint to which an answer is required. The decision of the ALJ is the final decision of the Secretary.

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

(a) Administrative review. (1) Consideration. Whenever an employer has requested an administrative review before an ALJ of a decision by the CO: not to accept for consideration an Application for Temporary Employment Certification; to deny an Application for Temporary Employment Certification; to deny an amendment of an Application for Temporary Employment Certification; or to deny an extension of an Application for Temporary Employment Certification, the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ (which may be a panel of such persons designated by the Chief Administrative Law

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Judge from BALCA established by 20 CFR part 656, which will hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The ALJ may not remand the case and may not receive evidence in addition to what the CO used to make the determination.

(2) Decision. Within 5 business days after receipt of the ETA case file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision by written decision. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the Administrator, OFLC, and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

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

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

(ii) The ALJ will ensure that the hearing is scheduled to take place within 5 calendar days after the ALJ's receipt of the ETA case file, if the employer so requests, and will allow for the introduction of new evidence; and

(iii) The ALJ's decision must be rendered within 10 calendar days after the hearing.

(2) Decision. After a *de novo* hearing, the ALJ must affirm, reverse, or modify the CO's determination, and the ALJ's decision must be provided immediately to the employer, CO, Administrator, OFLC, and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

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

(a) Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, Subpart E. Complaints which involve worker contracts must be referred by the SWA to ESA for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, ESA may report the results of its investigation to the Administrator, OFLC for consideration of employer penalties or such other action as may be appropriate.

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

becomes aware of a violation of these regulations, it may provide such information to the appropriate SWA and the CO.

§ 655.117 Revocation of approved labor certifications.

(a) Basis for DOL revocation. The CO, in consultation with the Administrator, OFLC, may revoke a temporary agricultural labor certification approved under this subpart, if, after notice and opportunity for a hearing (or failure to file rebuttal evidence), it is found that any of the following violations were committed with respect to that temporary agricultural labor certification:

(1) The CO finds that issuance of the temporary agricultural labor certification was not justified due to a willful misrepresentation on the application;

(2) The CO finds that the employer:

(i) Willfully violated a material term or condition of the approved temporary agricultural labor certification or the H-2A regulations, unless otherwise provided under paragraphs (a)(2)(ii) through (v) of this section; or

(ii) Failed, after notification, to cure a substantial violation of the applicable housing standards set out in 20 CFR 655.104(d); or

(iii) Significantly failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA at 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(iv) Failed to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency, or with one or more decisions or orders

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of the Secretary or a court order secured by the Secretary under sec. 218 of the INA at 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations).

(3) The CO determines after a recommendation is made by the WHD ESA in accordance with 29 CFR 501.20, which governs when a recommendation of revocation may be made to ETA, that the conduct complained of upon examination meets the standards of paragraph (a)(1) or (2) of this section; or

(4) If a court or the DHS, or, as a result of an audit, the CO, determines that there was fraud or willful misrepresentation involving the Application for Temporary Employment Certification.

(b) DOL procedures for revocation. (1) The CO will send to the employer (and his attorney or agent) a Notice of Intent to Revoke by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The CO must consider all relevant evidence presented in deciding whether to revoke the temporary agricultural labor certification.

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

(3) If, after reviewing the employer's timely filed rebuttal evidence, the CO finds that the employer more likely than not meets one or more of the bases for revocation under § 655.117(a), the CO will notify the employer, by means normally ensuring next-day

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delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination that the temporary agricultural labor certification should be revoked. The CO's notice will contain a detailed statement of the bases for the decision, and must offer the employer an opportunity to request a hearing. The notice must state that, to obtain such a hearing, the employer must, within 10 calendar days of the date of the notice file a written request to the, Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the Administrator, OFLC. The timely filing of a request for a hearing will stay the revocation pending the outcome of the hearing.

(c) Hearing. (1) Within 5 business days of receipt of the request for a hearing, the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The request for a hearing will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 15 calendar days after the ALJ's receipt of the ETA case file, if the employer so requests, and will allow for the introduction of new evidence; and

(iii) The ALJ's decision must be rendered within 20 calendar days after the hearing.

