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IMPACT OF FEDERAL LABOR AND SAFETY LAWS ON THE U.S. SEAFOOD INDUSTRY

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

MAY 6, 2015

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IMPACT OF FEDERAL LABOR AND SAFETY LAWS ON THE U.S. SEAFOOD INDUSTRY

WEDNESDAY, MAY 6, 2015

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
Washington, DC.

The Committee met, pursuant to notice, at 2:34 p.m., in Room SR–428A, Dirksen Senate Office Building, Hon. David Vitter, Chairman of the Committee, presiding.

Present: Senators Vitter, Risch, Fischer, Ayotte, Shaheen, and Cantwell.

OPENING STATEMENT OF HON. DAVID VITTER, CHAIRMAN, AND A U.S. SENATOR FROM LOUISIANA

Chairman VITTER. Good afternoon. We are going to start our hearing today on the Impact of Federal Labor and Safety Laws on the U.S. Seafood Industry. Thanks for joining us today.

We are going to be hearing from two panels of expert witnesses and stakeholders, a Federal panel who I will introduce in a minute, and then a stakeholder panel. I want to thank all of our witnesses for being here today to testify on these important issues.

As anyone who has visited Louisiana knows, we enjoy great quality seafood and that plays a major role in our culture and our economy, and this is true for other States in the United States and it is an important part of our economy. In Louisiana, that seafood industry supports 20,000 jobs in the State with an annual economic impact of over $1.7 billion.

More regionally, the Gulf States produce 70 percent of the nation's oysters, 69 percent of domestic shrimp, and are a leading producer of domestic hard- and soft-shell blue crabs. More broadly, the seafood industry is responsible for creating jobs and revenue that supports so many families along the Gulf, in Alaska, and elsewhere, including the East Coast and the West Coast.

Seafood processors in Louisiana and across the Gulf Coast rely on seasonal foreign workers to fill the most labor-intensive positions throughout the sector. These workers come to the United States legally under the H–2B visa program. This program is vital to many in the seafood business, as many of these operations take place in small rural communities where access to a stable, reliable labor force can be extremely difficult.

Recently, we have seen the difficulty of compliance with this program increase, most notably the Department of Labor's decision to stop accepting private wage rate surveys, which has often forced

businesses to reallocate their financial resources, and that has been a big, big cost increase for these businesses.

Another area that requires attention is ensuring the safety of seafood that is being imported into the country. It is imperative that we ensure that foreign imports are playing by the same rules and regulations that our domestic producers operate under, and that is one of the reasons I introduced the Imported Seafood Safety Standards Act. This legislation increases inspection rates, quality standards, and penalties in order to protect American families.

In closing, we need to make sure that Federal regulations of all types, like the two areas I have highlighted, do not unfairly and negatively impact our small domestic seafood providers. What Washington bureaucrats often fail to realize is that their rulemaking can literally put some small businesses, like domestic seafood producers, out of business. So, we need to focus on these and other regulatory areas.

Again, I thank everyone for being here today and I look forward to our discussion.

With that, I will turn it over to our Ranking Member, Senator Shaheen.

OPENING STATEMENT OF HON. JEANNE SHAHEEN, RANKING MEMBER, A U.S. SENATOR FROM NEW HAMPSHIRE

Senator SHAHEEN. Thank you, Mr. Chairman, and thank you to all of our panelists this afternoon for being here.

As the Chairman said, seafood is a big issue in my home State of New Hampshire just as it is in Louisiana. Even though we only have 18 miles of coastline, it is an industry that is important to the State, both because of our tourism industry and the fishing—the pleasure boat fishing that goes on off the coast of New Hampshire, but also because we have not only a small fishing industry, but we also have a fish processing industry in New Hampshire.

And, Mr. Chairman, in the interest of brevity and because I have to leave early, I am going to submit my full statement for the record, but I just wanted to raise a couple of concerns.

One is not directly related to this hearing, but since we are talking about seafood, I feel compelled to talk about the concerns that we have in New Hampshire and the Northeast relative to the fishing quotas that have been set by the Department of Commerce and specifically by NOAA. Over the past few years, the Federal Government has found that the declining levels of cod in the Gulf of Maine have been dramatic. There is some disagreement about that among scientists and among the fishing industry, but they have set very dramatic, very low quotas that have almost totally decimated the fishing industry in New Hampshire, and again, I appreciate that that is not the subject of today's hearing, but it is an issue that we are very concerned about and I think it is something that we need to deal with because of its impact on our small business fishing fleet in New Hampshire.

The other issue that is relevant to today's discussion is one that is having an impact in New Hampshire, as well, and that is the impact of creating a separate Federal program to remove catfish inspection authority from the FDA. As some of you probably already know, the 2008 farm bill transferred the inspection of catfish alone

from FDA to the Department of Agriculture and it left the FDA with the jurisdiction of all other seafood products. That means that all of our seafood processors that handle catfish will now be subject to two separate sets of regulations. This is a costly and unnecessary burden on these businesses. It will kill jobs and hurt economic development.

And, in fact, just the prospect of this regulation has put a freeze on job creation in some of those companies in New Hampshire. One seafood company, High Liner Foods, which I have had the opportunity to tour, has put on hold the job expansion that they would like to do because of the uncertainty around these regulations, and Mr. Chairman, I would like to enter this letter from High Liner Foods for the record, if I can.

[The letter follows:]

HIGH LINER FOODS

May 5, 2015

The Hon. Jeanne Shaheen
United States Senate
506 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Shaheen:

I am writing to express continued opposition to the USDA catfish inspection program. This program, created under the pretense of food safety, is a trade barrier that will increase seafood costs for consumers across the nation. The program will have a lasting negative impact on our company, our customers, and our Portsmouth employees.

High Liner has a long storied tradition in the seafood industry. Our operations recently relocated to Portsmouth and we are proud to have over 314 Granite State workers in our family. We provide consumers with innovative seafood products so they can enjoy the health benefits of seafood. The architects of the catfish program want to implement a program that raises our costs by restricting options for sourcing safe seafood, from both the U.S. and globally. That will impact our operations.

The USDA program is not justified on a food safety basis, as even USDA regards catfish as a "low risk food." If implemented, the program will trigger an immediate ban on imported catfish, restricting the supply of whitefish and raising our costs. The program is an obvious trade barrier. That is why all the major agricultural groups that care about exports want to repeal this program; they know that they will feel the brunt of any trade retaliation against the United States.

I was disappointed that, despite these flaws, the 2014 Farm Bill did not eliminate the catfish program. But we want to look forward and get this problem corrected.

As a Senator that cares about trade and jobs, we ask for your help in eliminating a program that the President and the Government accountants say should go. Repealing the USDA program will remove a significant impediment to better serving our customers and building our New Hampshire business. I am confident that you are still the best shot we have in congress to beat this ridiculous piece of legislation.

Sincerely,

Bill DiMento
Vice President of Quality Assurance, Sustainability, and Government Affairs

High Liner Foods
183 International Drive, Portsmouth, NH, 03801 T 603.818.5204 | C 508.397.2450

Chairman VITTER. Without objection.

Senator SHAHEEN. This duplicative regulation does not just affect the seafood industry and it is not really about food safety, I believe. I think it is an effort to set up trade barriers against foreign catfish that will dramatically affect not only the seafood processing business in New Hampshire and this country, but it also could put us open to challenge at the WTO and trade retaliation against other agricultural industries.

So, Mr. Chairman, I have been working with other members of the Senate to try and repeal this duplicative program. I hope we can do that. I think it is unnecessary and I hope that we will have the opportunity to do that and to further discuss this, not just in this committee, but when we get to the floor of the Senate.

So, thank you again to our panelists for being here and I look forward to the discussion today.

[The prepared statement of Senator Shaheen follows:]

Opening Statement: "*Impact of Federal Labor and Safety Laws on the U.S. Seafood Industry*"
May 6, 2015

Good morning. Thank you, Chairman Vitter, for hosting this hearing, and thank you all for being here today.

In New Hampshire, the seafood sector is an important part of the New Hampshire economy -- from commercial and recreational fishermen and commercial processors on the Seacoast to restaurants throughout the state. I'm pleased we will have an opportunity to discuss the impact of federal regulations on this important sector.

I understand that there are a number of issues facing the constituents of the Chairman in Louisiana, and I look forward to hearing more about those concerns. I'd like to take a few minutes to discuss some of the issues facing my constituents in New Hampshire.

First, although it is not within the scope of this hearing, it's clear that we need a new approach to address the current fishing crisis in New England. Over the past few years, the federal government has found declining levels of cod in the Gulf of Maine and has instituted drastic cuts to fishing quotas for this species – a critical source of revenue for New Hampshire fishermen. These sudden and severe restrictions have led to significant economic harm to the coastal communities in my state and threatens the future of the entire New Hampshire fishing industry. I look forward to discussing with the Chairman how we can examine this issue further.

Another issue I would like to discuss further today is the harmful effects of creating a separate federal program to remove catfish inspection authority from FDA. As some of you here likely already know, the 2008 Farm Bill transferred the inspection of catfish alone from FDA to USDA, while leaving FDA with the jurisdiction of all other seafood products. This means that all our seafood processors that handle catfish will now be subject to two separate sets of regulations. This is a costly and unnecessary burden on these businesses that will kill jobs and hurt economic development.

In fact, just the prospect of this regulation has put a freeze on business development and job creation in New Hampshire. One seafood company, High Liner Foods, has plans to expand and create jobs. But they can't go forward if it means subjecting themselves to two separate regulatory standards.

But this duplicative regulation does not just affect the seafood industry. It is, in fact, not even about food safety; rather, it is a thinly veiled trade barrier against foreign catfish. Since there is no scientific basis for the program, any WTO nation that currently exports catfish to the U.S. could challenge it and secure WTO-sanctioned trade retaliation against our critical agricultural export industries – like beef, soy, poultry, pork, grain, fruit and cotton. And in fact, our trading partners are already threatening this retaliation in the WTO and in Trans-Pacific Partnership negotiations.

I believe that we should repeal this unnecessary program, and I have authored bipartisan legislation to do so with Senator McCain.

Today, I plan to discuss the FDA's role in seafood inspection and the effects of transferring authority for this one species to a separate federal agency.

Thank you, Mr. Chairman, and I look forward to hearing from today's witnesses.

Chairman VITTER. Thank you, Senator Shaheen.

We will now go to our first panel of witnesses, our Federal panel. I will introduce both and then we will hear their testimony and have discussion following their testimony.

Dr. Steven Solomon is Deputy Associate Commissioner for Regulatory Affairs at the FDA, and he was appointed to that in April 2014. Prior to his appointment, he served in several capacities at the FDA since 1990. Dr. Solomon holds a D.V.M. degree from Ohio State University and a Master's of Public Health from Johns Hopkins University. Prior to joining the FDA, he owned and operated a private veterinary practice.

And, he will be followed by Ms. Portia Wu, Assistant Secretary of the Employment and Training Administration within the U.S. Department of Labor. She was appointed to that in April 2004 and she now leads that Employment and Training Administration with its mission to address our nation's workforce needs through high quality training and employment programs. Prior to that, she held a number of positions in public, nonprofit, and private sector situations, including serving at the White House on the Domestic Policy Council as Special Assistant to the President for Labor and Workforce Policy. Ms. Wu holds a Yale Law School degree and a degree from Yale College and a Master's degree from Cornell, and is originally from Albany, New York.

Welcome to both of you, and we will start with Dr. Solomon.

STATEMENT OF STEVEN M. SOLOMON, D.V.M., M.P.H., DEPUTY ASSOCIATE COMMISSIONER FOR REGULATORY AFFAIRS, FOOD AND DRUG ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Dr. SOLOMON. Good afternoon, Chairman Vitter, Ranking Member Shaheen, and members of the committee. I am Dr. Steve Solomon, Deputy Associate Commissioner for Regulatory Affairs at the Food and Drug Administration, and I appreciate the opportunity to appear before you today to discuss the agency's ongoing efforts to oversee the safety of the U.S. seafood supply.

FDA has a strong regulatory program in place to ensure the safety of both domestic and imported seafood. In fact, the Hazard Analysis and Risk Preventive Control framework of FDA's seafood safety program is a basis for the preventive controls requirements for other FDA regulated foods called for in the FDA Food Safety Modernization Act, or FSMA. The agency has a variety of tools to ensure compliance with seafood safety requirements, including inspections of both domestic and foreign processing facilities, a hundred percent electronic screening of all imported products, examination of sampling of domestic seafood and seafood offered for import in the United States, domestic surveillance sampling of imported products, inspection of seafood importers, and foreign country program assessments.

In today's testimony, I want to discuss FDA's regulatory framework for overseeing the safety of the U.S. seafood supply, emphasizing the agency's risk-based efforts with regard to imported seafood.

Processors of fish and fishery products are subject to FDA's Hazard Analysis Critical Control Point, or HACCP, regulation. In

short, the regulation requires both domestic and foreign processors of fish and fishery products to understand the food safety hazards associated with their process and product and require a preventive system to control for those hazards. Every processor is required to have and implement a written HACCP plan whenever a hazard analysis reveals one or more food safety hazards that are reasonably likely to occur. Foreign processors who export seafood to the United States also have to have—apply to the HACCP regulation.

In addition, HACCP regulations require importers to understand the hazards associated with the products they are importing and to take positive steps to verify that they obtain shipments from foreign processors who comply with these requirements.

In recent years, there have been reports of seafood in the United States being labeled with incorrect market names. FDA is aware that there may be economic incentives for some seafood producers and retailers to misrepresent the identity of the seafood species that they sell to buyers and consumers. While seafood fraud is often an economic issue, we have heightened concerns when species substitution poses a public health risk.

The agency has invested in significant scientific advancements to enhance its ability to identify seafood species using state-of-the-art DNA sequencing. FDA is actively working to transfer this technology, which will enable the seafood industry and others to monitor and test their products to confirm the species purchase is correct.

Turning now to imports specifically, it is the importers' responsibility to offer for entry into the United States product that is fully compliant with all applicable U.S. laws. FDA has numerous tools and authorities that enable the agency to take appropriate action regarding imported product. In recent years, the agency has significantly increased its number of foreign food inspections. Furthermore, if FDA requests to inspect a foreign facility and is refused, FSMA gave the agency the authority to not allow that facility's food submission into the United States.

Besides HACCP inspection of foreign facilities, the agency also conducts surveillance of food offered for import at the border to check for compliance with U.S. requirements. FDA reviews all import entries electronically prior to the product being allowed into the country. The agency has implemented an automated screening tool, the PREDICT system, which significantly improves FDA's screening of imported food. PREDICT utilizes the admissibility history of the firm and/or a specific product and incorporates the inherent risk associated with the product. For example, a PREDICT review includes the facility inspection history, data quality concerns, sample analytical findings, and type of product that the firm offers for entry into U.S. commerce.

Based on this electronic screening, the agency will direct resources to the most critical entries that have the greatest impact on public health. A subset of the import entries flagged may be physically inspected and/or sampled at varying rates depending on the type of the seafood product and the risk factors described.

Another key regulatory tool for controlling imported goods is the Import Alert. Import Alerts inform FDA field personnel that the agency has sufficient evidence or other information about a par-

ticular product, producer, shipper, or importer to believe that future shipments of an importer product may be violative. On the basis of that evidence, FDA field personnel may detain the article that is being offered for import in the United States without physically examining the product. The agency has over 45 active seafood Import Alerts that focus on imports from certain firms, products, and/or countries based upon past violations or public health concerns.

An Import Alert shifts the burden to the importer to demonstrate that the product meets FDA regulatory requirements. For example, FDA imposed a country-wide Import Alert on five aquaculture species from China in June 2007 due to the presence of unapproved animal drugs. These entries are currently subject to private laboratory testing before they are allowed into domestic commerce.

Finally, I would like to note that the FDA is working globally to better accomplish its mission to promote and protect the public health of the United States. As one example, the agency has conducted foreign country assessments to evaluate the country's laws for and implementation of good aquaculture practices. FDA uses the information from country assessments to target better surveillance sampling of imported aquaculture products, informs its planning of foreign seafood HACCP inspections, provide additional evidence for potential regulatory actions, and improve collaboration with foreign government and industry to achieve better compliance with FDA's regulatory requirements.

In closing, oversight of the safety of the U.S. food supply continues to be a top priority for FDA. The agency has a strong regulatory program in place for seafood products. We will continue to work with our domestic and international partners to ensure the safety of both domestic and imported seafood.

Thank you again for the opportunity to appear before you today, and I would be happy to answer any questions.

[The prepared statement of Dr. Solomon follows:]

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

Food and Drug Administration
Silver Spring, MD 20993

TESTIMONY OF

STEVEN M. SOLOMON, D.V.M., M.P.H.

DEPUTY ASSOCIATE COMMISSIONER
FOR REGULATORY AFFAIRS

FOOD AND DRUG ADMINISTRATION

DEPARTMENT OF HEALTH AND HUMAN SERVICES

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

UNITED STATES SENATE

MAY 6, 2015

For Release Only Upon Delivery

INTRODUCTION

Good afternoon, Chairman Vitter, Ranking Member Shaheen, and Members of the Committee. I am Dr. Steven Solomon, Deputy Associate Commissioner for Regulatory Affairs at the Food and Drug Administration (FDA or the Agency), which is part of the Department of Health and Human Services (HHS). Thank you for the opportunity to appear before you today to discuss the Agency's ongoing efforts to oversee the safety of the U.S. seafood supply.

In the interest of public health, it is vital that both domestically-processed and imported seafood are safe, wholesome, and properly labeled. FDA has had a strong regulatory program in place since the mid-1990s to ensure the safety of domestic and imported seafood. In fact, the hazard analysis and risk-based preventive controls framework of FDA's seafood-safety program is a basis for the preventive controls requirements for other FDA-regulated foods called for in the FDA Food Safety Modernization Act (FSMA), enacted in 2011. For this reason, FSMA specifically exempts seafood from some of its requirements. However, FSMA also provides the Agency with a number of new authorities that will help improve the safety of domestic and imported FDA-regulated foods, including seafood.

The Agency has a variety of tools to ensure compliance with seafood safety requirements, including inspections of domestic and foreign processing facilities, examination and sampling of domestic seafood and seafood offered for import into the United States, domestic surveillance sampling of imported products, inspections of seafood importers, evaluations of filers of seafood products offered for import, and foreign country program assessments. FDA works closely with our foreign, Federal, state, local, and Tribal partners to share relevant information and ensure that products in U.S. commerce meet applicable FDA requirements.

Seafood is one of the most highly-traded commodities in the world. The Agency recognizes that success in protecting the American public depends increasingly on our ability to reach beyond U.S. borders and engage with its government regulatory counterparts in other nations, as well as with industry and regional and international organizations, to encourage the implementation of science-based standards to ensure the safety of products before they reach our country.

In my testimony today, I will discuss FDA's regulatory framework for overseeing the safety of the U.S. seafood supply, emphasizing the Agency's efforts with regard to imported seafood.

