(h) *Electricity and lighting.* (1) Barring unusual circumstances that prevent access, electrical service or generators must be provided.

(2) In areas where it is not feasible to provide electrical service to mobile housing units, lanterns must be provided (e.g., battery operated lights).

(3) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit.

(i) *Bathing, laundry, and hand washing.* (1) Bathing facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per day.

(2) Laundry facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per week.

(3) Alternative bathing and laundry facilities must be available to occupants at all times when water under pressure is unavailable.

(4) Hand washing facilities must be available to all occupants at all times.

(j) *Food storage.* (1) Provisions for mechanical refrigeration of food at a temperature of not more than 45 degrees Fahrenheit must be provided.

(2) When mechanical refrigeration of food is not feasible, the employer must provide another means of keeping food fresh and preventing spoilage (e.g., a butane or propane gas refrigerator).

(k) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation, and stoves or hotplates.

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(l) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, for storing garbage and other refuse.

(2) Provision must be made for collecting refuse, which includes garbage, at least twice a week or more often if necessary for proper disposal in accordance with applicable local, State, or Federal law, whichever is most stringent.

(m) *Insect and rodent control.* Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents, and other vermin.

(n) *Sleeping facilities.* (1) A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement.

(2) Clean and sanitary bedding must be provided for each person.

(3) No more than two deck bunks are permissible.

(o) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable local or State fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Mobile housing units must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the mobile housing.

(p) *Maximum occupancy.* The number of occupants housed in each mobile housing unit must not surpass the occupancy limitations set forth in the manufacturer specifications for the unit.

Subparts C–D [Reserved]

Subpart E—Labor Certification Process for Temporary Employment in the Commonwealth of the Northern Marianas Islands (CW–1 Workers)

SOURCE: 84 FR 12431, Apr. 1, 2019, unless otherwise noted.

§ 655.400 Scope and purpose of this subpart.

(a) *Purpose.* (1) A temporary labor certification (TLC) issued under this subpart reflects a determination by the Secretary of Labor (Secretary), pursuant to 48 U.S.C. 1806(d)(2)(A), that:

(i) There are not sufficient U.S. workers in the Commonwealth who are able, willing, and qualified and who will be available at the time and place needed to perform the services or labor for which an employer desires to hire foreign workers; and

(ii) The employment of the CNMI-Only Transitional Worker visa program (CW–1) nonimmigrant worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(2) This subpart describes the process by which the Department of Labor (Department or DOL) makes such a determination and certifies its determination to the Department of Homeland Security (DHS).

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the employment of foreign workers in the CW–1 nonimmigrant classification, as defined in 48 U.S.C. 1806(d). It also establishes standards and obligations with respect to the terms and conditions of the temporary labor certification (TLC) with which CW–1 employers must comply, as well as the rights and obligations of CW–1 workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the TLC.

§ 655.401 Authority of the agencies, offices, and divisions in the Department of Labor.

The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 48 U.S.C. 1806. Determinations on a *CW–1 Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members, e.g., a Certifying Officer (CO).

§ 655.402 Definition of terms.

For purposes of this subpart:

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

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

(1) Is authorized to act on behalf of the employer for Temporary Labor Certification (TLC) purposes;

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

(3) Is not under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101.

Applicant (or U.S. applicant) means a U.S. worker who is applying for a job opportunity for which an employer has filed a *CW–1 Application for Temporary Employment Certification*.

Application for Prevailing Wage Determination means the Office of Management and Budget (OMB)-approved Form ETA–9141C (or successor form) and the appropriate appendices, submitted by an employer to secure a prevailing wage determination (PWD) from the National Prevailing Wage Center (NPWC).

CW–1 Application for Temporary Employment Certification means the OMB-approved Form ETA–9142C (or successor form) and the appropriate appendices, a valid wage determination, as required by § 655.410, and all supporting documentation submitted by an employer to secure a TLC determination from the OFLC Administrator.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia. Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS

under 8 CFR 1003.101 or 292.3, may represent an employer under this subpart.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of ALJs appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of BALCA.

Certifying Officer or CO means the person who makes determination on a *CW–1 Application for Temporary Employment Certification* filed under the CW–1 program. The OFLC Administrator is the national CO. Other COs may also be designated by the OFLC Administrator to make the determinations required under this subpart, including making PWDs.

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

CNMI Department of Labor means the executive Department of the Commonwealth Government that administers employment and job training activities for employers and U.S. workers in the Commonwealth.

Commonwealth or CNMI means the Commonwealth of the Northern Mariana Islands.

Corresponding employment means the employment of U.S. workers who are not CW–1 workers by an employer who has an approved *CW–1 Application for Temporary Employment Certification* in any work included in the approved job offer, or in any work performed by the CW–1 workers. To qualify as corresponding employment the work must be performed during the validity period of the *CW–1 Application for Temporary Employment Certification* and approved job offer, including any approved extension thereof.

CW–1 Petition means the U.S. Citizenship and Immigration Services (USCIS) Form I–129CW, *Petition for a CNMI–Only Nonimmigrant Transitional Worker,* a successor form, other form, or electronic equivalent, any supplemental information requested by USCIS, and additional evidence as may be prescribed or requested by USCIS.

CW–1 worker means any foreign worker who is lawfully present in the Commonwealth and authorized by DHS to perform temporary labor or services under 48 U.S.C. 1806(d).

Date of need means the first date the employer requires services of the CW–1 workers as indicated on the *CW–1 Application for Temporary Employment Certification*.

Department of Homeland Security or DHS means the Federal Department having jurisdiction over certain immigration-related functions, acting through its component agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, 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. The terms employee and worker are used interchangeably in this subpart.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

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

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to a CW–1 worker or a worker in corresponding employment, as defined under the common law of agency; and

(3) Possesses, for purposes of filing a *CW–1 Application for Temporary Employment Certification,* a valid Federal Employer Identification Number (FEIN).

Employer-client means an employer that has entered into an agreement

with a job contractor and that is not an affiliate, branch, or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer-client on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

Employment and Training Administration or ETA means the agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under for the administration and adjudication of a *CW–1 Application for Temporary Employment Certification* and related functions.

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

Full-time means 35 or more hours of work per week.

Governor means the Governor of the Commonwealth of the Northern Mariana Islands.

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers that are not an affiliate, branch, or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying, and releasing the workers.

Job offer means the offer made by an employer or potential employer of CW–1 workers to both U.S. and CW–1 workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means full-time employment at a place in the Commonwealth to which U.S. workers can be referred.

Joint employment means that where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker.

Layoff means any involuntary separation of one or more U.S. employees other than for cause.

Long-term worker means an alien who was admitted to the CNMI as a CW–1 nonimmigrant during fiscal year (FY) 2015, and who was granted CW–1 nonimmigrant status during each of FYs 2016 through 2018, as defined by DHS.

National Prevailing Wage Center or NPWC means that office within OFLC from which employers, agents, or attorneys who wish to file a *CW–1 Application for Temporary Employment Certification* receive a PWD.

NPWC Director means the OFLC official to whom the OFLC Administrator has delegated authority to carry out certain NPWC operations and functions.

National Processing Center (NPC) means the office within OFLC in which the COs operate, and which are charged with the adjudication of *CW–1 Applications for Temporary Employment Certification*.

NPC Director means the OFLC official to whom the OFLC Administrator has delegated authority for purposes of certain NPC operations and functions.

Occupational employment statistics (OES) survey means the program under the jurisdiction of the Bureau of Labor Statistics (BLS) that reports annual wage estimates, including those for Guam, based on standard occupational classifications (SOCs).

Offered wage means the wage offered by an employer in the *CW–1 Application for Temporary Employment Certification* and job offer. The offered wage must equal or exceed the highest of the prevailing wage, or the Federal minimum wage, or the Commonwealth minimum wage.

Office of Foreign Labor Certification or OFLC means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities, including determinations related to an employer's request for an *Application for Prevailing Wage Determination* or *CW–1 Application for Temporary Employment Certification*.