(2) Decision. After the hearing, the ALJ must affirm, reverse, or modify the CO's determination. The ALJ's decision must be provided immediately to the employer, CO,

Administrator, OFLC, DHS, and DOS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

(d) Employer's obligations in the event of revocation. If an employer's temporary agricultural labor certification is revoked under this section, and the workers have departed the place of recruitment, the employer will be responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.104(h)(1);

(2) The worker's outbound transportation expenses, as if the worker meets the requirements for payment under § 655.104(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.104(i); and

(4) Any other wages, benefits, and working conditions due or owing to the worker under these regulations.

§ 655.118 Debarment.

(a) The Administrator, OFLC may not issue future labor certifications under this subpart to an employer and any successor in interest to the debarred employer, subject to the time limits set forth in paragraph (c) of this section, if:

(1) The Administrator, OFLC finds that the employer substantially violated a material term or condition of its temporary labor certification with respect to the employment of domestic or nonimmigrant workers; and

(2) The Administrator, OFLC issues a Notice of Intent to Debar no later than 2 years after the occurrence of the violation.

(b) The Administrator, OFLC may not issue future labor certifications under this subpart to an employer represented by an agent or attorney, subject to the time limits set forth in paragraph (c) of this section, if:

(1) The Administrator, OFLC finds that the agent or attorney participated in, had knowledge of, or had reason to know of, an employer's substantial violation; and

(2) The Administrator, OFLC issues the agent or attorney a Notice of Intent to Debar no later than 2 years after the occurrence of the violation.

(c) No employer, attorney, or agent may be debarred under this subpart for more than 3 years.

(d) For the purposes of this section, a substantial violation includes:

(1) A pattern or practice of acts of commission or omission on the part of the employer or the employer's agent which:

(i) Are significantly injurious to the wages or benefits required to be offered under the H-2A program, or working conditions of a significant number of the employer's U.S. or H-2A workers; or

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

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

(iv) Reflect a significant failure to comply with the audit process in violation of § 655.112; or

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(v) Reflect the employment of an H-2A worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension;

(2) The employer's persistent or prolonged failure to pay the necessary fee in a timely manner, following the issuance of a deficiency notice to the applicant and allowing for a reasonable period for response;

(3) Fraud involving the Application for Temporary Employment Certification or a response to an audit;

(4) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA at 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

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

(6) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(e) DOL procedures for debarment under this section will be as follows:

(1) The Administrator, OFLC will send to the employer, attorney, or agent a Notice of Intent to Debar by means normally ensuring next-day delivery, which will contain a

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detailed statement of the grounds for the proposed debarment. The employer, attorney or agent may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The Administrator, OFLC must consider all relevant evidence presented in deciding whether to debar the employer, attorney, or agent.

(2) If rebuttal evidence is not timely filed by the employer, attorney, or agent, the Notice of Intent to Debar will become the final decision of the Secretary and take effect immediately at the end of the 14-day period.

(3) If, after reviewing the employer's timely filed rebuttal evidence, the Administrator, OFLC determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment under § 655.118(d), the Administrator, OFLC will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination of debarment and of the employer, attorney, or agent's right to appeal.

(4) The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and must offer the employer, attorney, or agent an opportunity to request a hearing. The notice must state that, to obtain such a hearing, the debarred party must, within 30 calendar days of the date of the notice, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the Administrator, OFLC. The debarment will take effect 30 days from the date the Notice of Debarment is issued unless a request for a hearing is properly filed within 30 days

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from the date the Notice of Debarment is issued. The timely filing of the request for a hearing stays the debarment pending the outcome of the hearing.

(5)(i) Hearing. Within 10 days of receipt of the request for a hearing, the Administrator, OFLC will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required;

(ii) Decision. After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC 's determination. The ALJ's decision must be provided immediately to the employer, Administrator, OFLC, DHS, and DOS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(iii) Review by the ARB.

(A) Any party wishing review of the decision of an ALJ must, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB must decide whether to accept the petition within 30 days of receipt. If the ARB declines to accept the petition or if the ARB does not issue a notice accepting a petition within 30 days after the receipt of a timely filing of the petition, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of

its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding in person or by certified mail.

(B) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges shall promptly forward a copy of the complete hearing record to the ARB.

