

§ 655.1302

20 CFR Ch. V (4-1-10 Edition)

§ 655.102(k). The CO will make a determination on the application in accordance with § 655.109.

§ 655.1302 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.

(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 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 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.

(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 re-

ruitment 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 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 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 work-site, 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 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.

(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.

(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.

§ 655.1303 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);