Place of employment means the worksite (or physical location) where work under the *CW–1 Application for Temporary Employment Certification* and job offer actually is performed by the CW–

1 workers and workers in corresponding employment.

Prevailing wage (PW) means the official wage issued by the NPWC on the Form ETA 9141C, *Application for Prevailing Wage Determination for the CW–1 Program*, or successor form. At least that amount must be paid to all CW–1 workers and U.S. workers in corresponding employment.

Prevailing wage determination (PWD) means the prevailing wage issued by the OFLC NPWC on the Form ETA–9141C, *Application for Prevailing Wage Determination for the CW–1 Program*, or successor form. The PWD is used in support of the *CW–1 Application for Temporary Employment Certification*.

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

Secretary of Homeland Security means the chief official of DHS or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest means an employer, agent, or attorney that is controlling and carrying on the business of a previous employer.

(1) Where an employer, agent, or attorney has violated 48 U.S.C. 1806 or the regulations in this subpart and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, and all the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

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

(viii) Similarity of products and services; and

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

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

Temporary labor certification or TLC means the certification made by the OFLC Administrator, based on the *CW–1 Application for Temporary Employment Certification*, job offer, and all supporting documentation, with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as a CW–1 worker.

United States means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth.

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

(1) A citizen or national of the United States;

(2) An alien lawfully admitted for permanent residence; or

(3) A citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau, who is eligible for nonimmigrant admission and is employment-authorized under the Compacts of Free Association between the United States and those nations.

U.S. Citizenship and Immigration Services or USCIS means the Federal agency within DHS that makes the determination whether to grant petitions filed by employers seeking CW–1 workers to perform temporary work in the Commonwealth.

Wages mean all forms of cash remuneration to a worker by an employer in payment for labor or services.

Work contract means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, places of employment, and other benefits, including all assurances and obligations required to be included under this subpart. The contract between the employer and the worker may be in the form of a separate written document containing the advertised terms and conditions of the job offer. 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 required terms of the certified *CW–1 Application for Temporary Employment Certification* will be the work contract.

§ 655.403 Persons and entities authorized to file.

(a) *Persons authorized to file.* In addition to the employer, a request for a PWD or TLC under this subpart may be filed by an attorney or agent, as defined in § 655.402.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *CW–1 Application for Temporary Employment Certification* and all documentation submitted to the Department.

§ 655.404 Requirements for agents.

An agent filing a *CW–1 Application for Temporary Employment Certification* on behalf of an employer must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer to the NPC at the time of filing the application.

§§ 655.405–655.409 [Reserved]

PREFILING PROCEDURES

§ 655.410 Offered wage rate and determination of prevailing wage.

(a) *Offered wage.* (1) The employer must advertise the position to all potential workers at a wage that is at least the highest of the following:

(i) The prevailing wage for the job opportunity obtained from the NPWC;

(ii) The Federal minimum wage; or

(iii) The Commonwealth minimum wage.

(2) The employer must offer and pay at least the wage provided in paragraph (a)(1) of this section to both its CW–1 workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal or Commonwealth law.

(b) *Determinations*—(1) *Methods.* The OFLC Administrator will determine prevailing wages in the Commonwealth and occupational classification as follows:

(i) If the mean hourly wage for the occupational classification in the Commonwealth is reported by the Governor, annually, and meets the requirements set forth in paragraph (e) of this section, as determined by the OFLC Administrator, that wage must be the prevailing wage for the occupational classification;

(ii) If the OFLC Administrator has not approved a survey, as reported by the Governor, for the occupational classification under paragraph (b)(1)(i) of this section, and the BLS OES survey reports a mean wage paid to workers in the SOC in Guam, the prevailing wage must be the mean wage paid to workers in the SOC in Guam from the BLS OES survey; and

(iii) If the OFLC Administrator has not approved a survey, as reported by the Governor, for the occupational classification under paragraph (b)(1)(i) of this section and the BLS OES survey does not report the mean wage paid to workers in the SOC in Guam under paragraph (b)(1)(ii) of this section, the prevailing wage must be the mean wage paid to workers in the SOC in the United States from the BLS OES Survey, adjusted based on the ratio of the mean wage paid to workers in all SOCs in Guam compared to the mean wage paid to workers in all SOCs in the United States from the BLS OES survey.

(2) *Multiple occupations.* If the job duties on the *Application for Prevailing Wage Determination* do not fall within a single occupational classification, the

NPC will determine the applicable prevailing wage based on the highest prevailing wage for all applicable occupational classifications.

(c) *Request for PWD*—(1) *Filing requirement.* An employer must electronically request and receive a PWD from the NPWC then electronically file the *CW–1 Application for Temporary Employment Certification* with the NPC.

(2) *Location and methods of filing*—(i) *Electronic filing.* The employer must file the *Application for Prevailing Wage Determination* and all required supporting documentation with the NPWC using the electronic method(s) designated by the OFLC Administrator. The NPWC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits with the application a statement of the need to file by mail.

(ii) *Filing by mail.* Employers that are unable to file electronically, either due to lack of internet access or physical disability precluding electronic filing, may file the application by mail. The mailed application must include a statement indicating the need to file by mail. The NPWC will return, without review, mailed applications that do not contain such a statement. OFLC will publish the address for mailed applications in the instructions to Form ETA–9141C.

(d) *NPWC action.* The NPWC will provide the PWD, indicate the source of the PWD, and return the *Application for Prevailing Wage Determination* with its endorsement to the employer.

(e) *Wage survey reported by the Governor.* The OFLC Administrator will issue a prevailing wage for the occupational classification in the Commonwealth based on a wage survey reported by the Governor if all of the following requirements are met:

(1) The survey was independently conducted and issued by the Governor of the Commonwealth, including through any Commonwealth agency, Commonwealth college, or Commonwealth university;

(2) The survey provides the arithmetic mean of the wages of workers in the occupational classification in the Commonwealth;

(3) The surveyor either made a reasonable, good faith attempt to contact all employers in the Commonwealth employing workers in the occupation or conducted a randomized sampling of such employers;

(4) The survey includes the wages of at least 30 workers in the Commonwealth;

(5) The survey includes the wages of workers in the Commonwealth employed by at least three employers;

(6) The survey was conducted across industries that employ workers in the occupational classification;

(7) The wage reported in the survey includes all types of pay;

(8) The survey is based on wages paid to workers in the occupational classification not more than 12 months before the date the survey is submitted to the OFLC Administrator for consideration; and

(9) The Governor submits the survey to the OFLC Administrator, with specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey.

(f) *Review of wage survey reported by the Governor.* (1) If the OFLC Administrator finds the wage reported for any occupational classification not to be acceptable, the OFLC Administrator must inform the Governor in writing of the reasons the wage reported in the survey was not accepted.

(2) The Governor, after receiving notification from the OFLC Administrator that the wage reported in the survey it provided for consideration is not acceptable, may submit corrected wage data or conduct a new wage survey and submit revised wage data to the OFLC Administrator for consideration under this section.

(g) *Validity period.* The NPWC will specify the validity period of the prevailing wage, which in no event may be more than 365 days or fewer than 90 days from the date that the determination is issued.

(h) *Retention of documentation.* The employer must retain the PWD for 3 years from the date of issuance if not

used in support of a TLC application or if it is used in support of a TLC application that is denied, and 3 years from the date on which the certification of the *CW–1 Application for Temporary Employment Certification* expires, whichever is later. The employer must submit the PWD to a CO if requested by a Notice of Deficiency (NOD), described in § 655.431, or audit, as described in § 655.470, or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

§ 655.411 Review of prevailing wage determinations.

(a) *Request for review of PWDs.* Any employer desiring review of a PWD must make a written request for such review to the NPWC Director. The written request must be received by the NPWC Director within 7 business days from the date the PWD was issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) *NPWC review.* Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review must issue a Final Determination letter; that letter may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.