(C) Where the ARB has determined to review such decision and order, the ARB shall notify each party of:

(1) The issue or issues raised;

(2) The form in which submissions shall be made (i.e., briefs, oral argument, etc.); and

(3) The time within which such presentation shall be submitted.

(D) The ARB's final decision must be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail. If the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final decision of the Secretary.

(f) Debarment involving members of associations. If the Administrator, OFLC determines a substantial violation has occurred, and if an individual employer-member of an agricultural association acting as a joint employer is determined to have committed the violation, the debarment determination will apply only to that member of the association unless the Administrator, OFLC determines that the association or other association members participated in the violation, in which case the debarment will be invoked against the complicit association or other association members.

(g) Debarment involving agricultural associations acting as joint employers. If the Administrator, OFLC determines a substantial violation has occurred, and if an

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agricultural association acting as a joint employer with its members is found to have committed the violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association unless the Administrator, OFLC determines that the member participated in the violation, in which case the debarment will be invoked against any complicit association members as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(h) Debarment involving agricultural associations acting as sole employers. If the Administrator, OFLC determines a substantial violation has occurred, and if an agricultural association acting as a sole employer is determined to have committed the violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

§ 655.119 Document retention requirements

(a) Entities required to retain documents. All employers receiving a certification of the Application for Temporary Employment Certification for agricultural workers under this subpart are required to retain the documents and records as provided in the regulations cited in paragraph (c) of this section.

(b) Period of required retention. Records and documents must be retained for a period of 3 years from the date of certification of the Application for Temporary Employment Certification.

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(c) Documents and records to be retained. (1) All applicants must retain the following documentation:

(i) Proof of recruitment efforts including:

(A) Job order placement as specified in § 655.102(e)(1);

(B) Advertising as specified in § 655.102(g)(3), or, if used, professional, trade, or ethnic publications;

(C) Contact with former U.S. workers as specified in § 655.102(h);

(D) Multi-state recruitment efforts (if required under § 655.102(i)) as specified in § 655.102(g)(3);

(ii) Substantiation of information submitted in the recruitment report prepared in accordance with § 655.102(k)(2), such as evidence of non-applicability of contact of former employees as specified in § 655.102(h);

(iii) The supplemental recruitment report as specified in § 655.102(k) and any supporting resumes and contact information as specified in § 655.102(k)(3);.

(iv) Proof of workers' compensation insurance or State law coverage as specified in § 655.104(e);

(v) Records of each worker's earnings as specified in § 655.104(j);

(vi) The work contract or a copy of the Application for Temporary Employment Certification as defined in 29 CFR 501.10 and specified in § 655.104(q);

(vii) The wage determination provided by the NPC as specified in § 655.108;

(viii) Copy of the request for housing inspection submitted to the SWA as specified in §655.104(d); and

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(2) In addition to the documentation specified in paragraph (c)(1) of this section, H-2ALCs must also retain:

(i) Statements of compliance with the housing and transportation obligations for each fixed-site employer which provided housing or transportation and to which the H-2ALC provided workers during the validity period of the certification, unless such housing and transportation obligations were met by the H-2ALC itself, in which case proof of compliance by the H-2ALC must be retained, as specified in § 655.101(a)(5);

(ii) Proof of surety bond coverage which includes the name, address, and phone number of the surety, the bond number of other identifying designation, the amount of coverage, and the payee, as specified in 29 CFR 501.8; and

(3) Associations filing must retain documentation substantiating their status as an employer or agent, as specified in § 655.101(a)(1).

Subpart C--[Removed and Reserved]

5. Subpart C is removed and reserved.

TITLE 29--LABOR

6. Revise part 501 to read as follows:

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

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Subpart A General Provisions

Sec.

Subpart B_Enforcement of Work Contracts

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501.43 Responsibility of the Office of Administrative Law Judges.

501.44 Additional information, if required.

501.45 Final decision of the Administrative Review Board.

Record

501.46 Retention of official record.

501.47 Certification.

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

Subpart A General Provisions

§ 501.0 Introduction.

These regulations cover the enforcement of all contractual obligation provisions applicable to the employment of H-2A workers under sec. 218 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of United States (U.S.) workers newly hired by employers of H-2A workers in the same occupations as the H-2A workers during the period of time set forth in the labor certification approved by ETA as a condition for granting H-2A certification, including any extension thereof. Such U.S. workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.