FDA'S SEAFOOD SAFETY PROGRAM

Because fish are cold-blooded and live in aquatic environments, fish and fishery products pose unique food safety challenges, which are quite different from those posed by land animals. FDA has developed extensive expertise in these areas over decades of regulating this commodity. Experts in FDA's Center for Food Safety and Applied Nutrition (CFSAN) are responsible for evaluating the hazard to public health presented by chemical, including toxins, and microbiological contaminants in fish and fishery products. FDA operates the Gulf Coast Seafood Laboratory in Alabama, which specializes in seafood microbiological, chemical, and toxins research. In addition, seafood research is conducted at CFSAN's research laboratory in College Park, Maryland. FDA, in collaboration with the National Oceanic and Atmospheric Administration at the Department of Commerce, also represents the United States at the Codex Alimentarius Commission's Committee on Fish and Fishery Products, the international food safety standard-setting body for this commodity.

FDA operates a mandatory safety program for processing of fish and fishery products. As a cornerstone of that program, FDA publishes the Fish and Fishery Products Hazards and Controls Guidance, an extensive compilation of the most up-to-date science and policy on the hazards that affect fish and fishery products and effective controls to prevent their occurrence. The document, currently in its fourth edition, has become the foundation of fish and fishery product regulatory programs around the world.

Seafood Hazard Analysis Critical Control Point (HACCP) Regulation and Inspections

Processors of fish and fishery products are subject to FDA's Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products, commonly known as the HACCP regulation. In short, this regulation requires both domestic and foreign processors of fish and fishery products to understand the food-safety hazards associated with their process and product and, through a system of preventive controls, to control for those hazards. Every processor is required to have and implement a written HACCP plan whenever a hazard analysis reveals one or more food-safety hazard(s) that is/are reasonably likely to occur. Foreign processors who export seafood products to the United States must operate in conformance with seafood HACCP regulations. In addition, HACCP regulations require importers to take positive steps to verify that they obtain shipments from foreign processors who comply with the regulation requirements. Congress, in FSMA, directed FDA to put in place a similar preventive controls system as the seafood HACCP program for other FDA-regulated foods as a way to prevent problems rather than reacting to them after they occur. The Agency is working to finalize rules to implement these preventive controls for FDA-regulated foods beyond seafood covered by the

HACCP regulation.

The field staff in FDA's Office of Regulatory Affairs (ORA) is responsible for overseeing regulatory compliance for fish and fishery products produced in the United States and for those products imported from abroad. The field staff conducts inspections of fish and fishery product processing establishments, conducts follow-up investigations to track foodborne illnesses, and performs other activities designed to oversee the safety of these products. The HACCP inspection approach is used by FDA during domestic and foreign inspections of seafood processors to focus its attention on the parts of seafood production and processing that are most likely to affect the safety of the product. Specifically, the approach allows FDA to evaluate processors' overall implementation of their HACCP systems over a period of time by having access to the firms' HACCP plans, including monitoring, corrective action, and verification records. In this model, it is the seafood industry's responsibility to develop and implement HACCP controls and the regulatory Agency's to oversee that the industry complies.

FDA allocates its inspection resources based mostly on the risk of the product. Examples of high-priority products include ready-to-eat products, such as hot or cold smoked fish, scombrotoxin-forming fish, such as tuna or mahi-mahi, aquacultured seafood products, and fish packed in reduced oxygen packages. Even though inspectional coverage is based primarily on product risk, FDA district offices may adjust that coverage to inspect a particular establishment, such as one that may have been associated with a consumer complaint or illness or one with a poor compliance history. Domestic seafood processors are inspected at least once every three years. FDA also conducts inspections of foreign seafood processors, and in Fiscal Year (FY) 2014 conducted 303 inspections under the foreign seafood program.

The regulatory sanctions that FDA has available to apply to domestic and foreign processors of fish and fishery products that are non-compliant include Warning Letters, seizure of products, injunction against further non-compliant practices, and/or prosecution of an individual or establishment. FSMA provided FDA with additional tools, such as the authority to issue a mandatory recall for certain foods (other than infant formula, for which FDA already has recall authority), when a company fails to voluntarily recall certain foods that meet certain criteria after being asked to do so by the Agency. In addition, FDA can now order administrative detention of any article of food, if there is reason to believe that it is adulterated or misbranded. These new enforcement tools, combined with FDA's new authority under FSMA to suspend the registration of a facility if the Agency determines that food manufactured, processed, packed, received, or held by such facility has a reasonable probability of causing serious adverse health consequences or death, enable the Agency to more effectively prevent unsafe food from entering commerce. I will describe the Agency's authorities specific to imports later in my testimony.

Working with Government and Industry Partners

FDA also works closely with the states and industry to ensure the safety of the U.S. seafood supply. In addition to the seafood HACCP inspections performed by FDA inspectors, FDA currently contracts with 24 state regulatory agencies to perform seafood HACCP inspections. These state partners operate under equivalent regulatory, operational, enforcement, and compliance protocols, and their inspectors are trained by FDA. There are 929 seafood HACCP inspections scheduled to be performed by our state partners in FY 2015.

The U.S. food safety program that controls molluscan shellfish (oysters, clams, mussels, and scallops) safety is called the "National Shellfish Sanitation Program" (NSSP). The NSSP is a Federal-state cooperative program with oversight provided by FDA in cooperation with state shellfish experts and other members of the Interstate Shellfish Sanitation Conference (ISSC). The purpose of the NSSP is to promote and improve the sanitation of shellfish moving in interstate commerce through Federal/state cooperation and uniformity of state shellfish programs. Thirty-five states have certified shellfish shippers participating in the NSSP. FDA's Interstate Certified Shellfish Shippers List (ICSSL) is published monthly on FDA's website for use by food control officials, the seafood industry, and other interested persons. The shippers listed on the ICSSL have been certified by regulatory authorities in the United States, Canada, Korea, New Zealand, and Mexico under the uniform sanitation requirements of the NSSP. Canadian, Korean, New Zealand, and Mexican shippers are included under the terms of the shellfish sanitation agreements FDA has with the governments of these countries. State and local retail food codes modeled after the FDA Food Code contain requirements that make it unlawful for retailers and food service operators to obtain raw molluscan shellfish from sources not included on the ICSSL.

DNA Testing to Address Seafood Fraud

In recent years, there have been reports of seafood in the United States being labeled with an incorrect market name. FDA is aware that there may be economic incentives for some seafood producers and retailers to misrepresent the identity of the seafood species they sell to buyers and consumers. While seafood fraud is often an economic issue, species substitution can be a public health risk (*e.g.*, substituting a scombrotoxin- or ciguatoxin-associated fish for a non-toxin-

associated fish). For this reason, the Agency has invested in significant technical improvements to enhance its ability to identify seafood species using state-of-the-art DNA sequencing. DNA sequencing has greatly improved FDA's ability to identify misbranded finfish seafood products in interstate commerce or offered for import into the United States. The Agency has trained and equipped eight field laboratories across the country to perform DNA testing as a matter of course for suspected cases of misbranding and for illness outbreaks due to finfish seafood, where the product's identity needs to be confirmed. FDA also trained analysts from the U.S. Customs and Border Protection (CBP) and the National Marine Fisheries Service in its new DNA-based species identification methodology. FDA has made its protocol for using DNA sequencing for the identification of finfish products as well as its DNA reference standards publicly available through the FDA website. As a follow up to its now established capacity to identify finfish products using DNA, FDA has recently developed a protocol and a DNA reference library to extend these identification capabilities to include commercial species of shrimp, crab, and lobster. The Agency has already posted some of its DNA reference sequences for shrimp, crab, and lobster on its website and anticipates releasing the protocol to the public this year after final peer review, which will enable the seafood industry to monitor and test their products to confirm the species.

With DNA testing capacity in place, FDA has conducted DNA testing on fish that have a history of being misidentified in an effort to determine the accuracy of the market names on their labels. These sampling efforts specifically targeted seafood reported to be at the highest risk for mislabeling and/or substitution, including cod, haddock, catfish, basa, swai, snapper, and grouper. As FDA announced in September 2014, the sampling and testing conducted as part of this project found that the fish species was correctly labeled 85 percent of the time. The Agency

has the authority to take enforcement action against products in interstate commerce that are adulterated or misbranded and refuse admission of products imported or offered for import that appear to be adulterated or misbranded. FDA will use the results from this testing to help guide future sampling, enforcement, and education efforts designed to ensure that seafood offered for sale in the U.S. market is labeled with an acceptable market name for the species. For instance, the Agency is conducting sampling and testing, in cooperation with state and local authorities, to look for mislabeling at the retail level. We also have posted on the FDA website a three-part learning module on proper seafood labeling to help the seafood industry, retailers, and state regulators ensure the proper labeling of seafood products offered for sale in the U.S. marketplace.

REGULATION OF FOOD IMPORTS

FDA's authority under the Federal Food, Drug, and Cosmetic Act (FD&C Act) provides a broad statutory framework to ensure that imported foods are safe, wholesome, and accurately labeled. It is the importer's responsibility to offer for entry into the United States product that is fully compliant with all applicable U.S. laws. Under the seafood HACCP regulation, HACCP controls are required for both domestic and foreign processors of fish and fishery products. Additionally, the regulation requires that U.S. importers take certain steps to verify that their foreign suppliers meet the requirements of the regulation. As mentioned earlier, FDA uses a variety of measures to enforce processors' compliance with seafood HACCP, including inspections of foreign processing facilities, use of a screening system to sample imported products, domestic surveillance sampling of imported products, inspections of seafood importers, evaluations of filers of seafood products, foreign country program assessments, and relevant

information from our foreign partners and FDA foreign office posts.

When an FDA-regulated product is offered for import into U.S. commerce, CBP procedures ensure that FDA is notified. If the product appears to be adulterated or misbranded, based on examination or other information, such as prior history of the product, manufacturer, or country, FDA will give notice advising the owner or consignee of the appearance of a violation under the FD&C Act and the right to provide testimony or evidence (such as a laboratory analysis by an independent laboratory) to rebut the appearance of the violation. In some circumstances, importers may request permission to recondition the product to bring it into compliance with applicable requirements and regulations. If the product is ultimately refused admission, it must be destroyed, unless it is exported by the owner or consignee within 90 days of the date of the notice of refusal.

In 2002, the Congress gave FDA new authorities to enhance protection of the food supply in the Public Health Security and Bioterrorism Preparedness and Response Act. One of the most important provisions is the requirement that FDA be provided prior notice of food (including animal feed) that is imported or offered for import into the United States. This advance information enables FDA, working closely with CBP, to more effectively target food that may be intentionally contaminated with a biological or chemical agent or which may pose a significant health risk to the American public. Suspect shipments then can be intercepted before they arrive in the United States and held for further evaluation. To enhance targeting efforts on commercial imports, FDA participates in the Commercial Targeting and Analysis Center, which consists of CBP and nine other participating Federal agencies.

FDA has numerous other tools and authorities that enable the Agency to take appropriate action regarding imported products. In recent years, the Agency has significantly increased the number of inspections of foreign food manufacturers. For example, FDA conducted 1,336 foreign food facility inspections in FY 2014, compared to 153 inspections in 2008. Looking specifically at seafood, the Agency conducted 303 foreign seafood facility inspections in FY 2014, compared to 95 inspections in 2008. Furthermore, FSMA gave FDA the authority to refuse admission into the United States of food from a foreign facility, if FDA is refused entry by the facility or the country in which the facility is located upon FDA's request to inspect such facility.

Besides physical inspections of domestic and foreign facilities, the Agency's field force also conducts surveillance of food offered for import at the border to check for compliance with U.S. requirements. As part of our surveillance work at the border, FDA utilizes a risk-based approach to allocate resources, with priority given to high-risk food safety issues. FDA screens all import entries electronically prior to the products' entering the country, and a subset of those are physically inspected at varying rates, depending on the potential risk associated with them. Based on the risk ranking, the Agency will direct resources to the more critical activities that have a greater impact on public health. In FY 2014, FDA processed approximately 938,000 entries of imported seafood, while our field staff performed nearly 26,000 physical examinations of seafood imports and collected over 5,600 samples of domestic and imported seafood for analysis at FDA field laboratories.

The Agency has implemented an automated screening tool, the Predictive Risk-based Evaluation for Dynamic Import Compliance Targeting (PREDICT) system, which significantly improves FDA's screening of imported food. PREDICT uses automated data mining and pattern discovery

to identify data anomalies with regard to import and compliance history of a firm and/or a specific product, such as the facility inspection history; results of previous field exams, sample analyses, and facility inspections; and types of products that the firm offers for entry into U.S. commerce. For example, if a firm historically imports fresh seafood and suddenly imports canned seafood, this information is detected by PREDICT and may trigger a decision by the Agency to conduct an examination of the new type of imported product.

Another key tool for screening imported goods is the Import Alert. Import Alerts inform FDA field personnel that the Agency has sufficient evidence or other information about a particular product, producer, shipper, or importer to believe that future shipments of an imported product may be violative. On the basis of that evidence, FDA field personnel may detain the article that is being offered for import into the United States without physically examining the product. The Agency has over 45 active seafood-specific Import Alerts that prevent imports from certain firms and/or countries based upon past violations. When an Import Alert is issued and FDA detains a shipment, the importer has an opportunity to introduce evidence to demonstrate that the product is not violative. Most commonly the existence of an Import Alert shifts the burden to the importer to conduct testing to demonstrate that the product meets FDA regulatory requirements. FDA decisions to remove a product, manufacturer, packer, shipper, grower, country, or importer from detention without physical examination would be based on evidence establishing that the conditions that gave rise to the appearance of a violation have been resolved and the Agency has confidence that future entries will be in compliance with the FD&C Act.

FDA also performs laboratory analysis on a sampling of products offered for import into the United States and performs periodic filer evaluations to ensure that import data being provided to

FDA is accurate. Certain violations relating to imported food may lead to civil or criminal charges.

Working with Foreign Counterparts

FDA is working globally to better accomplish its mission to promote and protect the public health of the United States. The Agency has strengthened and better coordinated its international engagements by establishing permanent FDA posts abroad in strategic locations, such as India and China. The posting of FDA staff in certain overseas regions is a key part of the Agency's strategy for expanding oversight of imported food. An expanded overseas presence allows for greater access for FDA inspections and for greater engagement with foreign industry and foreign counterpart agencies. This all helps to ensure that products shipped to the United States meet applicable FDA requirements.

FDA is working with foreign counterparts in many areas. For example, FDA has worked closely with the Chinese government on inspections, particularly for seafood. FDA imposed a country-wide Import Alert on all farm-raised catfish, basa, shrimp, dace, and eel from China in June 2007, due to the presence of unapproved animal drugs and/or unsafe food additives. Shipments of products covered by the Import Alert may be detained, without physical examination, at the time they are offered for import into U.S. commerce. The shipments can be released by FDA after evidence is provided to overcome the appearance that the products are violative. In October 2014, FDA and representatives from China's General Administration of Quality Supervision, Inspection, and Quarantine visited various facilities along the aquaculture supply chain in two provinces, including shrimp farms, feed stores, feed mills, retail facilities

that sell aquaculture drugs and chemicals, and processing facilities, to better understand China's food safety control systems.

The Agency has conducted foreign country assessments to evaluate the country's laws for, and implementation of, good aquaculture practices. Specifically, FDA evaluates the country's controls, including licensing and permitting, inspections, and training programs for aquaculture products. FDA uses the information from country assessments to better target surveillance sampling of imported aquaculture products, inform its planning of foreign seafood HACCP inspections, provide additional evidence for potential regulatory actions, such as an Import Alert, and improve collaboration with foreign government and industry contacts to achieve better compliance with FDA's regulatory requirements. For example, the country assessments for China in 2006, Chile in 2008, and India in 2010 resulted in increased sampling and testing for aquaculture products from these countries (*e.g.*, eel from China, salmon from Chile, and shrimp from India).

PRESIDENTIAL TASK FORCE ON COMBATING ILLEGAL, UNREPORTED, AND UNREGULATED FISHING AND SEAFOOD FRAUD

As mentioned previously, FDA is aware that there may be economic incentives for some seafood producers and retailers to misrepresent the identity of the seafood species they sell to buyers and consumers, and we have conducted DNA testing on fish that have a history of being misidentified, in an effort to combat seafood fraud. In June 2014, President Obama issued a Presidential Memorandum, "Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud." Among other actions, the

memorandum establishes a Presidential Task Force on Combating Illegal, Unreported, and Unregulated (IUU) Fishing and Seafood Fraud (Task Force), to be co-chaired by the Secretaries of State and Commerce. FDA, as a part of HHS, serves on the Task Force. The Task Force released its action plan in March 2015. Among other things, the plan directs the Task Force to identify and develop within six months a list of the types of information and operational standards needed for an effective seafood traceability program to combat seafood fraud and IUU seafood in U.S. commerce. The plan also directs the Task Force to establish, within 18 months, the first phase of a risk-based traceability program to track seafood from point of harvest to entry into U.S. commerce. FDA is working with its government partners to implement these recommendations in order to ensure that imported seafood is properly labeled.

CONCLUSION

Oversight of the safety of the U.S. food supply continues to be a top priority for FDA. The Agency has a strong regulatory program in place for seafood products. FDA will continue to work with our domestic and international partners to ensure the safety of both domestic and imported seafood.

Thank you, again, for the opportunity to appear before you today. I would be happy to answer any questions.

Chairman VITTER. Thank you very much, Doctor.
Now, we will hear from Ms. Wu. Welcome.

STATEMENT OF PORTIA WU, ASSISTANT SECRETARY FOR EMPLOYMENT AND TRAINING, U.S. DEPARTMENT OF LABOR

Ms. WU. Thank you, Mr. Chairman. Chairman Vitter, Ranking Member Shaheen, members of the committee, thank you for having me here today to discuss the H–2B program and the seafood industry. My name is Portia Wu and I am the Assistant Secretary at the Employment and Training Administration at the Department of Labor. Together with the Department of Homeland Security, we administer the H–2B program.

The H–2B program allows employers to meet legitimate needs for temporary foreign workers and the Department takes very seriously its statutory responsibility to administer this program and to ensure that U.S. workers have meaningful access to these job opportunities, that their wages and working conditions are not adversely affected. These efforts also help protect foreign-born workers from exploitation.

The Department recognizes the vital role that the H–2B program plays for the seafood industry. Many seafood employers are multigenerational family-owned businesses and they are a source of cultural pride in coastal areas. The jobs these businesses provide are critical to local communities and create additional jobs in other related industries.

And, Mr. Chairman, as you referenced, these businesses are often in remote or rural areas and so they can struggle to attract and retain a sufficient workforce necessary to provide seafood products for the United States and for the world. Thus, many do depend on temporary workers, including temporary foreign workers.

Over the last five years, employers in some of the largest seafood producing States, like Louisiana and Maryland, were among the top ten users of the H–2B program, and last year, approximately 55 percent of the seafood jobs certified by the Department of Labor were located in the Gulf Coast States, ranging from shrimp boat deckhands in Texas to seafood and crawfish processors and packagers in Louisiana.

We understand that seafood employers and others are impacted by the current annual 66,000 number cap on H–2B workers. That cap is set by Congress. And, we are again seeing demand nationwide that exceeds that cap.

The Department is committed to maintaining a fair and reliable application process for those who use the program. However, unfortunately, in recent years, we have faced difficulties in achieving stability in this program because the Department of Labor's H–2B regulations have been subject to numerous cases brought in court by both employers and worker advocates. In fact, this litigation ultimately resulted in temporarily suspending the processing of H–2B applications earlier this year.