(c) *Request for review by BALCA.* Any employer desiring review of the NPWC Director's decision on a PWD must make a written request to BALCA for review of the determination, with a copy simultaneously sent to the NPWC Director who issued the final determination. The written request must be received by BALCA within 10 business days from the date the Final Determination letter was issued.

(1) Upon receipt of a request for BALCA review, the NPWC will prepare an Appeal File and submit it to BALCA.

(2) The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD by the NPWC Director was based.

(3) BALCA will handle appeals in accordance with § 655.461.

§§ 655.412–655.419 [Reserved]

CW–1 Application for Temporary Employment Certification Filing Procedures

§ 655.420 Application filing requirements.

An employer seeking to hire CW–1 workers must electronically file a *CW–1 Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. This section provides the procedures an employer must follow when filing.

(a) *What to file.* An employer seeking a TLC must file a completed *CW–1 Application for Temporary Employment Certification* (Form ETA–9142C and the appropriate appendices and valid PWD), and all supporting documentation and information required at the time of filing under this subpart. Applications that are incomplete at the time of submission will be returned to the employer without review.

(b) *Timeliness.* (1) Except as provided in paragraph (b)(2) of this section, a completed *CW–1 Application for Temporary Employment Certification* must be filed no more than 120 calendar days before the employer's date of need.

(2) If the employer is seeking a TLC to extend the employment of a CW–1 worker, a completed *CW–1 Application for Temporary Employment Certification* must be filed no more than 180 calendar days before the date on which the CW–1 status expires.

(c) *Location and methods of filing*—(1) *Electronic filing.* The employer must file the *CW–1 Application for Temporary Employment Certification* and all required supporting documentation with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return, without review, any application submitted using a method other than the designated electronic method(s), unless the employer submits with the application a statement of the need to file by

mail or indicates that it already submitted such a statement to NPWC during the same fiscal year.

(2) *Filing by mail.* Employers that are unable to file electronically, either due to lack of internet access or physical disability precluding electronic filing, may file the application by mail. The mailed application must include a statement indicating the need to file by mail as indicated above. The NPC will return, without review, mailed applications that do not contain such a statement. OFLC will publish the address for mailed applications in the instructions to Form ETA–9142C.

(d) *Original signature and acceptance of electronic signatures.* An electronically filed *CW–1 Application for Temporary Employment Certification* must contain an electronic (scanned) copy of 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) or, in the alternative, use a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *CW–1 Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Requests for multiple positions.* An employer may request certification of more than one position on its *CW–1 Application for Temporary Employment Certification* as long as all CW–1 workers will perform the same services or labor under the same terms and conditions, in the same occupation, during the same period of employment, and at a location (or locations) covered by the application.

(f) *Scope of application.* (1) A *CW–1 Application for Temporary Employment Certification* must be limited to places of employment within the Commonwealth.

(2) In a single application filing, an association or other organization of employers is not permitted to file a *CW–1 Application for Temporary Employment Certification* on behalf of more than one employer-member under the CW–1 program.

(g) *Period of employment.* (1) Except as provided in paragraph (g)(2) of this section, the period of need identified in the *CW–1 Application for Temporary Employment Certification* must not exceed 1 year.

(2) If the employer is seeking TLC to employ a long-term CW–1 worker, the period of need identified in the *CW–1 Application for Temporary Employment Certification* must not exceed 3 years.

(h) *Return of applications based on USCIS CW–1 cap notice.* (1) Except as provided in paragraph (h)(3) of this section, if USCIS issues a public notice stating that it has received a sufficient number of CW–1 petitions to meet the statutory numerical limit on the total number of foreign nationals who may be issued a CW–1 permit or otherwise granted CW–1 status for the fiscal year, the OFLC Administrator must return without review any *CW–1 Applications for Temporary Employment Certification* with dates of need in that fiscal year received on or after the date that the OFLC Administrator provides the notice in paragraph (h)(2) of this section.

(2) The OFLC Administrator will announce the return of future *CW–1 Applications for Temporary Employment Certification* with dates of need in the fiscal year for which the cap is met with a notice on the OFLC's website. This notice will be effective on the date of its publication on the OFLC's website and will remain valid for the fiscal year unless:

(i) USCIS issues a public notice stating additional CW–1 permits are available for the fiscal year; and

(ii) The OFLC Administrator publishes a new notice announcing that additional TLCs may be granted in the fiscal year.

(3) After the notice that OFLC will return future *CW–1 Applications for Temporary Employment Certification*, the OFLC Administrator will continue to process *CW–1 Applications for Temporary Employment Certification* filed before the effective date of the suspension notice and will continue to permit the filing of *CW–1 Applications for Temporary Employment Certification* by employers who identify in the *CW–1 Application for Temporary Employment Certification* that the employment of all CW–1 workers employed under the *CW–1 Application for Temporary Employment Certification*

will be exempt from the statutory numerical limit on the total number of foreign nationals who may be issued a CW–1 permit or otherwise granted CW–1 status.

§ 655.421 Job contractor filing requirements.

(a) A job contractor may submit a *CW–1 Application for Temporary Employment Certification* on behalf of itself and that employer-client. By doing so, the Department deems the job contractor a joint employer.

(b) A job contractor must have separate contracts with each different employer-client. A single contract or agreement may support only one *CW–1 Application for Temporary Employment Certification* for each employer-client job opportunity in the Commonwealth.

(c) Either the job contractor or its employer-client may submit an *Application for Prevailing Wage Determination* describing the job opportunity to the NPWC. However, each of the joint employers is separately responsible for ensuring that the wage offer(s) listed in the *CW–1 Application for Temporary Employment Certification* and related recruitment at least equals the prevailing wage obtained from the NPWC, or the Federal or Commonwealth minimum wage, whichever is highest, and that all other wage obligations are met.

(d)(1) A job contractor that is filing as a joint employer with its employer-client must submit to the NPC a completed *CW–1 Application for Temporary Employment Certification* that clearly identifies the joint employers (the job contractor and its employer-client) and the employment relationship (including the places of employment), in accordance with instructions provided by the OFLC Administrator. The *CW–1 Application for Temporary Employment Certification* must bear the original signature of the job contractor and the employer-client or use a verifiable electronic signature method, consistent with the requirements set forth at § 655.420(d), and be accompanied by the contract or agreement establishing the employers' relationships related to the workers sought.

(2) By signing the *CW–1 Application for Temporary Employment Certification*, each employer independently attests to the conditions of employment required of an employer participating in the CW–1 program and assumes full responsibility for the accuracy of the representations made in the application and for all of the responsibilities of an employer in the CW–1 program.

(e)(1) Either the job contractor or its employer-client may place the required advertisements and conduct recruitment as described in §§ 655.442 through 655.445. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the NPC meeting the requirement set forth in § 655.446.

(2) All recruitment conducted by the joint employers must satisfy the job offer assurance and advertising content requirements identified in § 655.441. Additionally, in order to fully inform applicants of the job opportunity and avoid potential confusion inherent in a job opportunity involving two employers, joint employer recruitment must clearly identify both employers (the job contractor and its employer-client) by name and must clearly identify the place(s) of employment where workers will perform labor or services.

(3)(i) Provided that all of the employer-clients' job opportunities are in the same occupation located in the Commonwealth and have the same requirements and terms and conditions of employment, including dates of employment, a job contractor may combine more than one of its joint employer employer-clients' job opportunities in a single advertisement. Each advertisement must fully inform potential workers of the job opportunity available with each employer-client and otherwise satisfy the job offer assurances and advertising content requirements identified in § 655.441. Such a shared advertisement must clearly identify the job contractor by name, the joint employment relationship, and the number of workers sought for each job opportunity, identified by employer-client names and locations (e.g., five openings with Employer-Client A (place of employment location), three openings with Employer-Client B (place of employment location)).

(ii) In addition, the advertisement must contain the following statement: ''Applicants may apply for any or all of the jobs listed. When applying, please identify the job(s) (by company and work location) you are applying to for the entire period of employment specified.'' If an applicant fails to identify one or more specific work location(s), that applicant is presumed to have applied to all work locations listed in the advertisement.