§ 501.1 Purpose and scope.

(a) Statutory standard. Section 218(a) of the INA provides that:

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(1) A petition to import an alien as an H-2A worker (as defined in the INA) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied to the Secretary of the United States Department of Labor (Secretary) for a certification that:

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

(ii) 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.

(2) [Reserved]

(b) Role of the Employment and Training Administration (ETA). The issuance and denial of labor certification under sec. 218 of the INA has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL). In general, matters concerning the obligations of an employer of H-2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are issues such as whether U.S. workers are available, whether adequate recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing AEWR, whether workers' compensation insurance has been provided, whether employment was offered to U.S. workers as required by sec. 218 of the INA and regulations at 20 CFR part 655, Subpart B, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in 20 CFR part 655, Subpart B.

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(c) Role of the Employment Standards Administration (ESA), Wage and Hour Division (WHD). (1) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under sec. 218 of the INA, the regulations at 20 CFR part 655, Subpart B, or these regulations, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. See 8 U.S.C. 1188(g)(2).

(2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of sec. 218 of the INA have been delegated by the Secretary to the ESA, WHD. In general, matters concerning the obligations under a work contract between an employer of H-2A workers and the H-2A workers and U.S. workers hired in corresponding employment by H-2A employers are enforced by ESA, including whether employment was offered to U.S. workers as required under sec. 218 of the INA or 20 CFR part 655, Subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s) or debarment from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an H-2A Labor Contractors (H-2ALC), from the H-2ALC directly and/or from the insurer who issued the surety bond to the H-2ALC as required by 20 CFR part 655, Subpart B and 29 CFR 501.8).

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(d) Effect of regulations. The amendments to the INA made by Title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the WHD under the INA and these regulations apply to the employment of any H-2A worker and any other U.S. workers hired by H-2A employers in corresponding employment as the result of any application filed with the Department on and after June 1, 1987.

§ 501.2 Coordination of intake between DOL agencies.

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

§ 501.3 Discrimination prohibited.

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

(1) Filed a complaint under or related to sec. 218 of the INA or these regulations;

(2) Instituted or caused to be instituted any proceedings related to sec. 218 of the INA or these regulations;

(3) Testified or is about to testify in any proceeding under or related to sec. 218 of the INA or these regulations;

(4) Exercised or asserted on behalf of himself or others any right or protection afforded by sec. 218 of the INA or these regulations; or

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

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

§ 501.4 Waiver of rights prohibited.

No person shall seek to have an H-2A worker, or other U.S. worker hired in corresponding employment by an H-2A employer, waive any rights conferred under sec. 218 of the INA, the regulations at 20 CFR part 655, Subpart B, or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the INA or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the INA or these regulations. This does not prevent agreements to settle private litigation.

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§ 501.5 Investigation authority of Secretary.

(a) General. The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places (including housing) and such vehicles, and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under sec. 218 of the INA or these regulations.

(b) Failure to cooperate with an investigation. Where any employer (or employer's agent or attorney) using the services of an H-2A worker does not cooperate with an investigation concerning the employment of H-2A workers or U.S. workers hired in corresponding employment, the WHD shall report such occurrence to ETA and may recommend that ETA revoke the existing certification that is the basis for the employment of the H-2A workers giving rise to the investigation, and the WHD may recommend to ETA the debarment of the employer from future certification for up to 3 years. In addition, the WHD may take such action as may be appropriate, including the seeking of an injunction and/or assessing civil money penalties, against any person who has failed to permit the WHD to make an investigation.

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

(d) Report of violations. Any person may report a violation of the work contract obligations of sec. 218 of the INA or these regulations to the Secretary by advising any

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local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of DOL, WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.6 Cooperation with DOL officials.

All persons must cooperate with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The WHD will take such action as it deems appropriate, including seeking an injunction to bar any failure to cooperate with an investigation and/or assessing a civil money penalty therefore. In addition, the WHD will report the matter to ETA, and the WHD may recommend to ETA the debarment of the employer from future certification and/or recommend that the person's existing labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.

§ 501.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S. knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent

statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 501.8 Surety bond.