Last week, in order to quickly reinstate the H–2B program and also to bring certainty, stability, and continuity to that program, the Department of Labor and the Department of Homeland Security jointly issued two new regulations. One is an interim final rule establishing the overall framework for the H–2B program. I should

note that is an interim final rule, so it is open for public comment until June 29. The other is a final updated wage rule that allows the use of private wage surveys in certain circumstances in keeping with a recent court decision.

These rules immediately restore processes for approving prevailing wage requests and labor certification applications so the program can continue to operate. They expand employer requirements for recruitment and consideration of U.S. workers so United States workers have a fair shot at finding and applying for these jobs. It also permits employers in the seafood industry to continue to stagger the entry of their H–2B workers into the United States.

The regulations strengthen worker protections by clarifying employer obligations with respect to wages, working conditions, and benefits that must be offered to H–2B and U.S. workers alike.

And, finally, as I noted, the rules explicitly include the use of private wage surveys, which were restricted by a recent court decision, and they—so, we set guidelines for how these surveys can now be used, and that includes State surveys, which are often used in the seafood industry.

Both the Department of Labor and DHS are trying to ensure a smooth transition between the former regulations and the new rules. First and foremost, anyone who had already applied under the old rules or who were in line does not have to change anything. They will continue to operate under the prior regulations.

Second, the new regulations allow an expedited process for employers who have a start date of need before October 1, 2015, so people will have time to quickly transition.

In conclusion, the Department of Labor strives to maintain an H–2B program that is both responsive to legitimate employer needs where qualified U.S. workers are not available and to provide adequate protections for U.S. and foreign temporary workers. Doing so is not only good for law-abiding employers, including employers in the seafood industry, but also for the many U.S. workers seeking jobs in fields that rely heavily on the H–2B program.

Thank you again for this opportunity and I look forward to answering your questions.

[The prepared statement of Ms. Wu follows:]

STATEMENT OF
PORTIA WU
ASSISTANT SECRETARY FOR EMPLOYMENT AND TRAINING
U.S. DEPARTMENT OF LABOR
BEFORE THE
SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP
May 6, 2015

Introduction

Mr. Chairman and Members of the Committee, I want to thank you for this opportunity to appear before this Committee to testify about H-2B regulations and the seafood industry. I am Portia Wu, Assistant Secretary for the Department of Labor's (DOL) Employment and Training Administration (ETA).

The H-2B program allows U.S. employers to meet a legitimate need for temporary, foreign workers. DOL is responsible for issuing foreign labor certifications for this program and other temporary worker programs. In addition, under the Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act, ETA also funds state and local workforce systems and therefore we are responsible for connecting U.S. workers to jobs, including in the seafood industry. ETA will continue to fund these activities under the Workforce Innovation and Opportunity Act, which supersedes WIA and the Wagner-Peyser Act.

As I will explain today, our new H-2B regulations are intended to support our nation's businesses – including the seafood industry – by expeditiously reinstating the H-2B program to allow for access to foreign workers in cases where U.S. workers are not available. These regulations will bring certainty, stability, and continuity to the program in response to litigation on multiple fronts that has jeopardized the continuity of the H-2B program.

DOL's Role in the H-2B Program

The Immigration and Nationality Act (INA) establishes the H-2B nonimmigrant visa classification for employers to bring foreign workers to the United States to perform non-agricultural services or labor on a temporary basis if qualified U.S. workers capable of performing such services or labor cannot be found in this country (8 U.S.C. 1101(a)(15)(H)(ii)(b)). Section 214(c) of the INA requires employers to petition the Department of Homeland Security (DHS) to classify such temporary workers as H-2B nonimmigrants. The INA also requires DHS to consult with appropriate agencies of the Government, which DHS has long interpreted to include DOL, before adjudicating an employer's petition seeking to employ individuals under the H-2B nonimmigrant visa classification.

Under DHS regulations, before DHS can adjudicate an H-2B petition, the petitioner must receive a certification from DOL that there are insufficient qualified workers in the U.S. to perform the temporary labor or services for which the employer seeks foreign workers, and that the employment of the foreign workers will not have an adverse effect on the wages and working conditions of U.S. workers similarly employed (see 8 CFR 214.2(h)(6)(iii)(A) and (D)). Each DOL H-2B labor certification is specific to the employer and the temporary period of employment requested and corresponds to the geographic location in which the employer attempted to recruit U.S. workers for the job opportunity. That certification also includes the

obligation to offer and pay the required prevailing wage rate issued by DOL for the occupation and area of intended employment. After being granted a temporary labor certification by DOL, the employer may petition DHS for approval to bring foreign workers into the U.S. to fill the employer's need for requested labor or services stated in the approved H-2B temporary labor certification. If the petition is approved by DHS, foreign workers may then go to a U.S. embassy or consulate in their country to apply for an H-2B nonimmigrant visa from the Department of State. If the visa application is approved, the worker is issued a visa that he or she can use to apply for admission to the United States at a port of entry to perform the temporary work.

DOL strives to administer its part of the H-2B program, and other temporary worker programs, in a manner that is responsive to legitimate employer needs for labor where qualified U.S. workers are not available, and that provides adequate protections for U.S. and foreign temporary workers under our Nation's immigration and labor laws. In this context the regulations governing the H-2B program establish the minimum wages and employer obligations that apply to both H-2B and U.S. workers, as well as the recruitment criteria employers must meet to demonstrate eligibility to hire foreign labor. The Department's Office of Foreign Labor Certification issues prevailing wage determinations and temporary labor certifications in accordance with those regulatory standards to help ensure that U.S. workers have meaningful access to these job opportunities, and that the wages and working conditions of U.S. workers are not adversely affected by the employment of foreign workers though a temporary worker program. In addition, the Department's Wage and Hour Division enforces the laws within its jurisdiction that apply to all covered workers, such as the Fair Labor Standards Act, as well as specific worker protections in the H-2B program that not only help protect foreign workers from exploitation, but also provide similarly-employed U.S. workers with wages and working conditions that are at least equal to those provided to temporary foreign workers.

The H-2B program is capped at 66,000 visas per fiscal year. Workers engaged in temporary non-agricultural employment under the H-2B program come from a diverse set of countries and work in a range of industries. Each year, significant numbers of H-2B workers work in landscaping, forestry, hospitality services, construction, and seafood. Seafood industry employers who use the H-2B program each year are small and seasonal businesses primarily located in states along the eastern and gulf coasts. Because participation in the program is limited by the statutory cap, employer demand for foreign workers in the H-2B visa program often exceeds the current statutory limit. In Fiscal Year (FY) 2010, DOL certified approximately 3,726 temporary labor certification applications covering more than 93,000 worker positions. By FY 2014, employer requests for temporary non-agricultural labor certifications increased almost 25 percent with DOL certifying more than 4,638 temporary labor certification applications covering more than 94,000 worker positions. Within just the first six months of FY 2015, DOL certified more employer applications for H-2B workers than during all of FY 2014, many of them small businesses.

The H-2B Program and the Seafood Industry

First, I want to address the H-2B program and its relationship with the seafood industry. DOL understands that many seafood employers are family-owned businesses—some spanning generations—which proudly provide seafood products for domestic and international markets and that struggle each year to attract and retain a productive and stable workforce. We know that the seasonal jobs these businesses provide are critical to local communities, create additional jobs in other related industries, and are a source of cultural pride in coastal areas. DOL is

committed to maintaining a fair and reliable application process for these small and seasonal businesses.

Over the last five years, employers in some of the largest seafood-producing states were among the top ten users of the H-2B program. DOL has consistently certified H-2B applications for seasonal seafood jobs primarily located in Louisiana, Maryland, Virginia, Texas, North Carolina, and Massachusetts. In FY 2014, we certified more than 5,700 work positions related to the harvesting, processing, and packaging of seafood including, but not limited to, crab, shrimp, crawfish, and oysters, which is a 15 percent increase in program usage over the prior year. Approximately 55 percent of the certified seafood jobs were located along the Gulf Coast states, ranging from shrimp boat deckhands in Texas to seafood and crawfish processors and packagers in Louisiana. Employer temporary labor certification applications in the seafood industry during FY 2014 were certified 92 percent of the time and processed by the Department, on average, within 16 days of receipt – this is compared to a certification rate of 84 percent and an average processing time of 18 days for all other H-2B employers.

Achieving Stability in the H-2B Program

In recent years, DOL and DHS have faced difficulties in achieving stability in the H-2B program because DOL's H-2B regulations have been subject to litigation brought by both employers and worker advocates. The history of H-2B-related litigation has dictated the timing and in part the substance of the Departments' issuance of new regulations on April 29, 2015, which I discuss in further detail below. The two new regulations that DOL and DHS have just jointly issued are: the *Temporary Non-Agricultural Employment of H-2B Aliens in the United States, Interim Final Rule and Request for Comments* (2015 IFR), which establishes the overall framework for the H-2B program, and the *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Final Rule* (2015 Wage Final Rule), which implements the complete wage methodology for the H-2B prevailing wage process. These regulations are designed to bring stability, certainty, and clarity to the program.

Background on DOL's H-2B Program Regulations and Litigation

Before 2008, DOL used regulations to structure the H-2B program, but set many substantive program standards in sub-regulatory guidance. Since 2008, DOL has published several regulations governing the H-2B program, including:

- A comprehensive rule setting program requirements and prevailing wage rates for the H-2B program, 73 FR 78020 (2008 H-2B Rule), published in 2008, which took effect in January 2009;
- A 2011 Wage Rule revising the wage methodology from the 2008 H-2B Rule, 76 FR 3452 (2011 Wage Rule), which never took effect because, as explained below, Congress declined to fund administration and enforcement;
- A 2012 H-2B rule setting program requirements other than prevailing wages for the H-2B program, 77 FR 10038 (2012 H-2B Rule), which never took effect because, as explained below, its implementation and enforcement was enjoined; and
- A 2013 Interim Final Rule issued jointly with DHS revising the wage methodology for setting H-2B prevailing wages, 78 FR 24047 (2013 IFR), which took effect in April 2013.

Litigation Involving DOL's Rulemaking Authority and Procedures

DOL's authority to issue its own regulations in the H-2B program is the subject of dispute in the Federal appellate courts. The U.S. Court of Appeals for the Third Circuit concluded that DOL has independent authority under the INA to issue H-2B program regulations to provide advice to DHS. *See Louisiana Forestry Ass'n v. Perez*, 745 F.3d 653 (3d Cir. 2014). Contrary to that decision, the U.S. Court of Appeals for the Eleventh Circuit affirmed a trial court preliminary injunction concluding that DOL lacks authority under the INA to independently issue H-2B regulations. *See Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013). These conflicting court decisions have made it difficult for DOL to carry out its duties under the INA.

On remand from the Eleventh Circuit, the district court in *Bayou* vacated the 2012 H-2B rule, and permanently enjoined DOL from enforcing the rule on the ground that DOL lacks rulemaking authority in the H-2B program. *See Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, No. 3:12-cv-183 (N.D. Fla. Dec. 18, 2014) (*Bayou II*). DOL has appealed that decision to the Eleventh Circuit. Due to this injunction and vacatur of the 2012 H-2B Rule, DOL had continued to operate the program under the 2008 H-2B Rule. However, on March 4, 2015, the same district court that vacated DOL's 2012 rule also vacated the 2008 H-2B Rule and permanently enjoined DOL from enforcing it, *See Perez v. Perez*, No. 14-cv-682 (N.D. Fla. Mar. 4, 2015). Based on the *Perez* vacatur order and the permanent injunction, DOL was required to immediately cease implementing its H-2B labor certification regulations to comply with the court's order. In response to a motion from DOL, the court in *Perez* subsequently stayed its vacatur, ultimately until May 15, 2015, which allowed the Department to continue processing H-2B temporary labor certification applications under the 2008 H-2B Rule pending publication of the new DOL-DHS joint 2015 IFR. On April 30, 2015, the *Perez* Court lifted the stay of its vacatur of DOL's 2008 rule because DOL and DHS replaced it with a new comprehensive H-2B rule published in the *Federal Register* on April 29, 2015.

When DOL's 2008 H-2B regulations were vacated, DOL had no prior regulations it could implement to operate the H-2B program, nor was it able to run the H-2B program based on sub-regulatory guidance. At least two federal courts have made clear that DOL cannot set substantive requirements for its temporary labor certification programs through sub-regulatory guidance that has not gone through notice and comment procedures. *See Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) (holding that DOL violated the procedural requirements of the APA when it established requirements that "set the bar for what employers must do to obtain approval" of the H-2A labor certification application, including wage and housing requirements, in guidance documents); *Comite de Apoyo a los Trabajadores Agricolas v. Solis,* No. 2:09-cv-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (*CATA I*) (holding that DOL's failure to issue its pre-2008 H-2B guidance document through the notice and comment process was a procedural violation of the Administrative Procedure Act (APA) .

Litigation and Congressional Action Involving H-2B Prevailing Wage Rates

DOL's prevailing wage regulations, which are established so that the importation of foreign workers will not have an adverse effect on the wages of U.S. workers, have also been the subject of litigation and Congressional appropriations riders. In *CATA I*, a district court invalidated DOL's then-existing methodology, which included setting the H-2B prevailing wage based on skill levels. In response, DOL issued the 2011 Wage Rule, which concluded, among other things, that the vast majority of H-2B jobs involved unskilled labor, and that setting the

prevailing wage based on skill levels had little relevance in the H-2B program. Shortly before the 2011 Wage Rule came into effect, Congress issued an appropriations rider effectively barring implementation of the 2011 Wage Rule, and the same rider was issued in every appropriations enactment until January 2014. During the period DOL was unable to implement the 2011 Wage Rule, DOL continued to rely on the 2008 H-2B Rule, which allowed employers to use wages based on skill levels. In 2013, however, a district court vacated the problematic provision in the 2008 H-2B rule requiring skill-level-based prevailing wages (20 CFR 655.10(b)(2)), and ordered DOL to come into compliance in 30 days. *See Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (*CATA II*).

In response to the court's order in *CATA II*, and in order to address the Eleventh Circuit's decision in *Bayou* raising questions about DOL's regulatory authority, DOL and DHS jointly promulgated the 2013 IFR, which again revised the wage methodology, eliminating the four-tiered wage based on skill levels and generally establishing the Occupational Employment Statistics (OES) mean wage as the prevailing wage. The 2013 IFR also permitted the use of employer-provided surveys as an alternative to the OES wage. However, in December 2014, the U.S. Court of Appeals for the Third Circuit vacated the regulatory provisions that permitted employers to submit the employer-provided surveys as an alternative to that OES wage, concluding that those provisions had substantive and procedural defects under the APA. *See Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 191 (3d Cir. 2014). This vacatur prohibited DOL from accepting employer-provided surveys unless it engaged in further rulemaking.

The 2015 H-2B Interim and Wage Final Rules

On April 29, 2015, DOL and DHS jointly issued two regulations: the 2015 IFR establishing the overall framework for the H-2B temporary labor certification program, and the 2015 Wage Final Rule implementing the complete wage methodology for the H-2B prevailing wage process. As noted, these regulations are intended to bring certainty, stability, and continuity to the H-2B program after a period of uncertainty brought on by litigation.

The 2015 IFR strengthens recruitment and protections for U.S. workers, ensuring that they have a greater chance of finding and applying for jobs for which employers are seeking H-2B workers, and that U.S. workers who are doing essentially the same jobs as H-2B workers have substantially the same rights and benefits as those workers.

For example, the 2015 IFR improves U.S. worker access to jobs by requiring employers to extend recruitment efforts relating to the position described in the temporary labor certification until 21 days before the employer's date of need. This addresses an inadequacy in the 2008 rule, under which employers conducted a minimal recruitment effort almost four months before the start date of work. U.S. applicants – particularly unemployed workers – seeking temporary work often need work right away and cannot wait for four months. Under the 2015 IFR, employers must also make jobs available to former U.S. employees who worked for the employer in the occupation in the prior year, except those terminated for cause or who quit. The 2015 IFR also requires DOL to establish a national electronic registry that will improve U.S. worker access to these jobs. In areas of substantial unemployment the employer may be required to conduct additional recruitment efforts to ensure more opportunities for and a greater response from available and qualified U.S. workers.

In addition, employers bringing in foreign workers under the H-2B program must:

- Show temporary need to help prevent the program from being used for jobs that are really permanent and, therefore, not available to temporary foreign workers;
- Guarantee employment for a total number of work hours equal to at least three-fourths of the workdays during the periods for which they have requested H-2B workers, for both H-2B and U.S. workers in corresponding employment; and
- Pay visa fees of H-2B workers, the inbound transportation and related subsistence costs of workers who complete 50 percent of the job order period, and the outbound transportation and related subsistence expenses of employees who complete the entire work period.

The 2015 IFR also contains a number of provisions that will lead to increased transparency and address potential issues around foreign labor recruitment, such as requiring employers to 1) disclose their use of foreign labor recruiters in the solicitation of workers, which was the subject of a recent Government Accountability Office report issued in March 2015; 2) provide workers with earnings statements that clearly specify hours worked and offered and deductions from pay; and 3) display a poster describing employee rights and protections. And finally, the 2015 IFR strengthens DOL's enforcement and program integrity mechanisms by, for example, extending the potential period of debarment from the H-2B program resulting from employer violations from three to five years, and providing the Department with enhanced authority to revoke a temporary labor certification based on fraud, willful misrepresentation, or substantial program violations. (Additional information can be found at http://www.foreignlaborcert.doleta.gov/.)

The 2015 IFR also permits employers in the seafood industry, in certain circumstances, to stagger the entry of their H-2B workers into the United States (general users of the program must bring all their H-2B workers into the U.S. when work begins). Under section 108 of the Consolidated and Further Continuing Appropriations Act, 2015 (the "2015 Appropriations Act"), Pub. L. No. 113-235, 128 Stat. 2130, 2464, staggered entry of H-2B nonimmigrants employed by employers in the seafood industry is permitted under certain conditions. DOL and DHS have incorporated the requirements into the 2015 IFR.

The companion joint 2015 Wage Final Rule establishes the complete prevailing wage methodology for the H-2B program, which includes permitting employers to submit employer-provided surveys to set the prevailing wage in limited circumstances. We believe that this offers employers flexibility, while simultaneously ensuring that the prevailing wage is established at a level that meets DOL's obligation to ensure no adverse effect on U.S. workers similarly employed.

The 2015 Wage Final Rule retains as the primary prevailing wage the mean wage of all workers in the occupation in the geographic area of the H-2B work based on the OES survey. The OES mean wage has been governing prevailing wage determinations since April 2013, and the vast majority of employers using the H-2B program have been using this wage rate. The Wage Final Rule made two changes to streamline the prevailing wage process and address recent litigation concerning employer-provided surveys.