(f) If a TLC for the joint employers is granted, the Final Determination certifying the *CW–1 Application for Temporary Employment Certification* will be sent to both the job contractor and employer-client.

§ 655.422 Emergency situations.

(a) *Waiver of PWD requirement prior to application filing.* The CO may waive the requirement to obtain a PWD, as required under § 655.410(c), prior to filing a *CW–1 Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the labor market and to make a final determination as required by § 655.450. The requirement to obtain a PWD prior to filing the *CW–1 Application for Temporary Employment Certification,* under § 655.410(c), is the only provision of this subpart which will be waived under these emergency situation procedures.

(b) *Employer requirements.* The employer requesting a waiver of the requirement to obtain a PWD must submit to the NPC a completed *Application for Prevailing Wage Determination,* a completed *CW–1 Application for Temporary Employment Certification,* and a statement justifying the waiver request. The employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to an Act of God, or similar unforeseeable man-made catastrophic events (such as a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control. Issues related to the CW–1 visa cap are not good and substantial cause for a waiver of the filing requirements. Further, a denial of a previously submitted *CW–1 Application for Temporary Employment Certification* or CW–1 petition with USCIS does not constitute good and substantial cause necessitating a waiver under this section.

(c) *Processing of emergency applications.* The CO will process the emergency *CW–1 Application for Temporary Employment Certification,* including the *Application for Prevailing Wage Determination for the CW–1 Program,* in a manner consistent with the provisions of this subpart and make a determination in accordance with § 655.450. The CO will notify the employer, if the application cannot be processed because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or the filing does not meet the requirements set forth in this subpart.

§ 655.423 Assurances and obligations of CW–1 employers.

An employer employing CW–1 workers and/or workers in corresponding employment under a *CW–1 Application for Temporary Employment Certification* has agreed as part of the *CW–1 Application for Temporary Employment Certification* that it will abide by the following conditions with respect to its CW–1 workers and any workers in corresponding employment:

(a) *Rate of pay.* (1) The offered wage in the work contract equals or exceeds the highest of the prevailing wage, Federal minimum wage, or Commonwealth minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *CW–1 Application for Temporary Employment Certification* granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the work contract and the employer

must demonstrate that they are normal and usual for non-CW–1 employers for the same occupation in the Commonwealth.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece-rate is no less than the normal rate paid by non-CW–1 employers to workers performing the same activity in the Commonwealth. The average hourly piece-rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece-rate basis and at the end of the workweek the piece-rate does not result in average hourly piece-rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or in negotiable instrument payable at par. The payment must be made finally and unconditionally and ''free and clear.'' The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The work contract must specify all deductions not required by law that the employer will make from the worker's pay; any such deductions not disclosed in the work contract are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker ''kick backs'' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent, or recruiter, including any agents or employees of these entities or any affiliated person, derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *CW–1 Application for Temporary Employment Certification*.

(d) *Job opportunity is full time.* The job opportunity is a full-time position, consistent with §655.402, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—7 consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement must be listed in the work contract and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-CW–1 employers in the same occupation and in the Commonwealth. The employer's job qualifications and requirements imposed on U.S. workers must not be less favorable than the qualifications and requirements that the employer is imposing or will impose on CW–1 workers. A qualification

means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment that a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement.

(f) *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 of employment specified in the work contract, 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. See the exception in paragraph (f)(1)(iv) of this section.

(i) For purposes of this paragraph (f), a workday means the number of hours in a workday as stated in the work contract. 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 that has been approved by the CO.

(ii) In the event the worker begins working later than the start date of need specified in the application, 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.

(iii) 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 (10 weeks × 48 hours/week = 480 hours × 75 percent = 360). If a Federal holiday occurred during the 10-week period, the 8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks × 48 hours/week = 480 hours − 8 hours (Federal holiday) = 472 hours × 75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, the worker will not be required to work more than the number of hours specified in the work contract for a workday but all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or CW–1 worker less employment than that required under this paragraph (f)(1)(iv), 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. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays of the work contract period if each workday did not consist of a full number of hours of work time as specified in the work contract.

(2) *Guarantee for piece-rate paid worker*. If the worker is paid on a piece-rate basis, the employer must use the worker's average hourly piece-rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee in accordance with paragraph (f)(1) of this section.

(3) *Failure to work*. Any hours the worker fails to work, up to a maximum of the number of hours specified in the work contract for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the

payroll records in accordance with this subpart.

(g) *Impossibility of fulfillment.* 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, or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the work contract impossible, the employer may terminate the work contract with the approval of the CO. In the event of such termination, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the work contract or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the CW–1 worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with immigration laws, as applicable. If a transfer is not affected, the employer must 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 CW–1 employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the work contract the frequency with which the worker will be paid, which must be at least every 2 weeks. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: Records showing the nature, amount, and location(s) 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 in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; 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 or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

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

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

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

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

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

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address, and FEIN.

(j) *Transportation and visa fees*—(1)(i) *Transportation to the place of employment.* The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the United States, including another part of the Commonwealth, or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the work contract (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by

the worker. When it is the prevailing practice of non-CW–1 employers in the occupation and in the Commonwealth to do so or when the employer extends such benefits to similarly situated CW–1 workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's place of employment from such a distance that the worker is not reasonably able to return to their residence each day. 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 must be at least the amount permitted in § 655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: The costs of transportation and subsistence incurred by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the Fair Labor Standards Act applies independently of the CW–1 requirements and imposes obligations on employers regarding payment of wages.

(ii) *Transportation from the place of employment.* If the worker completes the period of employment covered by the work contract (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent CW–1 employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the work contract to provide or pay for the worker's transportation from the former employer's place of employment to such subsequent employer's place of employment, the former employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the work contract to provide or pay for the worker's transportation from the former employer's place of employment to such subsequent employer's place of employment, the subsequent employer must provide or pay for such expenses.

(iii) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable Federal and Commonwealth laws and regulations including, but not limited to, vehicle safety standards, driver licensure requirements, and vehicle insurance coverage.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the CW–1 worker, but not for passport expenses or other charges primarily for the benefit of the worker.

(k) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(l) *Disclosure of work contract.* The employer must provide to a CW–1 worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract including any subsequent approved modifications. For a CW–1 worker changing employment from a CW–1 employer to a subsequent CW–1 employer, the copy must be provided no later than the time an offer of employment is made by the subsequent CW–1 employer. The disclosure of all documents required by this paragraph (l) must be provided in a language understood by the worker. At a minimum, the work contract must contain all of the provisions required to be included by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the certified *CW–1 Application for Temporary Employment Certification* will be the work contract.

(m) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has, related to the CW–1 program:

(1) Filed a complaint under or related to any applicable Federal or Commonwealth laws and regulations;

(2) Instituted or caused to be instituted any proceeding under or related to any applicable Federal or Commonwealth laws and regulations;

(3) Testified or is about to testify in any proceeding under or related to any applicable Federal or Commonwealth laws and regulations;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to any applicable Federal or Commonwealth laws and regulations; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by any applicable Federal or Commonwealth laws and regulations.

(n) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining CW–1 labor certification or employment, including payment of the employer's attorney or agent fees, application and *CW–1 Petition* fees, recruitment costs, or any fees attributed to obtaining the approved *CW–1 Application for Temporary Employment Certification.* For purposes of this paragraph (n), 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. All wages must be paid free and clear. This paragraph (n) does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(o) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of CW–1 workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: ''Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees.''

(p) *Prohibition against preferential treatment of foreign workers.* 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 CW–1 workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's CW–1 workers. This does not relieve the employer from providing to CW–1 workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(q) *Nondiscriminatory hiring practices.* The job opportunity is open to any qualified U.S. worker as defined in § 655.402, regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 655.456.

(r) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in §§ 655.442 through 655.445.