(a) H-2ALCs shall obtain a surety bond to assure compliance with the provisions of this part and 20 CFR part 655, Subpart B for each labor certification being sought. The H-2ALC shall attest on the application for labor certification that such a bond meeting all the requirements of this section has been obtained and shall provide on the labor certification application form information that fully identifies the surety, including the name, address and phone number of the surety, and which identifies the bond by number or other identifying designation.

(b) The bond shall be payable to the Administrator, Wage and Hour Division, United States Department of Labor. It shall obligate the surety to pay any sums to the Administrator, WHD, for wages and benefits owed to H-2A and U.S. workers, based on a final decision finding a violation or violations of this part or 20 CFR part 655, Subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond shall be written to cover liability incurred during the term of the period listed in the application for labor certification made by the H-2ALC, and shall be amended to cover any extensions of the labor certification requested by the H-2ALC. Surety bonds may not be canceled or terminated unless 30 days' notice is provided by the surety to the Administrator, WHD.

(c) The bond shall be in the amount of $5,000 for a labor certification for which a H-2ALC will employ fewer than 25 employees, $10,000 for a labor certification for which a H-2ALC will employ 25 to 49 employees, and $20,000 for a labor certification for which a H-2ALC will employ 50 or more employees. The amount of the bond may be increased by the Administrator, WHD after notice and an opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

§ 501.10 Definitions.

(a) Definitions of terms used in this part. For the purpose of this part:

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals (BALCA) established by part 656 of this chapter, which will hear and decide appeals as set forth at 20 CFR 655.115.

Administrator, WHD means the Administrator of the Wage and Hour Division (WHD), ESA and such authorized representatives as may be designated to perform any of the functions of the Administrator, WHD under this part.

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator of the Office of Foreign Labor Certification (OFLC) has determined must be offered and paid to every H-2A worker employed under the DOL-approved Application for Temporary Employment Certification in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment

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during the H-2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

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

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

(2) Is not itself an employer, or a joint employer, as defined in this section, with respect to a specific application; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3, 1003.101.

Agricultural association means any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses or transports any worker that is subject to sec. 218 of the INA. An agricultural association may act as the agent of an employer for purposes of filing an H-2A Application for Temporary Employment Certification, and may also act as the sole or joint employer of H-2A workers.

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary agricultural labor certification determination from DOL. A complete

submission of the Application for Temporary Employment Certification includes the form and the initial recruitment report.

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

Department of Homeland Security (DHS) means the Federal agency having control over certain immigration functions that, through its sub-agency, United States Citizenship and Immigration Services (USCIS), makes the determination under the INA on whether to grant visa petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the U.S.

DOL or Department means the United States Department of Labor.

Eligible worker means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

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

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

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship with respect to H-2A employees or related U.S. workers under this part; and

(3) Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).

Employment Service (ES) refers to the system of Federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the SWAs and OFLC, including the National Processing Centers (NPCs).

Employment Standards Administration (ESA) means the agency within DOL that includes the WHD, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

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

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

Fixed-site employer means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this part who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to sec. 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this part, person includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

H-2A Labor Contractor (H-2ALC) means any person who meets the definition of employer in this section and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to sec. 218 of the INA or these regulations.

H-2A worker means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA, as amended.

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

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

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

Joint employment means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a "joint employer" of that employee.

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

Positive recruitment means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing means with respect to practices engaged in by employers and benefits other than wages provided by employers, that:

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

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

Prevailing hourly wage means the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.

Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.) to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1-1/2 bushels), a bushel of potatoes, and Eastern apple box (1-1/2 metric bushels), a flat of strawberries (twelve quarts), etc.

Representative means a person or entity employed by, or duly authorized to act on behalf of, the employer with respect to activities entered into for, and/or attestations made with respect to, the Application for Temporary Employment Certification.

Secretary means the Secretary of the United States Department of Labor or the Secretary's designee.

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

Successor in interest means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor for purposes of this part, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in a debarment recommendation. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

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(7) Similarity of products and services; and

(8) The ability of the predecessor to provide relief.

Temporary agricultural labor certification means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to secs. 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

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

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

United States (U.S.), when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, P.L. 110-229, Title VII, the Commonwealth of the Northern Mariana Islands.