First, and significantly for many employers in the seafood industry, the Wage Final Rule permits the submission of employer-provided surveys in the following limited circumstances: (1) if the OES does not collect data for the geographic area or the OES reports the wage rate in the geographic area at only the national level for the occupation; (2) if the job opportunity is not

included within an occupational classification of the OES or is within an occupational classification of the OES designated as a general "all other" classification; or (3) where the survey is independently conducted by a state entity. Based on DOL's extensive experience partnering with the states to collect wage data, DOL and DHS have determined that occupational wage surveys conducted and issued by state agencies, such as state agricultural, natural resources, or maritime agencies, or state colleges and universities, are neutral and reliable, and that they will not suffer the same shortcomings as other employer-provided surveys. Therefore, as long as these surveys meet the methodological standards contained in the new regulations, the Department will continue to accept state-conducted surveys.

Second, the Wage Final Rule no longer permits use of wage determinations under the Davis-Bacon Act (DBA) and the McNamara-O'Hara Service Contract Act (SCA) to set the prevailing wage in the H-2B program. The decision to discontinue these wage sources in the H-2B program is based largely on DOL's challenges in conforming the SCA and DBA categories to employer requests for prevailing wages in the H-2B program, and the desire to issue consistent prevailing wage determinations (PWDs) in the H-2B program. SCA and DBA will remain in force and effect independent of the H-2B program for all workers performing work under government contracts.

Smooth Transition between Former Regulations and the 2015 IFR

Both DOL and DHS are trying to ensure a smooth transition between the former regulations and the 2015 IFR and Wage Final Rule. All H-2B labor certifications granted under the provisions of the 2008 Final Rule will continue to be valid for the positions and period of employment certified. Pending applications for prevailing wage determination or for temporary labor certification will be processed under the regulations in place at the time they were filed (the 2008 Final Rule, as amended by the 2013 IFR). The 2015 regulations also include flexibility for employers who are seeking workers with a start date of need before October 1, 2015 by establishing a process for expedited recruitment of U.S. workers, including credit for recruitment employers had already completed under the 2008 Final Rule. The regulations grant these employers the ability to obtain a prevailing wage simultaneously with filing the application for temporary labor certification so that employers who are affected by the change in regulations can still quickly access the workers they need. Employers with a start date of need on or after October 1, 2015, must file their H-2B temporary labor certification applications under the regular filing procedures of the 2015 IFR.

Employers with an existing PWD or a pending or approved H-2B temporary labor certification also may submit a request for a Supplemental PWD (SPWD) in order to request a prevailing wage based on an alternate wage source. Such supplemental determinations will only apply to those H-2B workers who were not yet employed by the employer on the date the SPWD was issued, and will not apply to H-2B workers who were already working for the employer on or before the date of the SPWD, or U.S. workers who were recruited and hired under the original job order. Seafood employers using staggered entry likewise may request SPWDs.

To reduce the burdens and save time for employers who have recurring temporary needs, DOL will implement over time a new pre-filing process allowing an employer to "register" its temporary need for a specific number of positions the employer needs and will continue to need. Instead of having to prove temporary need each time the employer files an H-2B application, the employer will submit an H-2B registration in the first year this process is implemented and the registration will be valid for a period of up to three consecutive years during which the employer

will benefit from the streamlined application process. The Department will also continue to accept H-2B temporary labor certification applications for professional athletes, tree planting and related reforestation, and professional/outdoor entertainers under the existing special procedures.[1]

Conclusion

The Department will continue to focus on maintaining a fair and reliable H-2B temporary labor certification process while enforcing necessary protections for both U.S. and nonimmigrant foreign workers. To do so is good not only for workers but also for the law-abiding employers, including those who most participate in this capped visa program, including our nation's seafood employers. The Department has worked hard to prepare robust guidance for employers to help them navigate the new regulations, including a technical, dedicated Web page with Frequently Asked Questions and other resources that explain the differences between the old and new regulations, and guide employers on how to file their applications. In addition, the Department published a number of Factsheets that help employers comply with program obligations. We hope that these will significantly reduce the time and effort employers must invest to successfully use the H-2B program. The Department is confident that as program users become more familiar with these new requirements, overall program compliance will continue to increase and any delays attributed to failure to follow the program's rules will continue to decrease.

Mr. Chairman and Members of the Committee, thank you again for the opportunity to discuss the U.S. Department of Labor's role in addressing regulatory issues related to the H-2B program and its relevance to the seafood industry. I look forward to answering your questions.

[1] The 2015 IFR does not include the regulatory provision authorizing DOL to create new special procedures. A recent decision by the U.S. Court of Appeals for the D.C. Circuit held invalid such a provision in DOL's H-2A temporary agricultural worker program. *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014).

Chairman VITTER. Okay. Thank you, Ms. Wu, and we will start with our questions, and let me begin with you on one of the topics you discussed directly, and that is private wage surveys.

Is it not correct that the new rule you were describing greatly limits compared to past practice, greatly narrows and limits the use of private wage surveys?

Ms. WU. Senator, it is true that in December last year, we had—our previous rule allowed significant use of private wage surveys. That use was enjoined by a court in December of last year and the court's opinion lays out a great deal of reasoning, including concerns about how private wage surveys might undercut wages and some other reasons that, for example, surveys that use only entry-level wages are not permissible under the law. They found that to be a violation of the law.

At that time, we had to immediately suspend the use of surveys because of the court's order. However, with our new rule, we allow surveys in limited circumstances. There are some, and again, it is in keeping with the court's order, we believe, where, for example, an occupation is not well represented in the Occupational Employment Statistics.

We also specifically allow for State conducted surveys, and I know this is a subject of particular interest in the seafood industry because many States do this. There are some basic criteria in keeping with the court's order. For example, as I mentioned, you have to look at average wages in an industry, not simply entry-level wages. But, we believe that this may be an opportunity for many in the seafood industry to take advantage of this provision. We actually—I was talking with some of your folks from Louisiana today and we are putting out some assistance next week to explain to people how they can use these surveys.

In the transition provisions, we also said that, for example, if you already got your certification but you have not brought your workers in and you are wondering, can I go back and get a new survey wage, as long as it complies with our basic criteria, we put in a provision to allow people to go back and adjust that wage.

Chairman VITTER. Well, Ms. Wu, as you know, there is a lot of concern that the new system is too narrow and narrows the use of these surveys way beyond anything that would be absolutely required or demanded by the court. What is your reaction to that critique, which I think is a fair one?

Ms. WU. Thank you, Senator. I think we believe that the new provisions are in keeping with the court's order. I should note, the State-provided surveys, frankly, we may be getting some criticism from the other side that it may be going beyond what the court allowed. So, there are many points of view on it.

But, I do think that this provision of State-provided surveys may be an avenue that industries, particularly the seafood industry, could take advantage of and have taken advantage of in the past.

Chairman VITTER. Does use of these State surveys allow for recognizing differences which exist from one local area to others within the State?

Ms. WU. Yes, Senator, it could. Obviously, it is up to the State as to what level of detail is conducted in the surveys. They certainly could provide a survey where there are differences in local-

ity. Obviously, with different sorts of tasks in the industry, they would have different levels of wages. And, the Department is not in the business of dictating how employers should pay their wage or not. I know some employers, for example, use piece rate. They will be able to continue doing so.

Chairman VITTER. Okay. And, Dr. Solomon, my understanding is that in 2014, only about 2.77 percent of all seafood imports were inspected. Do you think that percentage is adequate, and if not, what does the FDA plan to do differently?

Dr. SOLOMON. So, the seafood safety system that I described during my testimony is multi-faceted, so there are many components of it. First, it is putting the Hazard Analysis Critical Control Point regulations into place, which puts the burden on the processor to produce safe product. Then, we have oversight by doing foreign inspections of them. Then, we also conduct inspections of HACCP regulations by the importers.

So, the testing that takes place at the border is a verification activity or a surveillance activity to try and find if there is any flaws in the system and how it is working and to identify them and it is verification activities.

So, we test at different rates a sampling. So, taking generic rates for seafood, we test higher rates for certain products, certain commodities, higher risk areas in much higher rates than that because we want to have additional verification for those particular aspects which pose the greatest safety concerns.

Chairman VITTER. I understand all of that. I did not mean to suggest by my question that you just do one thing, you just stop 2.77 percent at the border and test it. So, as part of that overall effort, do you think the net inspection rate of 2.77 percent is adequate?

Dr. SOLOMON. Examination at the border as a verification activity at the various rates we do, we think is a viable control measure in light of all the other measures that we have in place.

Chairman VITTER. So, you have no plans to increase it?

Dr. SOLOMON. With the resources we currently have, we would not just increase sampling testing. If the agency had additional resources, we would focus on all the aspects of the framework, the regulatory structure that I described.

Chairman VITTER. Why would you increase it if you had more resources?

Dr. SOLOMON. Greater oversight and greater confidence in how the system is working. We would do more foreign inspections. We would do more importer examinations. But, once again, not on a universal basis, on a risk basis, on the products——

Chairman VITTER. So, the level you do now is not optimal?

Dr. SOLOMON. Uh, we think we actually have very few foodborne illnesses associated with seafood products, but with more resources, the agency could do more.

Chairman VITTER. Okay. I am just trying to understand. You are suggesting it is adequate, but in the next sentence, you said you would certainly do more with more money.

Dr. SOLOMON. So, it is a risk basis in terms of looking at the products that are coming in. With additional resources, we could

look at lower levels of risk. We are looking at the highest levels of risk now.

Chairman VITTER. Doctor, certainly in the past, the following has happened. A batch of actually tested and rejected seafood imports has been simply shopped to another port of entry. What in your overall system today categorically prevents that?

Dr. SOLOMON. So, we have a notification system, electronic notification system. When we refuse an entry, that electronic notification system not only notifies Customs and Border Protection, but all the other FDA district offices and ports.

Chairman VITTER. And, so, how is that batch tagged indelibly so that that notification is meaningful so that those other ports can identify the same batch we are talking about?

Dr. SOLOMON. So, as you may be aware, we have been working for many years to try and get a marking rule that would provide that marking of the product. That is not in place yet, but right now, we do notifications based off the data that we have of who the importer is, what the commodity line is, and make sure that everyone is aware about that shipment was refused.

Chairman VITTER. So, if they—so, there is not a set marking rule, so if they change the packaging or any of the markings, they could very possibly get away with what I am describing?

Dr. SOLOMON. The system is not foolproof, I agree with you, but we do do notifications.

Chairman VITTER. Okay. Well, I mean, I would suggest that is a bigger hole than simply saying it is not absolutely foolproof, but we will pursue that.

Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman.

Dr. Solomon, as I said in my opening statement, I am very concerned that we are in the process of setting up a new program under the Department of Agriculture to separate catfish out from all other seafood and inspect them separately. I think it is duplicative and it does not make sense.

So, I wonder if you could talk a little bit about the program that has been operating under FDA, which up until now has had the responsibility for inspecting catfish. Can you tell us how it has functioned and whether or not catfish consumption has posed a risk to human health. Is there a reason why we should be setting up a separate program?

Dr. SOLOMON. So, the last part of the question, catfish is not one of the species that we particularly target as being a risky product. It is not a product that is typically eaten or consumed raw. It is cooked beforehand. It is not put into reduced oxygen packaging, some of the other risk factors that may be associated with it. So, we handle catfish under the same framework that I described before. We have both inspections, domestic inspections, foreign inspections, the HACCP controls in place that have been adequately controlling issues associated with catfish.

Senator SHAHEEN. So, and just to be clear, it is not the FDA or the Department of Labor or USDA that has set up this program separately. It was Congress that did this in the farm bill. But, there was not a safety risk to human health from catfish that triggered this effort, is that how you would analyze the situation?

Dr. SOLOMON. I am not aware of any specific safety hazards unique to catfish.

Senator SHAHEEN. Thank you. And, I know it may be hard for you to put a cost figure on the inspection of catfish under the FDA jurisdiction, that it may take you some time to come up with that. It is my understanding that right now, the USDA's catfish inspection program, it is estimated that it will cost about $14 million a year to operate. So, I am going to ask you to take for the record and try and get for this committee the cost of the inspection of catfish under FDA jurisdiction, if you would.

Dr. SOLOMON. We would be happy to provide that back to you.

Senator SHAHEEN. Okay. Thank you.

Ms. Wu, I appreciate the fact that the Department is in a challenging position relative to how to make the H–2B visa program work, given that we have not yet taken up comprehensive immigration reform, which would go a long way towards addressing this challenge. But, in the meantime we do have small businesses in my State, we heard from the Chairman in Louisiana, who are using the H–2B program and are confused about how the new rules will affect their business. So, can you talk a little bit about how you are addressing outreach to those small businesses that are affected.

Ms. WU. Absolutely, Senator. As I noted, we have a bunch of fact sheets on our Web site. We are also doing some sort of webinars and outreach next week to talk with people. We always—we have frequent listening sessions. We recognize the use of this program by small business. We are happy to answer any questions.

We have very detailed questions about, you know, if I already submitted my application, what happens to me now. And, I think, as I noted, for people who had already submitted their application before this whole court case in April, they can just keep going along. They got approved. They can keep going along, running the program the way they were going to do it this summer. There will be changes in the future.

For those who want workers before October 1, we put in a sort of expedited process. As you may know, DHS administers the cap, but the cap was hit fairly early this year. But, we continue to process requests for labor certification, because there are some exceptions. So, we are happy to answer any questions. We are doing outreach to small businesses.

Senator SHAHEEN. And, so, when you advertise those webinars that you are doing, do you notify the Small Business Administration so they can get it out to the Small Business Development Centers to share that with other businesses around the country? How do you get the word out that you are doing those kinds of webinars?

Ms. WU. Well, first and foremost, we use the contacts list that we have of the users of the program, because, obviously, the Small Business Administration deals with many, many businesses who do not even know what the H–2B program is.

Senator SHAHEEN. Right.

Ms. WU. So, we really focus on the contacts that we have and work with our colleagues at DHS and others to make sure that we get the word out. But, if you have other suggestions or if you are concerned about the employers in your State, we would be happy

to conduct some targeted outreach there. We also work with many of the associations who follow these regulations very closely. We make sure we get the word out to them. And, we have regular listening sessions with them to hear about their concerns.

I will note the new comprehensive rule is an interim final rule. We took comments on a similar rule in 2011–2012. We made some changes, in part in recognition of the concerns of small business. We are taking comments again and we very much welcome people's comments on how we can improve the program and make it usable for them.

Senator SHAHEEN. So, just because I am still not quite clear, if anybody has—if a company has applied for H–2B visas in the past, would they get a notification of proposed rule changes, of various outreach efforts that you are doing automatically because they are on your list?

Ms. WU. They should. They should. I will check with my operations people——

Senator SHAHEEN. Okay.

Ms. WU. Yes, we do.

Senator SHAHEEN. Behind you, they are nodding.

[Laughter.]

So, hopefully, that means that any New Hampshire company that has applied in the past will get those notifications.

Ms. WU. Yes, that is our hope.

Senator SHAHEEN. Thank you very much.

Chairman VITTER. Thank you.

Next is Senator Ayotte.

Senator AYOTTE. Thank you, Chairman.

I wanted to follow up on the question that Senator Shaheen had asked Dr. Solomon about the catfish program. As far as I can tell, the U.S. FDA handles seafood inspections for all other forms of seafood, correct?

Dr. SOLOMON. That is correct.

Senator AYOTTE. And, so, there is no reason why you could not continue to handle independently the inspection as you did before Congress on its own created this duplicative inspection regime, the inspection of catfish, which is actually a low-risk species, correct?

Dr. SOLOMON. We are currently, since that rule is not in effect yet, we are currently handling all the catfish inspections.

Senator AYOTTE. And in the end, as I understand it—you know, it has been interesting to me, we have nine GAO reports on this topic, and those nine GAO reports actually consistently recommend eliminating the newly created by Congress USDA program that, as I understand—you would not know these numbers—but as I understand, has already spent $20 million. Not one fish has been inspected. Obviously, the FDA has handled the inspection of seafood for a long time. And, here we are in the Congress going to—already spent another, you know, USDA, trying to stand up duplicative inspection, already spent $20 million on it, and as Senator Shaheen mentioned, it is going to cost USDA, the estimate is, $14 million a year to continue doing what you already do quite well.

So, I do not know if you have had a chance to look at these GAO reports. Have you?

Dr. SOLOMON. Not nine of them, but I have read some.

Senator AYOTTE. And, do you agree that you can handle the inspection of catfish, that we do not really need another office to inspect catfish?

Dr. SOLOMON. The program has worked effectively as far—from FDA's perspective.

Senator AYOTTE. Right. So, this is a great example of government run amok, truthfully, because the notion that we already have the FDA doing its job inspecting seafood, and to carve out just catfish so that we can spend millions of dollars more to have the USDA have another office inspecting catfish, which you are already doing quite well, for one species of fish—you know, these are the kinds of things that I think people look at Washington and they say, what are you all doing down there?

So, I really hope, you know, that we will have some common sense on this and allow you to continue to do what you have been doing historically rather than creating another—continuing to plunk millions of dollars into a duplicative program.

I also wanted to follow up, Ms. Wu, on the H–2B issue. I share—obviously, I serve in New Hampshire with Senator Shaheen, and what I have heard in New Hampshire, many of our seasonal businesses depend on these workers. In fact, in Portsmouth, Nashua, Laconia, they had the most H–2B visas granted. But, the abrupt breaks and a burdensome process, especially for smaller business, have been very, very difficult. So, when are we going to make sure that we are not in the same position we were this year as we look to the application process next year, you know, given that this is—people have to plan on what their workforce needs are?

Ms. WU. Thank you, Senator. It has been frustrating, I know. It has been frustrating for us trying to run a program. I am sure it has been frustrating and frightening, frankly, for a lot of small businesses when these abrupt court decisions come along and halt us from doing something we have been doing in the program, make us suspend this. I mean, it has really been very difficult.

That is why we asked for a stay with the court order so we could keep running the program this spring, and now we have issued comprehensive rules—even though the Department of Labor believes we have the authority to do this on our own, because of the legal challenges, we jointly issued these regulations with DHS. So, I think we feel like we are at least insulating ourselves from that level of legal attack. Unfortunately, we do continue to see attacks from all sides on this program, but we hope that brings some certainty and stability. And, we also are trying to include some provisions that will make things easier over the long run for businesses using this program.

Senator AYOTTE. Well, I really appreciate that, because just the feedback I have gotten from businesses in New Hampshire on the program is that under the administration, it has become more complicated, more difficult, more paperwork, and as I look at the new H–2B interim and wage final rules that were issued on April 29, it is more than 100 pages, and I see the burden on employers increasing. So, I hope when you look at this that we need to decrease the burden on employers, not create more paperwork, especially when many of them, as you know, this is something that they do

every year and they have been in the program already. So, thank you for being here today.

Chairman VITTER. Thank you.

And next, we will go to Senator Cantwell.

Senator CANTWELL. Thank you, Mr. Chair.

Dr. Solomon, I wanted to ask you about Russian pollack. Last fall, I sent a letter, led by my colleague, Senator Murkowski, to the FDA Commissioner Hamburg requesting to fix this labeling problem. The FDA has authority to change the acceptable market name of product from pollack, and not just Alaska pollack. The change would prevent Russian pollack from being labeled as United States Alaskan pollack. So, we requested that the FDA make this change in September and now it is May of 2015. So, do you agree that the term "Alaskan pollack" would give consumers the impression that the product is from Alaska?