(s) *No strike or lockout.* There is no strike or lockout at any of the employer's place(s) of employment within the Commonwealth for which the employer is requesting CW–1 certification at the time the *CW–1 Application for Temporary Employment Certification* is filed.

(t) *No recent or future layoffs.* 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 *CW–1 Application for Temporary Employment Certification* in the Commonwealth within the period beginning 270 calendar days before the date of need and through the end of the TLC's period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all CW–1 workers are laid off before any U.S. worker in corresponding employment.

(u) *No work performed outside the Commonwealth and job opportunity.* The employer must not place any CW–1 workers employed under the approved *CW–1 Application for Temporary Employment Certification* outside the Commonwealth or in a job opportunity not listed on the approved *CW–1 Application for Temporary Employment Certification.*

(v) *Abandonment/termination of employment.* Upon the separation from employment of any worker employed under the *CW–1 Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment period specified in the *CW–1 Application for Temporary Employment Certification,* the employer must notify OFLC in writing of the separation from employment not later than 2 working days after such separation is discovered by the employer. An abandonment or abscondment is 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. If the separation is due to the voluntary abandonment of employment by the CW–1 worker or worker in corresponding employment or is terminated for cause, and the employer provides appropriate notification specified under this paragraph (v), the employer will not be responsible for providing or paying for the subsequent transportation and subsistence costs of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section.

(w) *Compliance with applicable laws.* During the period of employment specified on the *CW–1 Application for Temporary Employment Certification,* the employer must comply with all applicable Federal and Commonwealth employment-related laws and regulations, including health and safety laws. This includes compliance with 18 U.S.C. 1592(a), with respect to prohibitions against employers, the employer's agents, or their attorneys knowingly holding, destroying or confiscating workers' passports, visas, or other immigration documents.

§§ 655.424–655.429 [Reserved]

Processing of an CW–1 Application for Temporary Employment Certification

§ 655.430 Review of applications.

(a) *NPC review.* The CO will review the *CW–1 Application for Temporary Employment Certification* for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart, and make a decision as to whether to issue a NOD under § 655.431 or a Notice of Acceptance (NOA) under § 655.433.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO to an employer requiring a response will be sent electronically or via first class mail using the address, including electronic mail address, provided on the *CW–1 Application for Temporary Employment Certification.* The employer's response to such a notice or request must be filed electronically or via first class mail. The employer's response must be filed electronically or postmarked by the date due or the next business day if the due date falls on a Saturday, Sunday, or Federal Holiday.

(c) *Information dissemination.* OFLC may forward, to DHS or any other Federal Government Official performing an investigation, inspection, audit, or law enforcement function, information OFLC receives in the course of processing a request for a *CW–1 Application for Temporary Employment Certification* or of administering program integrity measures such as audits.

§ 655.431 Notice of Deficiency.

(a) *Notification.* If the CO determines the *CW–1 Application for Temporary Employment Certification* contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will issue a NOD to the employer and, if applicable, the employer's attorney or agent.

(b) *Notice content.* The NOD will:

(1) State the reason(s) the *CW–1 Application for Temporary Employment Certification* fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *CW–1 Application for Temporary Employment Certification* within 10 business days from the date of the NOD, and state the modification that is required for the CO to issue a NOA; and

(3) State that if the employer does not comply with the requirements of § 655.432 for submitting a modified application, the CO will deny the *CW–1 Application for Temporary Employment Certification.*

§ 655.432 Submission of modified applications.

(a) *Review of a modified CW–1 Application for Temporary Employment Certification.* Upon receipt of a response to a NOD, including any modifications, the CO will review the response. The CO may issue one or more additional NODs before issuing a decision. The employer's failure to comply with a NOD, including not responding in a timely manner or not providing all required documentation, will result in a denial of the *CW–1 Application for Temporary Employment Certification.*

(b) *Acceptance of a modified CW–1 Application for Temporary Employment Certification.* If the CO accepts the modification(s) to the *CW–1 Application for Temporary Employment Certification,* the CO will issue a NOA to the employer and, if applicable, the employer's attorney or agent.

(c) *Denial of modified CW–1 Application for Temporary Employment Certification.* If the modified *CW–1 Application for Temporary Employment Certification* does not cure the deficiencies cited in the NOD(s) or otherwise fails to satisfy the criteria required for certification, the CO will, at its discretion, either send a second NOD or deny the *CW–1 Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.453.

(d) *Appeal from denial of modified CW–1 Application for Temporary Employment Certification.* The procedures for appealing a denial of a modified *CW–1 Application for Temporary Employment Certification* are the same as for appealing the denial of a nonmodified *CW–1 Application for Temporary Employment Certification,* outlined in § 655.461.

(e) *Post acceptance modifications.* Notwithstanding the decision to accept the *CW–1 Application for Temporary Employment Certification,* the CO may require modifications to the *CW–1 Application for Temporary Employment Certification* at any time before the final determination to grant or deny the *CW–1 Application for Temporary Employment Certification* if the CO determines that the job offer does not contain the minimum benefits, wages, and working conditions set forth in § 655.441. The employer must make such modifications, or the application will be denied under § 655.453. The employer must provide all workers recruited in connection with the job opportunity in the *CW–1 Application for Temporary Employment Certification* with a copy of the modified *CW–1 Application for Temporary Employment Certification,* as approved by the CO, no later than the date work commences.

§ 655.433 Notice of Acceptance.

(a) *Notification.* When the CO determines the *CW–1 Application for Temporary Employment Certification* contains no errors or inaccuracies, and meets the requirements set forth in this subpart, the CO will issue a NOA to the employer and, if applicable, the employer's attorney or agent.

(b) *Notice content.* The NOA must:

(1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.442 through 655.444, including any additional recruitment ordered by the CO under § 655.445;

(2) State that such employer-conducted recruitment must begin within 14 calendar days from the date the NOA is issued, consistent with § 655.440(b);

(3) Require the employer to submit a report of its recruitment efforts, by the date required by the CO in the NOA, as specified in § 655.446; and

(4) Advise the employer that failure to submit a complete recruitment report by the deadline will lead to denial of the application.

§ 655.434 Amendments to an application.

(a) *Increases in number of workers.* The *CW–1 Application for Temporary Employment Certification* may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial *CW–1 Application for Temporary Employment Certification* 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 employer demonstrates that the need for additional workers could not have been foreseen and is wholly outside of the employer's control. All requests to increase the number of workers must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(b) *Minor changes to the period of employment.* The *CW–1 Application for Temporary Employment Certification* may be amended at any time before the CO's certification determination to make minor changes (meaning a change of up to 14 calendar days) in the total period of employment, without requiring an additional recruitment period for U.S. workers. Changes will not be effective until submitted in writing and approved by the CO. 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 any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen and is wholly outside of the employer's control. The CO will deny any request to change the period of employment where the total amended period of employment will exceed the maximum applicable duration permitted under § 655.420(g). Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(c) *Other minor amendments to the CW–1 Application for Temporary Employment Certification.* The employer may request other minor amendments to the *CW–1 Application for Temporary Employment Certification* at any time before the CO's certification determination is issued. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. All requests for minor changes must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(d) *Amendments after certification are not permitted.* After the CO has made a determination to certify the *CW–1 Application for Temporary Employment Certification*, the employer may no longer request amendments.

§§ 655.435–655.439 [Reserved]

Post Acceptance Requirements

§ 655.440 Employer-conducted recruitment.

(a) *Employer obligations.* Employers must conduct recruitment of U.S.

workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *CW–1 Application for Temporary Employment Certification*.

(b) *Period to begin employer-conducted recruitment.* Unless otherwise instructed by the CO, the employer must begin the recruitment required in §§ 655.442 through 655.445 within 14 calendar days from the date the NOA is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.446.

(c) *Interviewing U.S. workers.* Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential CW–1 workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.

(d) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity and must hire all U.S. applicants who are qualified and who will be available for the job opportunity. U.S. applicants may be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired.