U.S. worker means a worker who is:

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

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

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

Work contract means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, required by the applicable regulations in subpart B of 20 CFR part 655, Labor Certification for Temporary Agricultural Employment of H-2A Aliens in the U.S. (H-2A Workers), or these regulations, including those terms and conditions attested to by the H-2A employer, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum shall be the terms of the job order, as provided in 20 CFR part 653, Subpart F, and covered provisions of the work contract shall be enforced in accordance with these regulations.

(b) Definition of agricultural labor or services of a temporary or seasonal nature. For the purposes of this part, agricultural labor or services of a temporary or seasonal nature means the following:

(1) Agricultural labor or services, pursuant to sec. 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), is defined as:

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

(ii) Agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f) (Work performed by H-2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the

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provisions of the FLSA as provided therein, including the overtime provisions in sec. 7(a) at 29 U.S.C. 207(a).;

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

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm where no H-2B workers are employed to perform the same work at the same establishment; or

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

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

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

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

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

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

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

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

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(3) The provisions of paragraphs (b)(2) (D)(1) and (2) of this section do not apply to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

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

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

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

(iii) Agricultural commodity. For purposes of paragraph (b)(1)(ii) of this section, agricultural commodity includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as

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processed by the original producer of the crude gum (oleoresin) from which derived. Gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine. See 12 U.S.C. 1141j(g) (sec. 15(g) of the Agricultural Marketing Act, as amended), and 7 U.S.C. 92.

(3) Of a temporary or seasonal nature

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

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

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

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

(C) On a seasonal or other temporary basis does not include

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(1) The employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis; or

(2) The employment of any worker who is living at his or her permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his or her employer and is not primarily employed to do field work.

(iii) Temporary. For the purposes of this part, the definition of temporary in paragraph (b)(3) of this section refers to any job opportunity covered by this part where the employer needs a worker for a position for a limited period of time, including, but not limited, to a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to 20 CFR 655.110.

Subpart B—Enforcement of Work Contracts

§ 501.15 Enforcement.

The investigation, inspections and law enforcement functions to carry out the provisions of sec. 218 of the INA, as provided in these regulations for enforcement by the WHD, pertain to the employment of any H-2A worker and any other U.S. worker hired in corresponding employment by an H-2A employer. Such enforcement includes work contract provisions as defined in § 501.10(a). The work contract also includes those employment benefits which are required to be stated in the job offer, as prescribed in 20 CFR 655.104.

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§ 501.16 Sanctions and remedies -- General.

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

(a) Institute appropriate administrative proceedings, including: the recovery of unpaid wages, including wages owed to U.S. workers as a result of a layoff or displacement prohibited by these rules (either directly from the employer, a successor in interest, or in the case of an H-2ALC also by claim against any surety who issued a bond to the H-2ALC); the enforcement of covered provisions of the work contract as set forth in 29 CFR 501.10(a); the assessment of a civil money penalty; reinstatement; or the recommendation of debarment for up to 3 years.

(b) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including the withholding of unpaid wages and/or reinstatement, to restrain violation of the H-2A provisions of the INA, 20 CFR part 655, Subpart B, or these regulations by any person.

(c) Petition any appropriate District Court of the U.S. for specific performance of covered contractual obligations.

§ 501.17 Concurrent actions.

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

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§ 501.18 Representation of the Secretary.

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

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

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation of the work contract as set forth in § 501.10(a) of these regulations.

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

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

(2) The number of H-2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation or violations;

(3) The gravity of the violation or violations;

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

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

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

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

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed (with each failure to pay a worker properly or to honor the terms or conditions of a worker's employment that is required by sec. 218 of the INA, 20 CFR 655, Subpart B, or these regulations constituting a separate violation), with the following exceptions:

(1) For a willful failure to meet a covered condition of the work contract, or for willful discrimination, the civil money penalty shall not exceed $5,000 for each such violation committed (with each willful failure to honor the terms or conditions of a worker's employment that are required by sec. 218 of the INA, 20 CFR 655, Subpart B, or these regulations constituting a separate violation);

(2) For a violation of a housing or transportation safety and health provision of the work contract that proximately causes the death or serious injury of any worker, the civil money penalty shall not exceed $25,000 per worker, unless the violation is a repeat or willful violation, in which case the penalty shall not exceed $50,000 per worker, or unless the employer failed, after notification, to cure the specific violation, in which case the penalty shall not exceed $100,000 per worker.