Dr. SOLOMON. So, the determination about the species naming is handled by our Center for Food Safety and Applied Nutrition. They have what they call a seafood list. I know that your submission—that issue is before that group. They look at both the species name, they work with fish taxonomists and look at the DNA sequencing that talks about these different species, and I know they have that issue under review.

Senator CANTWELL. And, so, when will we hear about that decision?

Dr. SOLOMON. I know they are actively working on it. I do not have that. We will be happy to try and get back with you.

Senator CANTWELL. Okay. Do you think, in your view, is the Russian pollack industry a sustainable fishing industry specifically—scientifically, I guess I would say?

Dr. SOLOMON. So, I do not think I am qualified to speak on that. We look at fish from a food safety perspective and we are not, you know, related to the trade issues or other issues associated with it.

Senator CANTWELL. Well, I think we see things, obviously, about it. They are known for labor issues. Just last month, a Russian pollack catcher/processor vessel sank in the Bering Sea. Only 63 crew members survived. Sixty-nine were lost. Forty percent of the crew were—they are illegally from countries like Burma, Ukraine, Latvia. And, so, these lives are being lost because of lack of training and survival skills, and then consumers are seeing a product that is labeled Alaska and is not really Alaskan pollack. So, we hope that you will get a decision through the FDA about this and look at both the way the industry is operating and the right that consumers have to understand this product. Thank you.

Thank you, Mr. Chairman.

Chairman VITTER. Okay. Thank you both very much. We will excuse you and call up our second panel of witnesses. As they get situated, I am going to go ahead and be introducing all three of them.

We are really pleased to be joined by Dr. Mike Strain, the Commissioner of the Louisiana Department of Agriculture and Forestry, who was elected to that position in 2007, sworn into office in January 2008. Dr. Strain holds a Doctorate in Veterinary Medicine from LSU and opened the Claiborne Hill Veterinary Hospital in Covington soon after he received that degree.

We are also joined by Mr. John P. Connelly, President of the National Fisheries Institute, America's leading trade association advocating for the full seafood supply chain. John was Chairman of the International Coalition of Fisheries Associations and a board trustee of the Marine Stewardship Council and is currently a board member of the International Seafood Sustainability Organization.

And, we are also joined by Mr. Frank Randol, President of Randol, Incorporated. Frank is a seafood processor from Lafayette, Louisiana. He has over 40 years of experience in the industry and also owns Randol's Restaurant in Lafayette, Louisiana.

Welcome to all of you, and we will start with Dr. Strain.

STATEMENT OF MIKE STRAIN, D.V.M., COMMISSIONER, LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY

Dr. STRAIN. Thank you. Good afternoon, Chairman Vitter. Thank you very much for the opportunity to come here and speak today. My name is Dr. Mike Strain. I am the Louisiana Commissioner of the Department of Agriculture, Forestry, and Aquaculture. I am testifying today on behalf of the Louisiana Department of Agriculture.

State Departments of Agriculture are responsible for a wide variety of programs, including food safety, combating the introduction and spread of plant and animal diseases, and fostering the economic vitality of our rural communities. Our department oversees all agriculture activities within the State, including the markets for products produced by our farmers, and especially what we are here to talk about today in seafood, in the crawfish industry, which falls under my purview.

First of all, I would like to thank Ms. Wu and other members of the Department of Labor for allowing us to come and visit with them on March 23 about this issue and have a very open and frank discussion.

Also with me today is the Director of the National Association of State Departments of Agriculture, which I am a Vice President, Dr. Barbara Glenn. My statement is also consistent with the position of the National Association of State Departments of Agriculture, representing commissioners, secretaries, and directors across all 50 States and four Territories, in the development, implementation, and communication of sound public policy and programs which support and promote American agricultural industry while promoting and protecting the environment and our consumers.

In order to feed our increased U.S. population, we must have a stable agricultural labor supply. The ability of seasonal businesses to keep their doors open and retain their full-time U.S. employees relies upon having successful peak seasons to offset the rest of the year when business is slow. During their busy seasons, companies must supplement their permanent staff with temporary seasonal employees. Employers spend thousands of dollars and hundreds of hours in their efforts to fill these positions.

Unfortunately, even in today's tough economic climates, there are not enough local workers available to fill all the temporary seasonal positions, and efforts to obtain U.S. workers to relocate for temporary seasonal employment have not been successful. As a result, businesses must utilize the H–2B guest worker program to

find seasonal workers and workers for their peak workforce needs. The H–2B program is vitally important for many industries, including forestry, nursery, landscaping, outdoor amusement, restaurant and hospitality, tourism, livestock, horse training, sugar, and many others.

In Louisiana, the seafood industry, which includes crawfish, shrimp, crabs, oysters, and catfish, is in a critical situation because seafood processors traditionally cannot fill their temporary or seasonal vacancies with U.S. workers. Many of these businesses are located in rural areas that simply do not have sufficient populations to supply their extra workforce needs. Additionally, many who are willing to work want full-time, year-round jobs. Indeed, many of the jobs in these locales that are year-round and are full-time depend on the various processors operating for their own jobs and business operations.

In 2014, Louisiana hired 5,546 H–2B workers. For each H–2B worker, it is estimated that 4.64 American jobs are created and sustained.

Over the last ten years, Louisiana has seen many natural challenges to the agricultural sector of our economy, with Hurricanes Katrina and Rita, floods on the Mississippi River, spilling water through the spillways into the Atchafalaya Basin, and drought. The H–2B regulations released on April 29, 2015, by the U.S. Department of Labor and the U.S. Department of Homeland Security could impact an already fragile industry's economic competitiveness.

The seasonal industries have had to weather several years of regulatory instability. The H–2B wage rule that the Department of Labor adopted on January 19, 2011, imposed a new, untested wage determining methodology that would significantly increase costs for small and seasonal small businesses. After being blocked by Congress in April 2013, the DOL issued an interim final rule that included the same methodology for setting wages, but recognized the importance of State wage surveys. Unfortunately, the new rule released two weeks ago is virtually identical to the rule that was blocked by Congress, causing additional obstacles for employers in the program.

In December 2014, the Department of Labor announced that it would no longer allow the private wage rate surveys that were developed by many State Departments of Agriculture, including Louisiana. My staff has spent countless hours gathering information to accurately depict the current wages that the industry is paying in our geographic location. This action forced employers into accepting higher prevailing wages that are not representative of the wages that are being paid domestically.

To make matters worse, the H–2B worker caps have already been exceeded and now many seafood processors have not received the workers that they need. Seafood processing has already begun early in the spring, and with the crawfish industry especially, it is time sensitive. These actions have a negative impact on the seafood industry and related commerce sectors, such as restaurants, et cetera.

Two months ago, the LSU Ag Center conducted a rapid economic analysis of the recent H–2B policy changes from the U.S. Depart-

ment of Labor for the Louisiana seafood industry. The assessment was conducted in response to potential changes in the cost and availability of labor stemming from a mid-year cap on H–2B permits and the Department of Labor announcement that it would no longer accept the private wage rate surveys. Results indicate that for every one dollar of employee compensation created by the seafood preparation and packaging industry in Louisiana, employee compensation increased by $2.06 across all sectors of the Louisiana economy. This includes the original one dollar of employee compensation created by the seafood preparation and packaging industry plus $1.06 of induced multiplier effects across all sectors of the economy.

Total income generated by H–2B visa workers in the Louisiana seafood industry is estimated between $36 and $43 million. Based on the assumption of $35 million in revenue, the loss of this revenue for any given number of firms would lead to a total reduction in labor income across the entire Louisiana economy, eventually leading to a number of companies closing. The economic impact of two processing facilities closing is $5.3 million, and with five firms shutting down, $13.3. Louisiana has already faced a number of processing facilities closing due to hurricanes and oil spills and the industry simply cannot be sustained without a stable workforce.

I am certain that not only is the seafood industry in Louisiana impacted, but the entire United States seafood industry will be affected by these actions. Our markets are subject to particularly fierce competition from abroad. For example, the Chinese have been extremely aggressive in trying to corner the U.S. crawfish market. This predatory practice and behavior began in 1993 and it has continued. The Chinese presently control over 50 percent of the market and are poised to capture even a larger market share if our producers are put at a further competitive price and labor disadvantage.

Without temporary H–2B guest seasonal workers to process seafood, Louisiana seafood processors would shut down, eliminating the primary market for our fishermen and our farmers to sell their catch. As a result, foreign seafood would gain a stronger foothold in the U.S. market and our fishermen and farmers who produce and harvest crawfish, shrimp, crabs, oysters, and catfish would be devastated and a key segment of the Louisiana economy crippled.

Once we lose the processors, we would not be able to depend on them coming back in future years. Therefore, the losses because of the processors scale back and do not have the ability to operate during the season will have irreparable and bad repercussions now and in the future.

The short-term consequence of an immediate expulsion of this vital segment of the workforce will cause a production crisis in a wide variety of seafood processing, field and nursery crops, sugar processing, forestry, livestock, restaurant industry, and others. This would leave the United States and our State of Louisiana no alternative but to import many food products from countries with surplus foreign labor. This is unacceptable. We must do everything in our power to grow and support America's jobs and economy.

We are asking for your help. We must streamline and expedite the H–2B process. We need a working system without overburden-

some rules, unrealistic time tables, and outright road blocks. Neglecting the labor needs of agriculture will raise the costs of production in a way that harms farmers, fishers, and industries throughout America.

I appreciate your time and encourage you to work with us to find workable solutions, ways that we can facilitate rather than making it so difficult to where our processors and our industries cannot operate. Where we are at currently, we have a large crawfish harvest and we do not have enough peelers to process it and that puts us in a severe economic state, and I am sure Mr. Randol will address that, as well.

Thank you.

[The prepared statement of Dr. Strain follows:]

LOUISIANA DEPARTMENT OF AGRICULTURE & FORESTRY
MIKE STRAIN DVM
COMMISSIONER

Senate Committee on Small Business and Entrepreneurship to discuss the "Impact of Federal Labor and Safety Laws on the U.S. Seafood Industry"

May 6, 2015

Statement of Mike Strain, DVM
Commissioner, Louisiana Department of Agriculture and Forestry

Good afternoon, Mr. Chairman. My name is Dr. Mike Strain and I am the Commissioner of the Louisiana Department of Agriculture and Forestry. I am testifying today on behalf the Louisiana Department of Agriculture and Forestry. State departments of agriculture are responsible for a wide range of programs including food safety, combating the introduction and spread of plant and animal diseases, and fostering the economic vitality of our rural communities. My Department also oversees all agricultural activities within the State, including the markets for products produced by our farmers. The activities of the crawfish industry also fall under my purview.

My statement is also consistent with the position of the National Association of State Departments of Agriculture (NASDA). NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four territories in the development, implementation, and communication of sound public policy and programs which support and promote the American agricultural industry, while protecting consumers and the environment.

In order to feed our increased U.S. population, we must have a stable agricultural labor supply. The ability of seasonal businesses to keep their doors open and retain their full-time U.S. employees relies upon having successful peak seasons to offset the rest of the year when their business is slow. During their busy seasons, companies must supplement their permanent staff with temporary seasonal employees. Employers spend thousands of dollars and hundreds of hours in their efforts to fill these positions. Unfortunately, even in today's tough economic climate, there are not enough local workers available to fill all the temporary seasonal positions, and efforts to obtain U.S. workers to relocate for temporary and seasonal employment have not been successful. As a result, businesses often must utilize the H-2B guest worker program to find seasonal workers and workers for their peak workforce needs.

The H-2B program is vitally important for many industries including forestry, nursery, landscaping, outdoor amusement, restaurant and hospitality, tourism, livestock and horse training, sugar and many others. In Louisiana, the seafood industry, which includes crawfish, shrimp, crabs, oysters and catfish, is in a critical situation because seafood processors traditionally cannot fill their temporary or seasonal job

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vacancies with U.S. workers. Many of these businesses are located in rural areas that simply do not have sufficient populations to supply their extra workforce needs. Additionally, many who are willing to work want full time, year round jobs. Indeed, many of the jobs in those locales that are year round and full time depend on the various food processors operations for their own jobs and business operations to be able to operate. In 2014, Louisiana hired 5,546 H-2B workers. For each H-2B worker it is estimated that 4.64 American jobs are created and sustained.

Over the last ten years, Louisiana has seen many natural challenges to the agricultural sector of our economy with Hurricanes Katrina and Rita, floods on the Mississippi River that required the release of water through the spillways into the Atchafalaya Basin, and a drought. The H-2B regulations, released on April 29, 2015, by the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security, could impact an already fragile industry's economic competitiveness.

The seasonal industries have had to weather several years of regulatory instability. The H-2B wage rule that the Department of Labor adopted on January 19, 2011 imposed a new untested wage determination methodology that would significantly increase costs for small and seasonal small businesses. After being blocked by Congress, in April 2013, the DOL issued an interim final rule that included the same methodology for setting wages, but recognized the importance of state wage surveys. Unfortunately, the new rule, released two weeks ago, is virtually identical to the rule that was blocked by Congress causing additional obstacles for employers in the program.

In December of 2014, the DOL announced that it would no longer allow Private Wage Rate (PWR) surveys that were developed by many state departments of agriculture, including the Louisiana Department of Agriculture and Forestry. My staff has spent countless hours gathering information to accurately depict the current wages that the industry is paying in our geographic locations. This action forced employers into accepting higher prevailing wages that are not representative of the wages that are being paid domestically.

To make matters worse, the H-2B worker caps have already been exceeded and many seafood processor applications have been delayed even with early submissions. Seafood processing already began in the early spring and with the worker caps reached, this will trickle down to other agriculture industries that utilize the program.

These actions will have a negative impact on the seafood industry and the related commerce sectors such as restaurants, etc. Two months ago, the LSU AgCenter conducted a rapid economic analysis of recent H-2B policy changes from the US DOL for the Louisiana seafood industry. The assessment was conducted in response to potential changes in the cost and availability of labor stemming from a mid-year cap on H-2B permits and the DOL announcement that it would no longer allow Private Wage Rate (PWR) surveys. Results indicate that for every one dollar of employee compensation created by the

seafood preparation and packaging industry in Louisiana, employee compensation increased by $2.06 across all sectors of the Louisiana economy. This includes the original $1 of employee compensation created by the seafood preparation and packaging industry plus an additional $1.06 of induced multiplier effects across all sectors of the state economy. Total income generated by H-2B visa workers in Louisiana seafood industry is substantial and ranges from $36 million to $43 million in the State of Louisiana.

Based on the assumption of $35 million in revenue, the loss of this revenue for any given number of firms would lead to total reduction in labor income across the Louisiana economy, eventually leading to companies closing. The economic impact of two processing facilities closing is $5.3 million and with five firms shutting down, $13.3 million. Louisiana has already faced a number of processing facilities closing due to hurricanes and oil spills, and the industry simply cannot sustain without a stable workforce. I am certain that not only is the seafood industry in Louisiana impacted, but the entire United States seafood industry will be affected by these latest actions of the DOL.

Our markets are subject to particularly fierce competition from abroad. For example, the Chinese have been extremely aggressive in trying to corner the U.S. crawfish market. This predatory behavior began in 1993 and has continued unabated. The Chinese presently control over 50% of the market and are poised to capture even more market shares if our producers are put at a further competitive price disadvantage, or are put out of business, as a result of the DOL H-2B rules.

Without temporary H-2B guest seasonal workers to process seafood, Louisiana's seafood processors would shut down, eliminating the primary market for our fishermen and farmers to sell their catch. As a result, cheaper foreign seafood would gain a stronger foothold in the U.S. market and our fishermen and farmers who produce and harvest crawfish, shrimp, crabs, oysters and catfish would be devastated and a key segment of the Louisiana economy would be crippled—lost to our economy. Once we lose the processors, we would not be able to depend on them coming back in future years. Therefore, losses because processors scale back or do not operate at all this season will have irreparable and bad repercussions now and in the future.

The short term consequence of an immediate expulsion of this vital segment of the workforce would cause a production crisis in a wide range of seafood processing, field and nursery crops, sugar processing, forestry, livestock and the restaurant industry, to name a few. This would leave the United States and our State of Louisiana no alternative but to import many food products from countries that have surplus farm labor. This is unacceptable and we must do everything in our power to grow and support America's jobs and economy.

We are asking for your help. We must streamline and expedite the H-B process. We need a working system without overly burdensome rules, unrealistic timetables, and outright roadblocks. Neglecting the labor needs of agriculture will raise the cost of production in a way that harms fisherman, farmers

and industries throughout America. Mr. Chairman and members of the committee, I appreciate your time and encourage you to work with us to find workable agriculture labor solutions that continue to support our fisherman, our farmers, our small businesses, our economy and provide valuable products to the nations consumers.

Chairman VITTER. Thank you very much, Dr. Strain.
We will now go to John Connelly. John, welcome.

STATEMENT OF JOHN P. CONNELLY, PRESIDENT, NATIONAL FISHERIES INSTITUTE

Mr. CONNELLY. Thank you, Chairman Vitter, for inviting the National Fisheries Institute to present our views today. Our comments will include a brief introduction, the importance of H–2B visas to seafood processors, the economics of the American seafood industry, and the U.S. seafood safety system and its results.

NFI is the nation's most comprehensive trade association. Our members include harvesters, like those on "Deadliest Catch," to importers who enable us to enjoy seafood from around the globe, to processors who put fish in a form that consumers recognize, to retailers and restaurants. We do represent all geographic regions, and we were particularly proud to have had the late Louisiana seafood leader, Mike Voisin of Motavatit Seafood in Houma, as our Chairman.

On H–2B visas, a functioning H–2B system is essential to seafood processors. Senator Mikulski captured many of the Senator's concerns in her letter to Secretary Johnson last week. Quote, "The lack of available temporary foreign workers has caused chaos among businesses in Maryland that depend on the H–2B program. More than 40 percent of Maryland's seafood processors have been unable to get the workers that they need for the 2015 crab season." I think Dr. Strain pretty much said it all, and I think that is reflective of the rest of the seafood community in the U.S.

On economics, seafood is the most globally traded food commodity. That benefits our fishing communities, as we send high quality and bountiful American seafood to Northern Asia and throughout Europe. Trade also benefits the more than 525,000 Americans that process, distribute, and sell imported seafood. Those jobs are found in nearly every State and are an important reminder that trade benefits the U.S. not just when we export.

Seafood trade also benefits farm States in two ways. About 18 percent of all soy goes into fish farms, many of those fish farms in Asia. And, two, the countries to which American farmers increasingly seek to send our ag products are countries that export seafood to America. We cannot expect to open Asian markets to U.S. pork, beef, poultry, corn, dairy, and soy if we shut off access to our seafood markets.

To seafood safety. NFI has been a long and strong supporter of seafood safety in word and deed. NFI has worked closely with academia and regulators to understand how to best implement HACCP. NFI joined you, Mr. Chairman, as an early and strong supporter of FSMA. And, NFI works with the Alliance for a Stronger FDA to urge Congress to appropriate the needed resources for the agency to meet its statutory obligations.

As Dr. Solomon aptly and fully described the HACCP system, I will not duplicate that extensive discussion.