(e) *Recruitment report.* The employer must prepare a recruitment report meeting the requirements of § 655.446, by the date specified by the CO in the NOA.

§ 655.441 Job offer assurances and advertising contents.

(a) *General.* All recruitment conducted under §§ 655.442 through 655.445 in connection with an *CW–1 Application for Temporary Employment Certification* must contain terms and conditions of employment that are not less favorable than those offered to the CW–1 workers and must comply with the assurances applicable to job offers as set forth in § 655.423.

(b) *Contents.* All advertising must contain the following information:

(1) The employer's name and contact information;

(2) A statement that the job opportunity is a temporary, full-time position and identify the job title and total number of job openings the employer intends to fill;

(3) A description of the job opportunity with sufficient information to apprise applicants of the services or labor to be performed, including the job duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) The place(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;

(5) The wage that the employer is offering, intends to offer or will provide to the CW–1 workers or, in the event that there are multiple wage offers, the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal or Commonwealth minimum wage;

(6) If applicable, a statement that overtime will be available to the worker and specify the wage offer(s) for working any overtime hours;

(7) The frequency with which the worker will be paid as required by § 655.423(h);

(8) A statement that the employer will make all deductions from the worker's paycheck required by law, and must specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;

(9) A statement summarizing the three-fourths guarantee as required by § 655.423(f);

(10) A statement that transportation and subsistence will be provided to the worker while traveling from the worker's origin to the place of employment as will the return transportation and subsistence at the conclusion of the job opportunity, as required by § 655.423(j)(1);

(11) If applicable, a statement that daily transportation to and from the place(s) of employment will be provided by the employer;

(12) If applicable, a statement that the employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.423(k);

(13) If applicable, any board, lodging, or other facilities the employer will offer to workers or intends to assist workers in securing;

(14) If applicable, a statement indicating that on-the-job training will be provided to the worker; and

(15) A statement that directs applicants to apply for the job opportunity directly with the employer, and that indicates at least two verifiable methods by which applicants may apply for the job opportunity, one of which must be via electronic means, and that provides the days and hours during which applicants may be interviewed for the job opportunity.

§ 655.442 Place advertisement with CNMI Department of Labor.

(a) The employer must place an advertisement with the CNMI Department of Labor for a period of 21 consecutive calendar days satisfying the requirements set forth in § 655.441.

(b) Documentation of this step must include:

(1) Either printouts of web pages in which the advertisement appeared on the CNMI Department of Labor job listing system, or other verifiable evidence from the CNMI Department of Labor containing the text of the advertisement; and

(2) The dates of publication demonstrating compliance with the requirement of this section.

§ 655.443 Contact with former U.S. workers.

The employer must contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 270 calendar days before the date of need, employed by the employer in the occupation at the place(s) of employment during the previous year (except those who were dismissed for cause or who abandoned the place(s) of employment), provide a copy of the *CW–1 Application for Temporary Employment Certification,* and solicit their return to the job. This contact must occur during the period of time that the job offer is being advertised on the CNMI Department of Labor's job listing system under § 655.442. The employer must retain documentation sufficient to prove such contact in accordance with § 655.456. An employer has no obligation to contact U.S. workers it terminated for cause or who abandoned employment at any time during the previous year, if the employer provided timely notice to the NPC of the termination or abandonment in the manner described in § 655.423(v).

§ 655.444 Notice of posting requirement.

The employer must post a copy of the *CW–1 Application for Temporary Employment Certification* in at least two conspicuous locations at the place(s) of employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the CW–1 workers. Electronic posting, such as displaying an electronic copy of the *CW–1 Application for Temporary Employment Certification* prominently on any internal or external website that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must be posted for a period of 21 consecutive calendar days. The employer must maintain proof the *CW–1 Application for Temporary Employment Certification* was posted and identify where and during what period of time it was posted in accordance with § 655.456.

§ 655.445 Additional employer-conducted recruitment.

(a) *Requirement to conduct additional recruitment.* The employer may be instructed by the CO to conduct additional reasonable recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there is a likelihood that U.S. workers who are qualified will be available for the work.

(b) *Nature of the additional employer-conducted recruitment.* The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but is not limited to, advertising the job offer on the employer's website or another electronic job search website; advertising with community-based organizations, local unions, or trade unions; or other advertising using a professional, trade, or other publication where such a publication is appropriate for the workers likely to apply for the job opportunity. When assessing the appropriateness of a particular recruitment method, the CO will consider the cost of the additional recruitment and the likelihood that the additional recruitment method(s) will identify qualified and available U.S. workers.

(c) *Proof of the additional employer-conducted recruitment.* The CO will specify the documentation or other supporting evidence that must be retained by the employer as proof that the additional recruitment requirements were met. Documentation must be retained as required in § 655.456.

§ 655.446 Recruitment report.

(a) *Requirements of the recruitment report.* No fewer than 2 calendar days after the last date on which the last advertisement appeared, as required by the NOA issued under § 655.433, the employer must prepare, sign, and date a recruitment report. Where recruitment was conducted by a job contractor or its employer-client, both joint employers must sign the recruitment report in accordance with § 655.421(e)(1). The recruitment report must be submitted to the NPC, by the date specified in the NOA, and contain the following information:

(1) The name of each recruitment activity or source;

(2) 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's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;

(3) Confirmation that the advertisement was posted on the CNMI Department of Labor's job listing system and the dates of advertising;

(4) Confirmation that former U.S. employees were contacted, if applicable, and by what means and the date(s) of contact;

(5) Confirmation the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the CW–1 workers and the dates of advertising;

(6) If applicable, confirmation that additional recruitment was conducted as directed by the CO and the date(s) of advertising; and

(7) If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update and retain the recruitment report.* The employer must update the recruitment report throughout the recruitment period. In a joint employment situation, either the job contractor or the employer-client may update the recruitment report throughout the recruitment period. The employer must retain the recruitment report as required in § 655.456.

§§ 655.447–655.449 [Reserved]

Labor Certification Determinations

§ 655.450 Determinations.

Except as otherwise noted in this section, the OFLC Administrator and CO(s), by virtue of delegation from the OFLC Administrator, have the authority to certify or deny *CW–1 Applications for Temporary Employment Certification*. The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.451, thus demonstrating that there is an insufficient number of U.S. workers in the Commonwealth who are able, willing, qualified and who will be available at the time and place of the job opportunity for which certification is sought and that the employment of the CW–1 workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

§ 655.451 Criteria for temporary labor certification.

(a) The criteria for TLC include whether the employer has complied with all of the requirements of this subpart, which are required to grant the labor certification.

(b) In determining whether there are insufficient U.S. workers in the Commonwealth to fill the employer's job opportunity, the CO will count as available any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason. In making this determination, the CO will also consider the employer's contacts with its former U.S. workers, including workers that have been laid off within 270 calendar days before the date of need.

§ 655.452 Approved certification.

If the TLC is granted, the CO will send a Final Determination notice and a copy of the certified *CW–1 Application for Temporary Employment Certification* to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.420(c), the CO will send the Final Determination notice and a copy of the certified *CW–1 Application for Temporary Employment Certification* by first class mail. The CO will send the certified *CW–1 Application for Temporary Employment Certification*, including approved modifications, on behalf of the employer, directly to USCIS using an electronic method(s) designated by the OFLC Administrator. The employer must retain a copy of the certified *CW–1 Application for Temporary Employment Certification*, including the original signed Appendix C, as required by § 655.456.

§ 655.453 Denied certification.

If an electronically filed TLC is denied, the CO will send the Final Determination notice to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.420(c), the CO will send the Final Determination notice by first class mail. The Final Determination notice will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.461; and

(c) State that if the employer does not request administrative review in accordance with § 655.461, the denial is final, and the Department will not accept any appeal on that *CW–1 Application for Temporary Employment Certification*.

§ 655.454 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of CW–1 workers or both, based upon information the CO receives during the course of processing the *CW–1 Application for Temporary Employment Certification*, an audit, or otherwise. The number of workers certified will be reduced by one for each U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and who has not been rejected for lawful, job-related reasons, to perform the labor or services. If a partial labor certification is issued, the CO will send the Final Determination notice approving partial certification using the procedures at § 655.452.