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(3) For purposes of paragraph (c)(2) of this section, the term serious injury means:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed $5,000 per investigation;

(e) For a willful layoff or displacement of any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment within 60 days of the date of need other than for a lawful, job-related reason, except that such layoff shall be permitted where all H-2A workers were laid off first, the civil penalty shall not exceed $10,000 per violation per worker.

§ 501.20 Debarment and revocation

(a) The WHD shall recommend to the Administrator, OFLC the debarment of any employer and any successor in interest to that employer (or the employer's attorney or agent if they are a responsible party) if the WHD finds that the employer substantially violated a material term or condition of its temporary labor certification for the employment of domestic or nonimmigrant workers.

(b) For purposes of this section, a substantial violation includes:

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(1) A pattern or practice of acts of commission or omission on the part of the employer or the employer's agent which:

(i) Are significantly injurious to the wages, benefits required to be offered under the H-2A program, or working conditions of a significant number of the employer's U.S. or H-2A workers;

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

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

(iv) Reflect the employment of an H-2A worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension;

(2) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

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

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(4) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(c) Procedures for Debarment Recommendation. The WHD will send to the employer a Notice of Recommended Debarment. The Notice of Recommended Debarment must be in writing, must state the reason for the debarment recommendation, including a detailed explanation of the grounds for and the duration of the recommended debarment. The debarment recommendation will be forwarded to the Administrator, OFLC. The Notice of Recommended Debarment shall be issued no later than 2 years after the occurrence of the violation.

(d) The WHD may recommend to the Administrator, OFLC the revocation of a temporary agricultural labor certification if the WHD finds that the employer:

(1) Willfully violated a material term or condition of the approved temporary agricultural labor certification, work contract, or this part, unless otherwise provided under paragraphs (d)(2) through (4) of this section.

(2) Failed, after notification, to cure a substantial violation of the applicable housing standards set out in 20 CFR 655.104(d);

(3) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under sec. 218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(4) Failed to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order Secured by the Secretary under sec.

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218 of the INA, 8 U.S.C. 1188, this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations).

(e) In considering a recommendation made by the WHD to debar an employer or to revoke a temporary agricultural labor certification, the Administrator, OFLC shall treat final agency determinations that the employer has committed a violation as res judicata and shall not reconsider those determinations.

Subpart C—Administrative Proceedings

§ 501.21 Failure to cooperate with investigations

No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.6 and 501.19 of this part, a civil money penalty may be assessed for each failure to cooperate with an investigation, and other appropriate relief may be sought. In addition, the WHD shall report each such occurrence to ETA, and ETA may debar the employer from future certification. The WHD may also recommend to ETA that an existing certification be revoked. The taking of any one action shall not bar the taking of any additional action.

§ 501.22 Civil money penalties--payment and collection.

Where the assessment is directed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty is due within 30 days and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator, WHD by certified check or by money order, made payable to the order of Wage and Hour

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Division, United States Department of Labor. The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

§ 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to impose an assessment of civil money penalties, and which may be applied to the enforcement of covered provisions of the work contract as set forth in § 501.10(a), including the collection of unpaid wages due as a result of any violation of the H-2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the Administrator, WHD decides to assess a civil money penalty or to proceed administratively to enforce covered contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the Administrator, WHD including the amount of any unpaid wages due or actions necessary to fulfill a covered contractual obligation, the amount of any civil money penalty assessment and the reason or reasons therefore.

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

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

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

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in § 501.32.

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

(1) Be typewritten or legibly written;

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

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

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

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

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

(d) The determination shall take effect on the start date identified in the determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

Rules of Practice

§ 501.34 General.

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

§ 501.35 Commencement of proceeding.

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

§ 501.36 Caption of proceeding.

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

In the Matter of _____, Respondent.

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

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the Administrator, WHD, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for

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hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

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

§ 501.38 Notice of docketing.

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

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

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, N.W.,

Washington, D.C. 20210, and one copy on the Attorney representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

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

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

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

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

(3) A waiver of any further procedural steps before the ALJ; and

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

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

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

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

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

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

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

(c) The decision shall be served on all parties and the Administrative Review Board (ARB) in person or by certified mail.