I will close, though, speaking to results. Results, after all, are what matters. The fact is, the Centers for Disease Control analyzed and reported illnesses from all foods. Over the five-year period end-

ing in 2010, CDC found that 141 of 122,000, that is, 0.001156, or 0.12 percent of illnesses were caused by imported seafood.

Most of us love baseball. It is a great day to go down to the Nats game. But, we recall going to the games with our dads, clutching that mitt, and hoping to catch that foul ball. Unfortunately, we often came home crestfallen because we rarely, if ever, did, because the chance of catching a foul ball is the exact same as becoming sick from imported seafood, 0.001156, or 0.12 percent.

As an example of the effectiveness of the FDA, and again, while the hearing focus is not on the USDA catfish program, I did want to acknowledge the leadership of Senators Shaheen and Ayotte and others on this committee in working in a bipartisan manner to eliminate a program that USDA's own risk experts have said will not improve public health, primarily because the FDA regulation of catfish, both domestic and imported, has reduced illnesses to less than two per year. That is a safe product.

It is because of the stringent requirements of HACCP, a system required for both domestic and imported seafood, a system that requires problems to be fixed thousands of miles away from America and not caught at the border, that Congress acknowledged and exempted companies in seafood HACCP compliance from some of FSMA's key provisions. NFI agrees with Congress' determination. The safety of domestic and imported seafood is excellent.

Thank you.

[The prepared statement of Mr. Connelly follows:]

Statement of John Connelly
President, National Fisheries Institute

United States Senate Committee on Small Business and Entrepreneurship
"Impact of Federal Labor and Safety Laws on the U.S. Seafood Industry"

May 6, 2015

The National Fisheries Institute (NFI) appreciates the opportunity to appear at today's hearing on the "Impact of Federal Labor and Safety Laws on the U.S. Seafood Industry."

Before discussing seafood safety, on behalf of the roughly 300 NFI member companies, I would like to thank Senators Vitter and Shaheen for the panel discussion on the recent released H-2B regulations. These regulations released by the Department of Homeland Security and the Department of Labor (DHS and DOL) will make the program more costly and complicated for small businesses to hire workers for seafood processing. Instead of issuing commonsense reforms, DHS and DOL sought to issue almost an identical rule as they released in 2012, which has met objections from Congress, stakeholders, and has been blocked in federal court. It is important that Congress pass legislation that creates a predictable and reliable H-2B program.

National Fisheries Institute and Its Engagement in Seafood Safety

The National Fisheries Institute has been the leading voice for the fish and seafood industry and America's largest seafood trade association for nearly 70 years. NFI promotes high quality and sustainable seafood as the daily protein food choice for feeding American families. NFI members span the entire seafood value chain --- from Alaska vessel owners, Pacific processors, Midwest importers, East Coast clam harvesters, Southern shellfish producers, to national distributors and seafood restaurants --- all with a common goal of providing nutritious and wholesome seafood meals to American families, while adhering to the highest standards of food safety.

NFI and its member companies have had a long record of positive engagement on both food safety and economic integrity. NFI has worked with the Food and Drug Administration to meet the requirements of the FDA Hazard Analysis & Critical Control Points (HACCP) system for the production of seafood products from both domestic and international sources. As discussed in greater detail below, HACCP is a comprehensive, science-based system of hazard control designed to eliminate food safety risks at their source, instead of relying solely on inspection and testing of the finished products to verify food safety. NFI members' engagement on these issues goes back to the establishment of the seafood HACCP program in 1997, and will continue going forward.

In addition:

- NFI was an early supporter of the Food Safety Modernization Act (FSMA), the most comprehensive food safety reform legislation in decades.

- NFI is a member and former board director of the Alliance for a Stronger FDA, and as such supports increased appropriations for FSMA implementation and FDA enforcement of FSMA requirements.
- NFI members are also members of the Better Seafood Board, an association of companies each of which pledges to abide by federal prohibitions against mislabeling, short-weighting, and other illegal practices that cheat NFI companies and the consumers they serve.

With this engagement in mind, NFI offers the following thoughts on the unparalleled nutritional value of fish, the benefits to the national economy provided by NFI member companies and their suppliers, and the food safety profile of both imported and domestic seafood products.

Health Benefits of Consuming Seafood

Seafood provides a variety of essential nutritional benefits that in some cases are available in fish and nowhere else. Seafood is a nutrient-dense food that is an excellent source of protein, vitamins and minerals. Specifically, fish are one of the best sources for long-chain omega-3 fatty acids DHA and EPA, which are essential in the prevention or mitigation of common, chronic diseases as well as in reducing the risk of heart disease in adults. As such, it is no surprise the 2010 Dietary Guidelines for Americans recommend consuming at least 8 ounces of seafood per week.

Fish are excellent sources of EPA and DHA. Numerous recent, large-scale studies have demonstrated the importance of EPA and DHA for pregnant and nursing women and their children, and especially in fetal and early childhood neurodevelopment. The Joint Food & Agriculture Organization ("FAO") and the World Health Organization ("WHO") of the United Nations determined in 2011 that the real risk of seafood to women and their babies during pregnancy is not eating enough fish.[1]

On this point in particular, scientists from government and universities, and healthcare professionals have all concluded that for moms and moms-to-be, and their babies, the overall benefits of this level of seafood consumption outweigh any risks. Dr. Stephen Ostroff, M.D., Acting Commissioner of Food and Drugs Administration, explicitly stated the need for pregnant women and young children to consume seafood:

> For years many women have limited or avoided eating fish during pregnancy or feeding fish to their young children. But emerging science now tells us that limiting or avoiding fish during pregnancy and early childhood can mean missing out an important nutrients that can have a positive impact on growth and development as well as on general health.

[1] http://whqlibdoc.who.int/trs/who_trs_916.pdf.

Economic Impact of U.S. Agriculture Export Products and the Seafood Industry

Since the nation's earliest days, the food industry has been central to U.S. economic health and a driver of other, related industries, such as waterborne and highway freight transportation, restaurants, and hospitality and lodging. The seafood industry contributes to the American economy in three important ways:

1. Harvesting and processing of fish caught in U.S. waters;
2. Trade of seafood that is transformed in American processing operation into meals Americans enjoy (including the hundreds of millions provided to American consumers by NFI members); and
3. Fish meal and related products that are used as ingredients in aquaculture and livestock production and as additives in food and even medical products.

First, the direct economic benefits of seafood for the American table are significant. The U.S. seafood industry encompasses a full supply chain of economic partners. From harvesters on the water, to exporters and importers arranging for global trade, through secondary processors adding value and putting fish into a recognizable product, to retailers and restaurant groups, the industry represents a variety of related and interdependent businesses.

The Department of Commerce's economic analysis states that the seafood industry generates over 1,270,000 jobs in the U.S. with a sales impact of $140,660,993,000.[2] Of those jobs, U.S. harvested seafood creates 744,850 jobs. These jobs are the fishermen and women following traditions started by the nation's earliest settlers and working their craft from Louisiana to Alaska, and now extending to fish farming from Maine to California.

Department of Commerce's economic analysis also states that imported seafood creates another 525,291 American jobs, or about 4 in every 10 American seafood jobs.[3] Imported seafood also generates about 64% of the sales of the seafood industry and creates about 56% of the value added to fish in the United States. These seafood imports support American processing jobs from Seattle to Portsmouth to Buhl to Denver to Brownsville to Miami.

Lastly, there is an important but little-noted connection between U.S. agricultural exports and imported seafood. In particular farmed fish and shellfish that is raised overseas uses U.S. fish meal, soybeans and soybean products, and other farm products. In 2014, American farmers exported a record $152.5 billion of food and other agriculture goods to consumers worldwide.[4] According to the U.S. Department of Agriculture (USDA), every $1 billion of these exports

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[2] *National Overview U.S. Summary Management Context*. NOAA Fisheries, 2012. Web. 29 Aug. 2014. http://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2012/FEUS2012_NationalOverview.pdf.

[3] *Understanding the Commercial Fisheries and Recreational Fisheries Economic Impact Estimates*. NOAA Fisheries, 2012. Web. 29 Aug. 2014. <http://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2012/Understanding_fisheries_economic_impact_estimates.pdf>.

[4] http://blogs.usda.gov/2015/04/10/removing-barriers-to-agricultural-trade-ensures-us-products-can-thrive-in-foreign-markets/.

supported 6,800 American jobs.[5] U.S. agricultural exports have been larger than U.S. agricultural imports since 1960, generating a surplus in U.S. agricultural trade. This surplus helps balance the deficit in nonagricultural U.S. merchandise trade.

International trade – and the role of the American farmer in that trade – are at the top of the Senate's agenda right now, with consideration of Trade Promotion Authority. One of the universally embraced objectives of TPA is opening new markets for American farmers and knocking down barriers to agricultural products. In light of that, it is critical to understand that the Pacific Rim nations that often supply seafood to American consumers are also nations that increasingly welcome our pork, beef, soybeans, poultry, and dairy. The truism that trade is a two-way street is more apt today than ever before, and U.S. trade policy must reflect that.

Food Safety

The Food Safety Modernization Act

Any discussion of food safety must begin by recognizing the significant reforms put in place by Congress in the Food Safety Modernization Act in 2010. NFI was an early supporter of FSMA and appreciates the support of the Chairman as an original cosponsor.

The legislation is characterized by its "preventive controls" approach, which requires two things. First, it requires the regulated industry to develop and implement preventive control plans tailored to the challenges that the particular food item presents all along the supply chain. Second, this approach obligates FDA to implement a risk-based inspection strategy. Congress recognized, when considering FSMA, that blanketing FDA resources equally over every food and every facility is not only a waste of tax dollars and enforcement assets, but actually increases the risks posed by the complex and varied U.S. food industry. The preventive controls approach Congress adopted is modeled on concepts learned through two decades of Seafood HACCP development and implementation. When it enacted FSMA, Congress ratified the food safety approach that has been in place for domestic and imported seafood since 1998.[6] Congress felt that Seafood HACCP was such a success that it exempted from the preventive controls and related foreign supplier verification requirements for companies in compliance with Seafood HACCP.

The Food and Drug Administration Seafood Inspection Program – Hazard Analysis & Critical Control Points

It is important to emphasize that all seafood products sold in the United States, both imported and domestically-produced, must meet the same stringent food safety laws and regulations, including FDA's Seafood HACCP regulation and food facility registration requirements.

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[5] http://www.jec.senate.gov/public/?a=Files.Serve&File_id=266a0bf3-5142-4545-b806-ef9fd78b9c2f.

[6] https://www.congress.gov/bill/111th-congress/senate-bill/510/text?q=%7B%22search%22%3A%5B%22Food+Safety+Modernization+Act+%28FSMA%29%22%5D%7D.

The FDA HACCP regulation imposes a set of stringent and tailored requirements on the production of fish and fishery products, both domestic and imported seafood (including any food item in which seafood is a characterizing ingredient) and is applied to all seafood processors, importers, and wholesalers. In addition to required specific sanitation controls, the Seafood HACCP program obligates regulated companies to meet seven basic requirements:

1. Conduct a hazard analysis and identify preventative measures;
2. Identify critical control points (CCP);
3. Establish critical limits;
4. Monitor each CCP;
5. Establish corrective action to be undertaken when a critical limit deviation occurs;
6. Establish a record keeping system; and
7. Establish verification procedures.

By carefully identifying potential sources of contamination throughout the production process and requiring continuous monitoring, extensive recordkeeping and verification that control measures are in place, a strong HACCP program ensures a high degree of food safety. As a final measure of food safety assurance, FDA conducts inspections of firms and food products to confirm that HACCP principles are being appropriately applied. Similarly, all imported food products are subject to targeted and random FDA inspection when offered for import at U.S. ports of entry.

Imported seafood must meet the same food safety standards and HACCP requirements as seafood produced or processed in the United States. HACCP requires any problems to be identified and eliminated or mitigated at their source. For imported seafood that means problems must be fixed thousands of miles from the U.S. border. Importers are required to take steps to verify that their imported products are obtained from foreign processors that fully comply with the Seafood HACCP Regulation. This requirement makes sure that the safety of imported seafood is equivalent to the safety of seafood harvested or processed domestically. And, it is in the best interest of domestic processors to ensure that all of their raw material supplies—from overseas and domestic—are safe and wholesome.

Although the HACCP concept was developed in the United States, and the United States was one of the first countries to mandate its application to seafood, HACCP has become a universally-recognized industry standard for almost all seafood traded worldwide. It has been endorsed by the Codex Alimentarius Commission, the World Health Organization, and the UN FAO as an effective, non-discriminatory food safety mechanism. Most developed countries and a long list of developing countries have adopted HACCP requirements for domestic and imported seafood and other food products, including the European Union, Canada, Australia, New Zealand, Japan, Vietnam, Brazil, Thailand and many others.

The rapid and widespread adoption of HACCP as a food safety control system worldwide reflects its well-documented ability to minimize food safety risks, as well as its flexibility to be effectively applied in nearly all types and sizes of processing facilities. And, as the *de facto* world standard for the international seafood trade, the adoption of HACCP provides a high-level of regulatory harmonization and coordination that facilitates world trade and reduces the

potential for individual countries to erect technical barriers to trade based on arbitrary or non-science based safety concerns, all while providing a high margin of consumer food safety.

In addition to HACCP, FDA uses a comprehensive and layered approach to seafood safety. Its tools include:

- Inspections at the border are not the start of the seafood safety system, and are only one part of FDA's enforcement system. PREDICT (Predictive Risk-based Evaluation for Dynamic Import Compliance Targeting) enables FDA to target its inspections on countries or companies that have exhibited problems in the past. This enables increased testing on products that FDA deems of higher regulatory and enforcement interest. This is an appropriate use of government's resources.
- Any company subject to an Import Alert (another agency enforcement tool) must provide evidence that *all* shipments of the food in question meets the agency's standards, Import Alerts are in effect a 100%, importer-financed border testing program.
- FDA compliance actions against wayward firms and food items posing a heightened risk. Since 1998, FDA has issued more than 1,200 Warning Letters to seafood processors, initiating heightened agency scrutiny over those firms' operations.

This aggressive oversight is a demonstration of a food safety agency using the tools at its disposal to ensure a safe seafood supply, rather than a perceived sign of a weak system.

Seafood Safety System: The Results

So, FDA uses a number of tools to ensure seafood safety, from both domestic and imported sources. What are the results? Impressive. The safety of seafood imports and the effectiveness of FDA seafood regulations have been established over several decades of increasingly globalized fisheries trade and confirmed by U.S. government agencies.

The Centers for Disease Control and Prevention analyzed 6 years of reported foodborne illnesses data from 2005-2010, from across the country. CDC found that less than 2 percent of the more than 120,000 reported illness were attributed to imported food. An even smaller percentage of reported illnesses – 0.12 percent – were caused by imported seafood.[7] The CDC found that 141 of the 122,000 reported illnesses were connected to imported seafood.

In light of outcomes such as this, Congress expressly exempted the seafood industry from the preventive controls and foreign supplier verification activities (outlined above) that the FSMA imposed on the rest of the food industry.[8]

Nevertheless, no system is perfect; and any food industry subsector can find ways to improve. But the reasonable approach to protecting public health without severely disrupting

[7] http://wwwn.cdc.gov/foodborneoutbreaks/;
http://www.cdc.gov/media/releases/2012/p0314_foodborne.html.
[8] FSMA, §§ 103(j)(1)(A) and 301(e)(1).

markets, creating regulatory uncertainty and threatening international trade relations is to strengthen the system already in place. That is why NFI has supported providing FDA with the specific funding and staffing levels prescribed in Section 401 of the FSMA.

Any suggested improvements, too, must be applied evenly to domestic as well as imported seafood. This is critically important to ensure that any new legislation or regulation meets basic World Trade Organization obligations for nondiscrimination and also to avoid retaliatory imposition of similar measures on the nearly $6 billion in U.S. seafood that American watermen and aquaculturists produce and ship overseas every year.

There is no question that HACCP is a powerful tool for eliminating most food safety risks, and it is and should remain the first line of defense against food safety risks posed by fish of any origin. Under current regulations U.S. importers and processors are responsible for ensuring that HACCP systems are fully implemented and that imports fully meet the standards applied to domestic supplies. The HACCP system requires 100% compliance with the science-based regulations. Random inspections at the port of entry by FDA provide a second line of defense against the possibility that harmful products could reach US consumers.

Conclusion

NFI appreciates the opportunity to provide views on seafood safety from the perspective of over 300 NFI member companies. In this undoubtedly vital area of the American food industry, it is essential to rely on the facts and in particular on the reported food safety outcomes. Though any industry can do better, those outcomes demonstrate that seafood, imported and domestic, is a well-managed, safe, and wholesome product that Americans can feel confident feeding their families.

Chairman VITTER. Thank you very much.

And now, we will hear from Mr. Frank Randol. Frank, welcome.

STATEMENT OF FRANK B. RANDOL, PRESIDENT, RANDOL, INC., LAFAYETTE, LA

Mr. RANDOL. Thank you, Chairman Vitter, and for the members that are not here, Ranking Member Shaheen, Senator Cardin. I want to thank you for inviting me here to testify about the guest worker program that we refer to as H–2B.

The program is a vital part of the survival—this program is vital to the survival of seafood processing, especially in Louisiana and Maryland. The program—I will—and I am getting shook. Excuse me. Just let me go.

Chairman VITTER. Sure.

Mr. RANDOL. It is vital. I will submit my statements for the record, in addition to a number of exhibits that will provide a useful reference for the committee. I will now provide my oral comments.

I am here to express my concerns for the future of my business and other small businesses that struggle daily to succeed. I started Randols in 1971, starting small—one man, one truck. After four decades, Randols has grown in size and scope. We are transitioning to the next generation. The future is in my sons that work my business, allowing me to pull back.

Hurdles over the last four years were detailed by the Commissioner—floods, hurricanes, oil spills, lack of product, predatory imports from China, yet the single most pressing issue for us has always been the lack of labor.

In the 1970s, when I started my business, I was lucky enough to have the refugees from Vietnam come in, so we brought in roughly 40 to help us get through that time. Over the course of the years, we came to the 1990s, when that started to wane just a little bit. We discovered the H–2B program and started bringing in the guest workers from Mexico. We started with 40, dwindled to 30, now we are to 25.

I am here to talk about the H–2B guest worker program, the legal—legal—temporary workers that we get from visas to support businesses from farming, fishing, to restaurants, wholesale, and retail food operations. The attached declarations that I have submitted from Dr. Strain, filed in our suit of 2011 against the Department of Labor, gives an overview of the importance of the H–2B program to the Louisiana economy.

The H–2B application process has been a growing and expensive challenge. Since DOL took over the initial wage certification from the State in 2008, the process has become increasingly more time consuming and costly. Initially, I did the paperwork myself, but now, I have to turn it over to someone else more qualified to run through the governmental hoops. Many people are using legal or international immigration attorneys to do their paperwork. The stack of paperwork here represents what was submitted on the October 2014 application for the first cap. The same amount was resubmitted for the second cap, so it would be twice that stack.

We missed both caps. Our plant was scheduled to open February 2015. We are still waiting to see if we will be getting any workers

this year so we can open and salvage a part of it. Last year, we were processing between 6,000 and 8,000 pounds of seafood daily, and like I said, right now, we are shuttered.