The Final Determination notice will:

(a) State the reason(s) the period of employment or the number of CW–1 workers requested has been reduced, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request administrative review of the partial certification under § 655.461; and

(c) State that if the employer does not request administrative judicial review in accordance with § 655.461, the partial certification is final, and the Department will not accept any appeal on that *CW–1 Application for Temporary Employment Certification*.

§ 655.455 Validity of temporary labor certification.

(a) *Validity period.* A TLC is valid only for the period of employment as

approved on the *CW–1 Application for Temporary Employment Certification*. The certification expires after the last day of authorized employment, including any approved extensions thereof.

(b) *Scope of validity.* A TLC is valid only for the number of CW–1 positions, the places of employment located in the Commonwealth, the job classification and specific services or labor to be performed, and the employer(s) specified on the approved *CW–1 Application for Temporary Employment Certification*, including any approved modifications. The TLC may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 655.456 Document retention requirements for CW–1 employers.

(a) *Entities required to retain documents.* All CW–1 employers filing a *CW–1 Application for Temporary Employment Certification* are required to retain the documents and records establishing compliance with this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of record retention.* The employer must retain records and documents for 3 years from the date on which the certification of the *CW–1 Application for Temporary Employment Certification* expires, or 3 years from the date of the final determination if the *CW–1 Application for Temporary Employment Certification* is denied, or 3 years from the date the Department receives the request for withdrawal of a *CW–1 Application for Temporary Employment Certification* under § 655.462.

(c) *Documents and records to be retained by all employers.* All employers filing a *CW–1 Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records to the Department and any other Federal Government Official in the event of an audit or investigation:

(1) Proof of recruitment efforts, including:

(i) Placement of the job offer with the CNMI Department of Labor as specified in § 655.442;

(ii) Contact with former U.S. employees as specified in § 655.443, including documents demonstrating that each such U.S. worker had been offered the job opportunity listed in the *CW–1 Application for Temporary Employment Certification,* and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons;

(iii) Posting notice of the job opportunity to all employees in the job classification and area in which the work will be performed by the CW–1 workers as specified in § 655.444; and

(iv) All additional employer-conducted recruitment required by the CO as specified in § 655.445.

(2) Documentation supporting the information submitted in the recruitment report prepared in accordance with § 655.446, such as evidence of nonapplicability of contact with former workers as specified in § 655.443 and any supporting resumes and contact information as specified in § 655.446.

(3) Records of each worker's earnings, hours offered and worked, location(s) where work is performed, and other information as specified in § 655.423(i).

(4) If applicable, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 655.423(j).

(5) Copies of written contracts with third parties demonstrating compliance with the prohibition of seeking or receiving payments or other compensation of any kind from prospective workers as specified in § 655.423(o).

(6) Evidence of the employer's contact with U.S. workers who applied for the job opportunity in the *CW–1 Application for Temporary Employment Certification,* including, but not limited to, documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.423(q).

(7) Written notice provided to and informing OFLC that a CW–1 worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *CW–1 Application for Temporary Employment Certification,* as specified in § 655.423(v).

(8) A copy of the *CW–1 Application for Temporary Employment Certification* and all accompanying appendices, including any modifications, amendments, or

extensions, signed by the employer as directed by the CO.

(d) *Availability of documents and records for enforcement purposes.* The employer must make available to the Department, DHS or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function all documents and records required to be retained under this subpart for purposes of copying, transcribing, or inspecting them.

§§ 655.457–655.459 [Reserved]

POST CERTIFICATION ACTIVITIES

§ 655.460 Extensions.

(a) *Basis for extension.* Under certain circumstances an employer may apply for extensions of the period of employment. A request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). Such requests must be 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 not grant an extension where the total period of employment under that *CW–1 Application for Temporary Employment Certification* and the authorized extension would exceed the maximum applicable duration permitted under § 655.420(g).

(b) *Decision by the CO.* The CO will notify the employer of the decision in writing. The employer may appeal a denial of a request for an extension by following the appeal procedures in § 655.461.

(c) *Obligations during period of extension.* The CW–1 employer's assurances and obligations under the TLC will continue to apply during the extended period of employment. The employer must immediately provide to its CW–1 workers and workers in corresponding employment a copy of any approved extension.

§ 655.461 Administrative review.

(a) *Request for review.* Where authorized in this subpart, an employer wishing review of a determination by the CO must request an administrative review before BALCA of that determination to exhaust its administrative remedies. In such cases, the request for review:

(1) Must be received by BALCA, and the CO who issued the determination, within 10 business days from the date of the determination;

(2) Must clearly identify the particular determination for which review is sought;

(3) Must include a copy of the CO's determination;

(4) Must set forth the particular grounds for the request, including the specific factual issues the requesting party alleges needs to be examined in connection with the CO's determination;

(5) May contain any legal argument that the employer believes will rebut the basis for the CO's determination, including any briefing the employer wishes to submit; and

(6) May contain only such evidence as was actually before the CO at the time of the CO's determination.

(b) *Appeal File.* After the receipt of a request for review, the CO will send a copy of the Appeal File, as soon as practicable by means normally assuring next-day delivery, to BALCA, the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor (counsel).

(c) *Assignment.* The Chief ALJ will immediately, upon receipt of the appeal file from the CO, assign either a single member or a three-member panel of BALCA to consider a particular case.

(d) *Administrative review*—(1) *Briefing schedule.* If the employer wishes to submit a brief on appeal, it must do so as part of its request for review. Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit a brief in support of the CO's decision and, if applicable, in response to the employer's brief.

(2) *Standard of review.* The ALJ must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(e) *Scope of review.* BALCA will, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95, affirm, reverse, or modify the CO's determination, or remand to the CO for further action. BALCA will reach this decision after due consideration of the documents in the Appeal File that were before the CO at the time of the CO's determination, the request for review, and any legal briefs submitted. BALCA may not consider evidence not before the CO at the time of the CO's determination, even if such evidence is in the Appeal File, request for review, or legal briefs.

(f) *Decision.* The decision of BALCA must specify the reasons for the action taken and must be provided to the employer, the CO, and counsel for the CO within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, using means normally assuring expedited delivery.

[84 FR 12431, Apr. 1, 2019, as amended at 85 FR 13029, Mar. 6, 2020; 85 FR 30615, May 20, 2020]

§ 655.462 Withdrawal of a CW–1 Application for Temporary Employment Certification.

(a) The employer may withdraw a *CW–1 Application for Temporary Employment Certification* after it has been submitted to the NPC for processing, including after the CO grants certification under § 655.450. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *CW–1 Application for Temporary Employment Certification* and work contract with respect to all workers recruited and hired in connection with that application.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the *CW–1 Application for Temporary Employment Certification* and stating the reason(s) for the withdrawal.

§ 655.463 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for TLCs. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§§ 655.464–655.469 [Reserved]

INTEGRITY MEASURES

§ 655.470 Audits.

The CO may conduct audits of certified *CW–1 Applications for Temporary Employment Certification.*

(a) *Discretion.* The CO has the sole discretion to choose the certified applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. The audit letter will:

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

(2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and

(3) Advise that failure to comply fully with the audit process may result:

(i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.471 in future filings of *CW–1 Applications for Temporary Employment Certification* for a period of up to 2 years; or

(ii) In a revocation of the certification or debarment from the CW–1 program and any other foreign labor certification program administered by the Department.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice,

Civil Rights Division, Immigrant and Employee Rights Section.

§ 655.471 Assisted recruitment.

(a) *Requirement of assisted recruitment.* If, as a result of audit or otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future *CW–1 Application for Temporary Employment Certification*.