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(d) The decision concerning civil money penalties and/or back wages when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ shall, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition shall be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision concerning civil money penalties and/or back wages within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ shall be deemed the final agency action. If the ARB does not issue a notice accepting a petition for review of the decision concerning the debarment recommendation within 30 days after the receipt of a timely filing of the petition, or if no petition has been received by the ARB within 30 days of the date of the decision, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be inoperative unless and until the ARB issues an order affirming the decision.

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

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§ 501.43 Responsibility of the Office of Administrative Law Judges.

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

§ 501.44 Additional information, if required.

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

(a) The issue or issues raised;

(b) The form in which submissions shall be made (i.e., briefs, oral argument, etc.); and

(c) The time within which such presentation shall be submitted.

§ 501.45 Final decision of the Administrative Review Board.

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

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge, or, where the case has been the subject of administrative review, the ARB.

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§ 501.47 Certification.

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

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

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

Authority: Sections 1-19, 52 Stat. 1060, as amended; 29 U.S.C. 201-219

10. Revise §780.115 to read as follows:

§ 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not agricultural or horticultural commodities, for the purpose of the FLSA. (See § 780.205 regarding production of Christmas trees.) It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within sec. 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see

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§§ 780.200 through 780.209 discussing the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute agriculture. For a discussion of the exemption in sec. 13(b)(28) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter.

11. Revise § 780.201 to read as follows:

§ 780.201 Meaning of forestry or lumbering operations.

The term forestry or lumbering operations refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild Christmas trees is included. (See the related discussion in §§ 780.205 through 780.209 and in part 788 of this chapter which considers the sec. 13(b)(28) exemption for forestry or logging operations in which not more than eight employees are employed.) Wood working as such is not included in forestry or lumbering operations. The manufacture of charcoal under modern methods is neither a forestry nor lumbering operation and cannot be regarded as agriculture.

12. Revise § 780.205 to read as follows:

§ 780.205 Nursery activities generally and Christmas tree production.

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

(1) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees, and shrubs, vines, and flowers;

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

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

(b) Trees produced through the application of extensive agricultural or horticulture techniques to be harvested and sold for seasonal ornamental use as Christmas trees are considered to be agricultural or horticultural commodities. Employees engaged in the application of agricultural and horticultural techniques to produce Christmas trees as ornamental horticultural commodities such as the following are employed in agriculture:

(1) Planting seedlings in a nursery; on-going treatment with fertilizer, herbicides, and pesticides as necessary;

(2) After approximately three years, re-planting in lineout beds;

(3) After two more seasons, lifting and re-planting the small trees in cultivated soil with continued treatment with fertilizers, herbicides, and pesticides as indicated by testing to see if such applications are necessary;

(4) Pruning or shearing yearly;

(5) Harvesting of the tree for seasonal ornamental use, typically within 7 to 10 years of planting.

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(c) Trees to be used as Christmas trees which are gathered in the wild, such as from forests or uncultivated land and not produced through the application of agricultural or horticultural techniques are not agricultural or horticultural commodities for purposes of sec. 3(f).

13. Revise § 780.208 to read as follows:

§ 780.208 Forestry activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. For such operations to fall within sec. 3(f), they must qualify under the second part of the definition dealing with incidental practices. See § 780.201.

PART 788-FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

14. Revise § 788.10 to read as follows:

§ 788.10 Preparing other forestry products.

As used in the exemption, other forestry products means plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns, roots, stems, leaves, Spanish moss, wild fruit, and brush. Christmas trees are only included where they are gathered in the wild from forests or from uncultivated land and not produced through the application of extensive

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agricultural or horticultural techniques. See 29 CFR 780.205 for further discussion. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations that change the natural physical or chemical condition of the products or that amount to extracting (as distinguished from gathering) such as shelling nuts, or that mash berries to obtain juices.

Signed in Washington this 5th day of December, 2008.

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Brent R. Orrell,

Deputy Assistant Secretary, Employment and Training

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Victoria A. Lipnic,

Assistant Secretary, Employment Standards Administration

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Alexander J. Passantino,

Acting Administrator, Wage and Hour Division

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