Often, we hear the remark, why, if you pay more money, then you will get the labor you need. We feel that that is not the case. It is more about the job than the money in our seafood industry. After missing the cap—both caps—we tried something different, seven prison trustees. After one day, one prison trustee said, "I would rather go back to jail than to peel crawfish."

[Laughter.]

The warden picked him up, brought him back, we did not see him again. The remaining trustees continued to shrink until after a two-week effort, they were all gone.

Now, union activity has started to increase and created problems for us, and recently, the NLRB has surfaced and getting involved. We have referenced this in documents that we brought as exhibits.

We need—urgently, we need fixes to save the H–2B program for small businesses. Congress has to take action now. The lost opportunity to fix the problems created by DHS and DOL last year have already done severe harm in Louisiana. Some of Louisiana's small businesses will not recover. Others may be forced to cross the border. As in the past, we need immediate Congressional action to block the new DHS and DOL proposals of last Wednesday. The H–2B Workforce Coalition has submitted a statement which we have attached as an exhibit.

In addition, we need to resume the H–2B returning worker, guest worker exemption from the annual cap. We also have to return to the authority of determining prevailing wages to the States. Additionally, we feel we need a seat at the table with DOL, just like the National Guest Workers Alliance. SBA's Office of Advocacy needs to be more aggressive in confronting DHS and DOL as policy changes are being discussed.

And, part of what came up today, as I was listening to the testimony, is what we have been hearing, that somehow, what is happening here was caused by a judge or was caused by industry. You know, we just do not see it that way. We are small people, but we do know that no matter where it was caused or what, somehow, when something like this happens, if there is an error or whatever, the people that make the error still have their jobs. But in our case, we are small. We do not survive.

So, there is some give and take that has got to take place here, and that is really why I am here. Somebody had to come up and tell you about what is going on back home, the little guys that are having problems. And, some of the big guys have the same problem. Hershey had these problems the last part of—from 2007 on to 2011 when they decided to open up in Monterrey, Mexico, and most of their growth has already been funneled into that plant for their—American chocolate is now the Americas' chocolate.

We have one right here, Elmer's, Louisiana, Ponchatoula, largest employer in Ponchatoula. He hires—he uses H–2B. He missed the cap and he is struggling. He is trying to make his orders for this year. Small business. He is up against somebody like Hershey. I am not saying that they are going to Mexico. This is good chocolate. It needs to stay home.

I would be happy to answer any questions you may have. Thank you again.

[The prepared statement of Mr. Randol follows:]

Written Statement
of
Frank B. Randol
President, Randol, Inc
Lafayette, Louisiana
to the
Senate Small Business and Entrepreneurship Committee
May 6, 2015

Thank you Chairman Vitter, Ranking Member Shaheen, Senator Cardin and Members of the Committee for inviting me to testify about an extremely important program for the small business community, the GUEST WORKER PROGRAM referred to as the H-2B program. This program is vital for the survival of seafood processing small businesses especially in Louisiana and Maryland.

I will submit my statement for the record in addition to a number of exhibits that will provide a useful reference for the Committee.

I will now provide my oral remarks.

I'm here to express my concerns about the future of my business and other small businesses that struggle to daily succeed…

After completing active duty service as a Lieutenant in the US Army, I returned to La. and started Randols (1971)…starting small … one man one truck…

After four decades Randols has grown in size and scope… we are transitioning to the next generation…the future is in my sons that work the business allowing me to pull back…

Continuous natural and man-caused obstacles to running my business

Hurdles (over 4 decades):

Floods-

Mississippi River diversions thru Atchafalaya Basin

Hurricanes-

Katrina, Rita, Ike, Gustov, etc

Oil spills-

BP

Lack of product (catch)-

drought, cost of crop production

Predatory imports from China-

Chinese dumping (CDSOA) …$1.67 lb was the import price quote used in first World Trade Court action

Lack of labor-

Changes in H2B rules and Feds grabbing authority from Louisiana

The attached declaration (Exhibit) by Dr. Mike Strain filed in our 2011 lawsuit against the DoL gives an overview of the importance of the H-2B program to the Louisiana economy.

I'm here today to talk about the H-2B (guest worker) program …legal temporary workers that get work visas to support businesses from farming and fishing to restaurants and wholesale and retail food operations

1970's Vietnamese …sponsored Family of 40

'90 s… H-2B…Mexican labor (40 then 30 now 25)…

H-2B application process a growing and expensive challenge

Since DoL took over initial wage certification from the States (2008), the process has become increasingly more time consuming and difficult…initially I did the paperwork myself but have had to turn it over to someone else more qualified to run through the government hoops… just like many people have to use CPAs

These papers (Exhibits) represents what was submitted (Oct 2014) for the first application (CAP 1:First Half FY15)… the same amount was re- submitted (Jan 2015) for the second application (CAP 2:Second Half FY15)… We missed both CAPs…our plant was scheduled to open Feb 2015…we are still waiting to see if we will get workers so we can open and salvage part of this year…

Availability of domestic labor is a continuing problem

Last year we were processing between 6-8,000 lbs seafood daily…having missed both CAPs we have little hope that the plant will open this year… missing the 2015 crawfish & blue crab season…

Often we hear comments like " if you pay more money then you will get the labor you need"… we feel that it's more about the job than the money… it's probably considered by most to be one of American's least desired jobs…

Recent recruitment (Exhibit)... 7 prison trustee's... after first day one trustee said he would rather go back to jail than peel crawfish (Exhibit)... the Warden was informed and he never returned... the remaining trustees in training continued to shrink until we halted the effort after 2 weeks...

Union activity has created even more problems

National GuestWorkers Alliance (NGA) letter dated August 2012 (Exhibit) requesting a meeting "to negotiate a long-term solution and reach an agreement" to the reported "significant labor abuse" in the seafood industry...

NLRB now getting involved

Signed agreement to educate (Exhibit).

Urgently Needed Fixes to Save the H-2B Program for Small Businesses

Congress has to take action now. The lost opportunity to fix the problems created by DHS and DoL last year has already done severe harm in Louisiana...some Louisiana small businesses will not recover.

As in the past, we need immediate Congressional action to block the new DHS/DoL proposals of last Wednesday. The H2B Workforce Coalition statement is attached.

In addition,

We need to resume the H-2B returning guest worker exemption from the annual cap.

We need to return authority for determining prevailing wages to the states.

We need a seat at the table at DoL just like the NGA...and the SBA Office of Advocacy needs to be more aggressive in confronting DHS and DoL as policy changes are being discussed.

I would be happy to answer any questions you may have.

Chairman VITTER. Thank you very much, Frank, and let us start with you, since you offer such a great real world perspective.

If you can—I know you touched on it in your testimony—walk through the specific, concrete impact to your business that the various recent Department of Labor changes and rulings have had, number one. Number two, if you have any reaction so far—and it may be too new, maybe you do not—but, if you have any reaction so far of the new Department of Labor guidance moving forward on wage surveys.

Mr. RANDOL. Let me start from the back. It is more of the same, as I see it, from DOL. We have reviewed this stuff. It is stuff that does not work. I mean, program rules, 75 percent guarantee. Hurricane comes, I cannot turn them back, got to keep them for ten months and got to pay them. That does not work in Louisiana.

As far as the parity, if I pay one person this, another person has to be paid the same. In the seafood industry, we pay for productivity. You know, we might bring them in at entry level, but we give them the incentives through piece work. They accelerate. They get better. They might enter at a nominal rate, but a lot of these people get up to these larger rates, $12 to $15 an hour, peeling crawfish. That is attainable.

Chairman VITTER. Just to take those two examples, as far as you know, is any of that mandated by statutory law, or is it just a creation of the Department of Labor?

Mr. RANDOL. Creation. These mandates are killers for us. You know, you all write the laws, they interpret the laws, and then we try to say that is not what you meant, and that is what I have been doing for the last decade. You saw me up here in 2006. It was very easy to predict or see where we were going, and now we are here, you know, when I first came to discuss this. The pain is in reality, and the pain to me. I feel it because I am in it and I cannot get out of it.

We got through the process. We missed the first cap. I have been at this for a half a year, trying to make a deadline that was imposed—I can only start four months before I need them, four months, and I have been at it for six months and I am still not in the last step, which would gain me access in six weeks to bring them in. The real lifting is at the border to determine whether these people really need to come in. We demonstrated that we do not have the workforce here, but——

Chairman VITTER. Frank, if I can interrupt for a second, if I can just through the record ask Ms. Wu, we talked about two specific requirements that you mentioned that are just flat out unworkable in the real world from your perspective. Ms. Wu, if you could submit for the record any statutory basis that requires the Department of Labor to do that, because from what I see, there is none. Thank you.

Go ahead, Frank.

Mr. RANDOL. Okay. The last one, we see that a lot of this stuff is outlined in the H–2B Coalition paper, but what comes to mind is open up a job order that starts four months out and you have to take it 20 days to where these people are coming inside the country and leave it open. So, normally, we—you know, we have demonstrated that there are no people that want this job. But

these are just some of the few, and what I have offered to DOL is, you know, the NGA apparently has their ear. Let us let small business somehow be in the process so that we do not see the results of a mandate, but we have a team effort to try to move forward. Because, like I say, when they impose these things, we feel the pain. A lot of people go out of business.

Chairman VITTER. Right. Let me ask both you and Dr. Strain if you have any specific reaction yet to their new guidance about allowing private, including State, surveys. Is it workable? Is it not? Is it reasonable? Is it too narrow? Do you have any reaction yet?

Dr. STRAIN. Mr. Chairman, the reaction I have is that we have been using the State prevailing wage rate surveys for many years, and when you look at the final rule, it says they will be used in limited exceptions. And, so, now we have several different methodologies to determine a wage rate. I mean, simply let us continue to use the prevailing wage rate rule.

If you look at it in the seafood industry and the crawfish industry, the State prevailing wage rate, as determined by the LSU Ag Center and my office, it is currently $8.66. That is a floor. But, they are also paid on piecemeal, and you have some—you have workers that make $12, $15, $18 an hour depending on production. This sets a minimum wage.

So, let us not—if you look at what is in the interim rule there, it is very—it is complicated. We need to simplify this.

Chairman VITTER. Okay. And, Dr. Strain, I also wanted to touch on my Imported Seafood Safety Act.

Dr. STRAIN. Yes, sir. Please.

Chairman VITTER. As you know, we have worked on it together. We have talked about it. As you know, it would give States more power to increase seafood inspections for foreign imports——

Dr. STRAIN. Yes, sir.

Chairman VITTER [continuing]. In conjunction with the Federal Government. We have talked about this before, essentially empowering you to reinforce the effort of the Federal Government to put more cops on the beat. We do this in many other areas where the primary regulation is at the Federal level, but related State entities can help enforce that. What is your view on that and how it could improve seafood safety?

Dr. STRAIN. Mr. Chairman, the American public, when they go to the market, 100 percent of the mammalian proteins for beef and pork and 99 percent for poultry—there is a specialty thing for poultry, if you have a very small amount, less than 10,000 chickens, you can sell them, but it is very tiny—but all those proteins are inspected. They are monitored from the farm all the way through slaughter. They are inspected at slaughter and they are tested and back-traced. The American public believes their seafood that they consume is inspected and safe at that same level.

If you look at the CDC report, and I am going to quote their press release, March 14, 2012, it says that we currently import about 85 percent of our seafood, 60 percent of our fresh produce, and we currently import about 50 percent of our crawfish. And, I quote, "CDC experts reviewed outbreaks from their Foodborne Disease Outbreak Surveillance System from 2005 to 2010. During that five-year period, 39 outbreaks, 2,348 illnesses, were linked to im-

ported food from 15 countries. Of those outbreaks, 17, half, occurred in 2009 and 2010. Overall, fish, 17 outbreaks, were the most common source of implicated imported foodborne disease outbreaks, followed by spices. Nearly 45 percent of the imported foods causing outbreaks came from Asia."

The American public assumes that we are doing this testing. We know that we are not. Less than three percent of the imported seafood. Eighty-five percent of the seafood consumed in the United States is imported, and less than three percent is being tested.

Furthermore, when you look at that particular issue, if you look in a container of seafood, there could be, in the case of crawfish, there could be up to 20 different lots—20 different lots, different origins, coming together. So, when you think that it is all a blended product and you take one sample and that it is consistent with everything in the container, it is not.

And, when you look at the particular issues that we are talking about, we are talking about antibiotics that are banned from the United States, such as chloramphenicol, chemicals such as malachite green that are banned from the United States.

And, so, when you look at that, it is imperative that we all be on the same level playing field. And, when you start talking about why we need to test this seafood and you say, well, how are we going to stop port shopping, well, it is very simple, is that we need to make sure that we have eyes on at the processing level in those foreign countries, and I think some of that will take into effect in the future under the Food Safety Modernization Act, but that is somewhere in the future, and that container be accompanied by a certificate stating that it has been tested, and that when—if you get—and if that container comes in and you retest that container and it is not what it says, then it can either return directly and be certified to go back to the country of origin or be destroyed on site.

Now, our department, I am responsible—I oversee the Department of Animal Health and Food Safety and we have a food inspection program. We also work hand in hand with the USDA Animal and Plant Health Inspection Service, to where we do joint meat inspection. We do State plants and we can work jointly on Federal plants where those products can cross State lines. But, I am not permitted to test imported seafood. Now, I can look at the containers to make sure that, and as I, as the Commissioner of the Office of Metrology, Weights, Measures, and Standards, that if there is a pound of seafood in there, there is supposed to be a pound. But, we are not allowed to take samples and test it for contaminants.

So, just like we are having a working relationship and we have a cooperative endeavor agreement with the Federal Government to do the other protein inspections, let us have the same arrangements where my inspectors who are out at those plants looking at other things—and we do label inspections for the Federal Government, as well—give us the authority under cooperative endeavor agreement to be a further arm. We have testing labs in Louisiana. We do half of the seafood testing.

Chairman VITTER. And, so, if that were done, which I certainly support and am advocating through my bill, that would be fully

consistent with the Federal standards. It would not be using different standards in any way. You would just be additional cops on the beat, correct?

Dr. STRAIN. That is correct. And, if you—and, what we do, our standards, our procedures are in alignment with the Federal procedures.

Chairman VITTER. Right. Right.

Dr. STRAIN. And, we should have standards as high as the European Union.

Chairman VITTER. Right.

Dr. STRAIN. They test, and I believe it is up to 15 to 20 percent of all the products going to the EU. We should meet at least those standards.

Chairman VITTER. Right. Well, thank you all very much.

We are going to wrap up, but in doing so, let me also ask through the record if Dr. Solomon could supplement his testimony with a response to this question. Dr. Strain mentioned the use of chemicals on imported seafood that are banned in the United States. Why should not that practice be presumptive grounds to not allow that seafood into the country, if Dr. Solomon could respond for the record.

Thank you all very much. I think this was very informative and productive, particularly focusing on Department of Labor activity and regulations and the safety regime for seafood imports.

Thanks very much, and our hearing is adjourned.

[Whereupon, at 3:54 p.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

United States Senate
WASHINGTON, DC 20510

April 30, 2015

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Secretary Perez:

We write in support of a robust, comprehensive joint agency final rule on the H-2B foreign labor certification program. Our constituents include business owners who depend on the H-2B program for temporary nonagricultural labor, but also qualified U.S. workers who need access to jobs and strong worker protections. We urge you to work with the Department of Homeland Security to promulgate a comprehensive rule for the H-2B visa program that enables the program to help business owners while still ensuring strong protections for all workers.

As you know, the Department of Labor announced a final rule in February 2012 to improve the H-2B visa program. However, that 2012 rule was never implemented after it was preliminarily enjoined by the District Court for the Northern District of Florida in April 2012.

We fully support the added protections the 2012 rule provided and urge you to make your new joint rule mirror the 2012 rule as much as possible. These important worker protections include provisions to increase recruitment of U.S. workers, the creation of a national registry of all H-2B job postings to help U.S. workers learn of available temporary jobs, and the extension to U.S. workers of benefits such as transportation costs and prevailing wages currently available to H-2B workers. We appreciate that the joint interim final rule contains strong worker protections, and we urge you to continue this approach when the rule is finalized.

We recognize that the H-2B program provides valuable, qualified workers to many businesses across the United States and support the continuation of the program. However, we urge you to use this opportunity to strengthen protections for both H-2B and U.S. workers. A robust joint rule that includes strong worker protections will enhance the H-2B program, help protect H-2B workers from exploitation, and help Americans looking for work.

We look forward to hearing from you.

Sincerely,

RICHARD BLUMENTHAL
United States Senator

ELIZABETH WARREN
United States Senator

EDWARD J. MARKEY
United States Senator

JEFF MERKLEY
United States Senator

RICHARD J. DURBIN
United States Senator

SHERROD BROWN
United States Senator

AL FRANKEN
United States Senator

MAZIE K. HIRONO
United States Senator

Note the NLRB role...

U.S. signed agreement with Mexico to teach immigrants to unionize

BY SEAN HIGGINS | MARCH 30, 2015 | 5:00 AM

The federal government has signed agreements with three foreign countries — Mexico, Ecuador and the Philippines — to establish outreach programs to teach immigrants their rights to engage in labor organizing in the U.S.

The agreements do not distinguish between those who entered legally or illegally. They are part of a broader effort by the National Labor Relations Board to get immigrants involved in union activism.

The five-member board is the agency that enforces the National Labor Relations Act, the main federal law covering unions. In 2013, Lafe Solomon, the board's then-acting general counsel, signed a "memorandum of understanding" with Mexico's U.S. ambassador. The current general counsel, Richard Griffin, signed additional agreements with the ambassadors of Ecuador and the Philippines last year.

"Those are the only countries that the NLRB has MOUs with," said spokeswoman Jessica Kahanek.

The agreements are substantially similar, with several sections repeated verbatim in each one. All three documents state that the No. 1 outreach goal is "to educate those who may not be aware of the Act, including those employees just entering the work force, by providing information designed to clearly inform [that nation's] workers in the United States of America their rights under the Act and to develop ways of communicating such information (e.g., via print and electronic media, electronic assistance tools, mobile device applications, and links to the NLRB's web site from the [country's] web sites) to the ... workers residing in the United States of America and their employers."

The board has said the law's protections for workers engaged in union organizing extend even to people who are not legally authorized to work in the U.S. An employer who fires an illegal immigrant worker — which is required under federal immigration law — can be sanctioned by the board if it decides the worker's union activism was the real reason for the dismissal.

In the documents, the countries' foreign consulates agree to help locate foreign nationals living in the U.S. "who might aid the NLRB in investigations, trials or compliance matters" involving businesses and to develop a system for the consulates to refer complaints from foreign workers to the board's regional offices.

The documents also call for systems to inform foreign businesses operating in the U.S. of their responsibilities to their employees under federal labor law. In testimony before the House Appropriations Committee on March 24, Griffin characterized that as the principal focus of the agreements.

"We have executed letters of agreement with foreign ministries designed to strengthen collaborative efforts to provide foreign business owners doing business in the United States, as well as workers from those countries, with education, guidance and access to information regarding their rights and responsibilities under our statute," he told lawmakers.