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a *CW–1 Application for Temporary Employment Certification*, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.461 apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.442 through 655.445 and may consist of, but is not limited to, one or more of the following:

(1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the *CW–1 Application for Temporary Employment Certification*;

(2) Designating the sources where the employer must recruit for U.S. workers in the Commonwealth and directing the employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisements;

(4) Requiring the employer to notify the CO in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO;

(7) Requiring the employer to provide proof of all U.S. workers who applied (or on whose behalf an application is made) in response to the employer's recruitment efforts;

(8) Requiring the employer to submit any proof of contact with all referrals and former U.S. workers; or

(9) Requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) *Failure to comply.* If an employer materially fails to comply with requirements ordered by the CO under this section, the certification will be denied and the employer and its attorney or agent may be debarred under § 655.473.

§ 655.472 Revocation.

(a) *Basis for revocation.* The OFLC Administrator may revoke a TLC approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the TLC was not justified due to fraud or misrepresentation of a material fact in the application process;

(2) The employer substantially failed to comply with any of the terms or conditions of the approved TLC. A substantial failure is a failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.473(d); or

(3) The employer impeded the audit process, as set forth in § 655.470, or impeded any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

(b) *DOL procedures for revocation*—(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's TLC, the OFLC Administrator will issue a Notice of Revocation to the employer (and its attorney or agent, if applicable). The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence to the OFLC Administrator or to request administrative review of the Notice of Revocation by BALCA. If the employer does not submit rebuttal evidence or request administrative review within 10 business

days from the date the Notice of Revocation is issued, the notice will become the final agency action and will take effect immediately at the end of the 10 business days.

(2) *Rebuttal.* If the employer timely submits rebuttal evidence, the OFLC Administrator will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification must be revoked, the OFLC Administrator will inform the employer of its right to appeal the final determination to BALCA according to the procedures of § 655.461. If the employer does not appeal the final determination, it will become the final agency action.

(3) *Request for review.* An employer may appeal a Notice of Revocation or a final determination of the OFLC Administrator after the review of rebuttal evidence to BALCA, according to the appeal procedures of § 655.461.

(4) *Stay.* The timely submission of rebuttal evidence or a request for administrative review will stay the revocation pending the outcome of the proceeding.

(5) *Decision.* If the TLC is revoked, the OFLC Administrator will provide copies of final revocation decisions to DHS and DOS promptly.

(c) *Employer's obligations in the event of revocation.* If an employer's TLC is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other required expenses;

(2) The workers' outbound transportation and other required expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

[84 FR 12431, Apr. 1, 2019, as amended at 85 FR 13029, Mar. 6, 2020; 85 FR 30615, May 20, 2020]

§ 655.473 Debarment.

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the *Application for Prevailing Wage Determination* or *CW–1 Application for Temporary Employment Certification*, as defined in paragraph (d) of this section. The OFLC Administrator will provide copies of final debarment decisions to DHS and DOS promptly.

(b) *Effect on future applications in all foreign labor programs.* The debarred employer, or a debarred agent or attorney, or any successor in interest to any debarred employer, agent, or attorney, will be disqualified from filing any labor certification applications or labor condition applications with the Department subject to the term limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Period of debarment.* No employer, agent, or attorney may be debarred under this subpart for more than 5 years for a single violation.

(d) *Definition of violation.* For the purposes of this section, a violation of a material term or condition of the *Application for Prevailing Wage Determination* or *CW–1 Application for Temporary Employment Certification* includes:

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

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's CW–1 workers or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with the NOD process, as set forth in § 655.431, or the

assisted recruitment process, as set forth in § 655.471;

(vi) Impeding the audit process, as set forth in § 655.470, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function;

(vii) Employing a CW–1 worker outside of the Commonwealth, in an activity not listed in the work contract, or outside the validity period of employment of the work contract, including any approved extension thereof;

(viii) A violation of the requirements of § 655.423(n) or (o);

(ix) A violation of any of the provisions listed in § 655.423(q); or

(x) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) Fraud involving the *Application for Prevailing Wage Determination* or the *CW–1 Application for Temporary Employment Certification* under this subpart; or

(3) A material misrepresentation of fact during the course of processing the *CW–1 Application for Temporary Employment Certification*.

(e) *Determining whether a violation is substantial.* In determining whether a violation is substantial as to merit debarment, the factors the OFLC Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the CW–1 program;

(2) The number of CW–1 workers, workers in corresponding employment, or U.S. workers who were or are affected by the violation(s);

(3) The gravity of the violation(s); or

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

(f) *Debarment procedure*—(1) *Notice of Debarment.* If the OFLC Administrator makes a determination to debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, the OFLC Administrator will issue the party a Notice of Debarment. The notice will state the reason(s) for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and it will inform the party subject to the notice of its right to submit rebuttal evidence to the OFLC Administrator, or to request administrative review of the decision by BALCA. If the party does not file rebuttal evidence or a request for review within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect on the date specified in the notice or if no date is specified, at the end of 30 calendar days The timely filing of rebuttal evidence or a request for review stays the debarment pending the outcome of the appeal as provided in paragraphs (f)(2) through (6) of this section.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the notice within 30 calendar days of the date the notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a Final Determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party must be debarred, the OFLC Administrator will issue a Final Determination and inform the party of its right to request administrative review of the debarment by BALCA according to the procedures in this section. The party must request review within 30 calendar days after the date of the Final Determination, or the Final Determination will be the final agency order and the debarment will take effect on the date specified in the Final Determination or if no date is specified, at the end of 30 calendar days.

(3) *Request for review.* (i) The recipient of a Notice of Debarment or Final Determination seeking to challenge the debarment must request review of the debarment within 30 calendar days of the date of the Notice of Debarment or the date of the Final Determination by the OFLC Administrator after review of rebuttal evidence submitted under paragraph (f)(2) of this section. A request for review of debarment must be filed in writing with the Chief ALJ, United States Department of Labor, in accordance with 29 CFR part 18, with a simultaneous copy served on the OFLC Administrator; the request must clearly identify the particular debarment

determination for which review is sought; and must set forth the particular grounds for the request. If no timely request for review is filed, the debarment will take effect on the date specified in the Notice of Debarment or Final Determination, or if no date is specified, 30 calendar days from the date the Notice of Debarment or Final Determination is issued.

(ii) Upon receipt of a request for review, the OFLC Administrator will promptly send a certified copy of the ETA case file to the Chief ALJ by means normally assuring expedited delivery. The Chief ALJ will immediately assign an ALJ to conduct the review.

(iii) Statements, briefs, and other submissions of the parties must contain only legal argument and only such evidence that was within the record upon which the debarment was based, including any rebuttal evidence submitted pursuant to paragraph (f)(2) of this section.

(4) *Review by the ALJ.* (i) In considering requests for review, the ALJ must afford all parties 30 days to submit or decline to submit any appropriate Statement of Position or legal brief. The ALJ must review the debarment determination on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted.

(ii) The ALJ's final decision must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ's decision will be provided to the parties by expedited mail. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision in accordance with 29 CFR part 26. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar 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 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is the final agency action. If a petition for review is accepted, the decision of the ALJ will 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.

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

(iii) Where the ARB has determined to review the decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which the presentation must be submitted.

(6) *ARB decision.* The ARB's decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

[84 FR 12431, Apr. 1, 2019, as amended at 85 FR 13029, Mar. 6, 2020; 85 FR 30615, May 20, 2020; 86 FR 1778, Jan. 11, 2021]

§§ 655.474–655.499 [Reserved]

Subpart F—Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

SOURCE: 60 FR 3956, 3976, Jan. 19, 1995, unless otherwise noted.

GENERAL PROVISIONS

§ 655.500 Purpose, procedure and applicability of subparts F and G of this part.

(a) *Purpose.* (1) Section 258 of the Immigration and Nationality Act (''Act'') prohibits nonimmigrant alien crewmembers admitted to the United States on D-visas from performing longshore work at U.S. ports except in five specific instances:

(i) Where the vessel's country of registration does not prohibit U.S. crewmembers from performing longshore work in that country's ports and nationals of a country (or countries)