Griffin, formerly a top lawyer for the International Union of Operating Engineers, testified that the agreements save taxpayer money because they would "pay dividends as employers will be able to avoid unintentionally violating our statute and workers will be educated about their statutory rights to engage with one another to improve their conditions of employment, both of which benefits taxpayers, and the country as a whole, through increased economic growth."

If the main intention is to provide legal information to foreign employers, it is not clear why the board pursued agreements with those countries, which represent a relatively small portion of businesses operating the in the U.S.

A November study by the Bureau of Economic Analysis found that Mexican businesses operating in the U.S. employ slightly less than 69,000 people total. The numbers employed by Ecuadorian and Philippine businesses operating in the U.S. are so small, the bureau doesn't publish a measurement for either one.

By comparison, Canadian businesses employ well over a half-million people in the U.S. British businesses employ nearly a million, Japanese nearly 720,000 and German 620,000.

Mexico and the Philippines, one the other hand, represent two of the countries providing the most immigrants to the U.S. Mexico accounts for 11.6 million immigrants living in the U.S., the most from any single country, according to the Migration Policy Institute. The Philippines is fourth overall, accounting for 1.8 million.

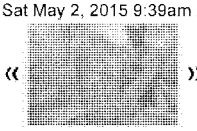
A 2013 board press release stated the Mexican agreement was "an outgrowth of initial negotiations between the NLRB's Chicago office and the Mexican Consulate in Chicago. The framework has been used by other federal labor agencies, including the Department of Labor and the Equal Employment Opportunity Commission, which have similar agreements with the Mexican Embassy and its consulates."

The release quoted Solomon saying, "With coordination from the consulates, we expect to meet with Mexican workers around the country to help forge innovative solutions to issues specific to their needs."

Last month, Griffin instituted a new policy in which the board will "facilitate" obtaining visas for illegal immigrants if their status impedes it from pursuing a labor violation case against a business. The policy gives illegal immigrants living in the U.S. a strong incentive to engage in labor activism, because doing so will make employers reluctant to fire them and potentially get them a visa, and therefore legal status, if they are fired.

http://www.washingtonexaminer.com/u.s.-signed-agreement-with-mexico-to-teach-immigrants-to-unionize/article/2562215

Tangle over guest workers traps Louisiana crawfish trade
Sat May 2, 2015 9:39am EDT



1 of 2

By Jonathan Kaminsky

NEW ORLEANS (Reuters) - It is nearing peak harvesting season for Louisiana crawfish, but a shortage of migrants to peel them is hurting the industry, largely because of a fight over foreign guest workers that has stirred fears Chinese imports will gain ground.

The worker shortfall, which Louisiana officials estimate will cut its frozen crawfish output by more than half, at a cost of up to $50 million, is largely the result of a long conflict over rules and wages for seasonal laborers under the H-2B visa program.

Louisiana's crawfish processors, who lead the United States in output of the tricky-to-peel shellfish, are hurting badly, says Frank Randol.

His Lafayette plant, for example, would normally have 40 workers peeling thousands of bite-sized crawfish tails everyday, but now stands idle.

"We finally stabilized our industry," Randol said, referring to a period of recovery after a tariff on cheaper Chinese imports was imposed 18 years ago. "And now this chops the legs out from under us."

In southern Louisiana, where whole boiled crawfish are a cherished spring and early summertime staple, hopes are fading that the output of peeled, frozen tail meat can be salvaged.

The labor shortages are not limited to Louisiana. This week, U.S. Senator Barbara Mikulski, Democrat of Maryland, said her state's crab industry was set to fall short of the temporary workers it needs by more than 40 percent.

CONTENTIOUS NEW RULES

Kevin Dartez, whose Abbeville, Louisiana facility peels and sells both crawfish and crabs, said losing his guest labor will mean heavy losses. He refuses to bring on unauthorized immigrants and has found locals largely unwilling to take on such tedious unskilled work.

"The crawfish season is screwed," he said. "The crabs aren't getting peeled either."

Each year, the U.S. lets in up to 66,000 workers under the H-2B program, many from Mexico, for jobs ranging from hotel maid to landscaper.

Employers have to prove to the Labor Department that their wages are fair and that workers will not disadvantage American job-seekers before visas are granted by the

Department of Homeland Security. The workers must return home after their fixed-term jobs end.

Critics of Louisiana's crawfish processors, and of businesses relying on H-2B laborers generally, say many exploit a largely powerless migrant workforce, and that legal and legislative challenges to Obama administration efforts to make the program more worker-friendly have slowed the application process.

"This is largely a crisis they've brought on themselves," said Jacob Horwitz, a labor organizer with the New Orleans-based National Guestworker Alliance.

Crawfish processors counter the current problem was triggered by the Labor Department responding to a December court order on wages by forcing them to resubmit applications too late to secure workers.

The situation was exacerbated when the Labor Department stopped processing H-2B applications for two weeks in March after a separate court decision found it lacked rule-making authority over the program. Once that ruling was stayed, the Department of Homeland Security received an uptick in applications and within days announced the worker cap was filled.

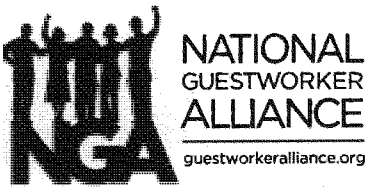
This week, the Labor and Homeland Security departments jointly unveiled new H-2B rules seen as favoring workers on pay and protections, but which are expected to come under congressional scrutiny.

In Louisiana, with processors buying fewer crawfish, farmers and fishermen have little choice but to keep them in the muddy water or sell them by the side of the road at cut-rate prices.

Sherbin Collette, mayor of Henderson, a fishing community in the southern part of the state, said the labor shortage is shaping up as the worst crisis the industry has faced since cheap Chinese imports nearly wiped out the domestic frozen crawfish supply in the 1990s.

"This is almost as critical as a hurricane coming to hit us," Collette said.

(Reporting by Jonathan Kaminsky. Editing by Jill Serjeant and Andre Grenon



8/20/12

Crawfish Processors' Alliance Inc.
1008 Vincent Berard Road
Breaux Bridge, LA 70517
Telephone: 337-667-6118

Dear Mr. Adam Johnson,

As you know there have been significant labor abuse reported and serious government investigations into labor and immigration violations in the Seafood industry this season. Most significantly the issues at the Walmart supplier CJ's Seafood, as reported in multiple news outlets including local Lafayette area news and National news including the following:

International Business Times - 6/6/12
"Mexican Guest Workers Claim Wal-Mart Supplier Stole Their Wages"
http://www.ibtimes.com/articles/349409/20120606/guest-workers-h2-b-visas-labor-abuse.htm

Huffington Post - 6/14/12
"Labor Department's Guestworker Reforms Blocked by GOP, Democratic Senators"
http://www.huffingtonpost.com/2012/06/14/labor-department-guest-worker-reforms_n_1597509.html

The Daily Beast - 6/14/12
"Walmart 'Unable to Substantiate' Forced Labor Claims at Seafood Supplier"
http://www.thedailybeast.com/articles/2012/06/14/walmart-unable-to-substantiate-forced-labor-claims-at-seafood-supplier.html

The Guardian - 6/22/12
"Walmart Supply Workers Complain of Mistreatment by Company's Contractors"
http://www.guardian.co.uk/business/2012/jun/22/walmart-supply-workers-mistreatment-contractors

International Business Times - 6/25/12
"Labor Rights Advocates: A Dozen Wal-Mart Suppliers Received 482 Federal Citations"
www.ibtimes.com/articles/356679/20120626/h-2b-visas-guest-workers-labor-rights.htm

New York Times - 6/30/12
"Walmart Suspends Seafood Supplier over Work Conditions"
http://www.nytimes.com/2012/06/30/business/wal-mart-suspends-seafood-supplier-over-work-conditions.html

The Guardian - 6/30/12
"Walmart Suspends Seafood Supplier over Working 'Violations'"

http://www.guardian.co.uk/business/2012/jun/30/walmart-suspends-seafood-supplier

Reuters - 6/30/12
"Walmart Suspends Louisiana Seafood Supplier"
http://www.reuters.com/article/2012/06/30/walmart-supplier-suspension-idUSL2E8HU2YS20120630

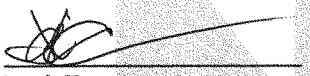
The Nation - 7/3/12
"The Big Bad Business of Fighting Guestworker Rights"
http://www.thenation.com/article/168715/big-bad-business-fighting-guest-worker-rights

New York Times editorial - 7/9/12
"Forced Labor on American Shores"
http://www.nytimes.com/2012/07/09/opinion/forced-labor-on-american-shores.html

NPR's On Point - 7/11/12
"Forced Labor in the USA"
http://onpoint.wbur.org/2012/07/10/forced-labor-in-the-usa

The New York Times – 7/24/12
"C.J.'s Seafood Fined for Labor Abuses"
http://www.nytimes.com/2012/07/25/business/cjs-seafood-fined-for-labor-abuses.html?_r=1

Given these issues we are writing to set up a meeting with you to negotiate a long-term solution and reach an agreement that will prevent this kind of abuse from happening in the future and prevent the industry from being negatively impacted as a result of publicity around reports of labor violations.



Jacob Horwitz
Lead Organizer
National Guestworker Alliance
Cc:

Michael LeBlanc – Director

Terry Guidry – Vice President

Frank B. Randol- Secretary

Dexter Guillory- Treasurer

Craig West – Director

Michael K. Hengens – Vice President

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

THE LOUISIANA FORESTRY ASSOCIATION, INC., *et al.*	)	
Plaintiffs,	)	**Case No. 1:11-cv-01623**
v.	)	**Judge: DRELL**
HILDA L. SOLIS, *et al.*	)	**Magistrate: KIRK**
Defendants.	)	

Declaration of Michael Strain D.V.M.

1. My name is Michael Strain, D.V.M. I am the elected Commissioner of Agriculture and Forestry for the State of Louisiana. My Department oversees all agricultural commerce and activities within the State, including the markets for products produced by our farmers. The activities of the sugar cane, crawfish and forestry industries also fall under my purview, and I give this Declaration as part of my official duties as Commissioner. I was elected to this office in 2007. I was awarded a Doctorate in Veterinary Medicine in 1983 by Louisiana State University.

2. I am also a member of the National Association of State Departments of Agriculture (NASDA) that "represents the state departments of agriculture in the development, implementation, and communication of sound public policy and programs which support and promote the American agricultural industry, while protecting consumers and the environment." During the NASDA spring meeting in February, the members unanimously endorsed "work on ... H2B labor reform to ... make the labor wage rate more competitive." Many of my colleagues

have the same concern I do: the proposed wage rule makes the wages LESS competitive and must not be allowed to go into force.

3. In order to feed our increased U.S. population, we must have a stable agricultural labor supply. The ability of seasonal businesses to keep their doors open and retain their full-time U.S. employees relies upon having successful peak seasons to offset the rest of the year when their business is slow. During their busy seasons, companies must supplement their permanent staffs with temporary seasonal employees. Employers spend thousands of dollars and hundreds of hours in their efforts to fill these positions. Unfortunately, even in today's tough economic climate, there are not enough local workers available to fill all the temporary seasonal positions, and efforts to obtain U.S. workers to relocate for temporary and seasonal employment have not been successful. As a result, businesses often must utilize the H-2B guest worker program to find seasonal workers and workers for their peak workforce needs.

4. Louisiana has seen many natural challenges to the agricultural sector of our economy in the Hurricanes Katrina and Rita, floods on the Mississippi River that required the release of water through the spillways into the Atchafalaya Basin, and a drought. The last thing our agriculture, forestry, seafood and sugar industries need is an assault on their economic competitiveness by the U.S. Department of Labor's H-2B wage rule, which I understand is scheduled to go into effect on September 30, 2011.

5. Our markets are subject to particularly fierce competition from abroad. For example, the Chinese have been extremely aggressive in trying to corner the U.S. crawfish market. This predatory behavior began in 1993 and has continued unabated. The Chinese presently control over 50% of the market and are poised to capture even more market share if our

producers are put at a further competitive price disadvantage - or are put out of business - as a result of the Department of Labor H-2B wage rule.

6. The H-2B wage rule that the Department of Labor adopted on January 19, 2011 that I now understand will go into effect on September 30, 2011, instead of January 1, 2012, imposes a new untested wage determination methodology that will significantly increase costs for small and seasonal small businesses. It threatens both H-2B jobs, as well as full-time permanent U.S. workers' jobs in those businesses. Some of our Louisiana businesses that are dependent on the availability of H-2B guest workers between September 30 and January 1 would not have been affected at all or would have been affected much less severely are particularly in jeopardy now because they had not thought they would be affected this season. They made their business plans, commitments and contracted sales based on a January 1, 2012, date and not a September 30, 2011, date for implementing the new rule. There is not a way to remedy their problems if this new rule is allowed to go into effect.

7. The short term consequence of an immediate expulsion of this vital segment of the workforce would cause a production crisis in a wide range of field and orchard crops, seafood processing, sugar processing, forestry, livestock and the restaurant industry, to name a few. This would leave the United States and our State of Louisiana no alternative but to import many food products from poorer countries that have surplus farm labor. This not acceptable and must be stopped.

8. The Louisiana economy relies heavily on agricultural production. In Louisiana, the H-2B program is a critical enabler in agricultural processing. In 2009, according to the U.S. Department of Labor, Louisiana ranked as the state with the fifth largest use of the H-2B program in the U.S. with 7,716 H-2B job positions certified statewide.

9. The H-2B program is important for the seafood industry, which includes crawfish, shrimp, crabs, oysters and catfish, because seafood processors traditionally cannot fill their temporary or seasonal job vacancies for seafood peelers with U.S. workers. Many of these businesses are located in rural areas that simply do not have sufficient populations to supply their extra workforce needs. Additionally, many who are willing to work and available want full time, year round jobs. Indeed, many of the jobs in those locales that are year round and full time depend on the various food processors operations for their own jobs and business operations to be able to operate. Without temporary H-2B guest seasonal workers to peel seafood, Louisiana's seafood processors would shut down, eliminating the primary market for our fishermen and farmers to sell their catch. As a result, cheaper foreign seafood would gain a stronger foothold in the U.S. market and our fishermen and farmers who produce and harvest crawfish, shrimp, crabs, oysters and catfish would be devastated and a key segment of the Louisiana economy would be crippled—lost to our economy. Once we lost the processors, we would not be able to depend on them operating in future years, and so losses because processors scale back or do not operate at all this season will have irreparable and bad repercussions now and in the future.

10. Farmers need to have stable and competitive markets for their harvests. Many rice farmers harvest crawfish from their rice paddies so that they have a dual crop from that land. The income from selling crawfish to processors is essential for the viability of many farms. Therefore, the jobs of the tractor drivers on those farms and the jobs of employees who provide the fuel, seedlings and other products and services needed to produce the rice and the crawfish on those farms are linked to our ability to have enough temporary workers at the processing facilities at the right time at wage rates that do not create chaos in their other employees' wage

and benefit structures and that are reasonable in real world ways are essential to the maintenance of both rice farming and crawfish farming operations.

11. The number of currently permitted seafood processors within the State is as follows:

Crawfish	49
Shrimp	78
Crab	24
Oyster shucking plants	30
Oyster dealers/shippers	48
Fish	35
Alligator	15

12. We also have H-2B workers certified to operate sugar mill boilers, handle bagasse burning in the steam boilers, and maintain the equipment. While we grow sugar cane all year and start the next crop as soon as this year's crop is harvested, most mills only operate about 100 days, starting about October 1. This is an industry, along with some of our seafood processing, that is particularly hard hit by what the Department of Labor is going to do this year: the sugar mills and some of our seafood businesses that operate in the fall would not have suffered immediate effects from this new rule and wage setting methodology if it had been put into effect on January 1, 2012, instead of September 30. It is impossible to staff those mills fully with U.S. workers when the operating job is so short term, and as in other parts of our Louisiana industry, many jobs depend on the H-2B workers being available when they are needed and the employers being able to pay them wage rates that are planned for and that are not out of line with other jobs at the mills, including full time, year round jobs. If the sugar mills go down, there will be no

need for the U.S. workers who do have year round jobs handling maintenance and other off season jobs—or those who grow the cane. Without the sugar boilers in the sugar mills and other H-2B employees who work the mills, sugar mills would be unable to process or purchase our farmers' sugar cane crop, thereby killing the entire sugarcane industry, Louisiana's number one agronomic crop, which in 2010 was valued at $1 billion. Moreover, thousands of other jobs that are dependent on sugarcane processing would be lost. There are many temporary, seasonal jobs that H-2Bs perform at the sugar mills, and it is fair to say that the mills would be unable to operate if they had to depend on being able to hire legal U.S. workers for the jobs in which H-2B visa workers are employed.

13. The same can be said for landscapers who rely on H-2B workers for installing plants and shrubbery. Furthermore, without H-2B workers, our nursery crop producers would lose the primary market for selling nursery plants.

14. The housing market is very poor and timber prices are low. Landowners owning forestland in Louisiana have seen income from timber investments shrink, costs rise, and mills close due to the poor economic conditions in the area and across the country. Most of the forestland in Louisiana is family owned and landowner income cannot justify paying more to manage their forest, and certainly not to reforest their timberlands after harvest, especially at higher wage rates that will be affecting tree planters' costs this year.

15. The lack of reforestation from planting improved seedlings from forest nurseries will have an immediate adverse effect from the absence of economic activity associated with replanting as scheduled and most desirable from a scheduling standpoint. It will also be a long-term effect on availability of future forest resources when the economy and housing turn around. Delaying planting this year even until just next season will necessarily mean that timber that

would be ready for harvest will require another year of growth. That is leaving an asset unused for a year even if planting can resume next year.

16. With the loss of jobs already experienced by the forest industry because of the economy, any cost increases will worsen the situation.

17. Landowners are also hearing from reforestation contractors that because of the uncertainty about the new wage guidelines and anticipated rise in costs, the contractors will not perform any service this season. So even if the landowner were willing to pay a higher price, the landowner may be unable to locate anyone to do the tree planting. The future of forestry is in jeopardy because of the new H-2B wage guidelines.

18. Louisiana can ill afford a loss from the $3.1 billion dollars generated in the State from forestry each year or a loss in employment from one of Louisiana's largest manufacturers.

19. I have reviewed the "2011 Louisiana Forestry Facts" that is attached as Exhibit 1 to this Declaration. This one-page fact summary is published by the Louisiana Forestry Association and is based on data published by the Louisiana Department of Agriculture and Forestry and the LSU Ag Center, the Louisiana Department of Employment and Training, and data that is collected by the Association itself. Based on my knowledge of the importance of the forestry industry in the State in my role as Commissioner of Agriculture and Forestry, I believe the information in that summary is accurate and reflects the contributions of that industry to the economic well being of this State and to providing employment for the of citizens of this State.

20. While the numbers of H-2B workers in absolute terms is very small in comparison to the whole agricultural workforce in this State, the contributions the H-2B workers make in maintaining our agricultural operations is essential.

I have read the foregoing and swear that it is true under penalty of perjury. Executed this 14 day of September 2011.

Michael Straw, D.V.M.

2011 Louisiana Forestry Facts*

published by the Louisiana Forestry Association • www.laforestry.com

How much forestland does Louisiana have?
Forests cover 14 million acres, about 50% of Louisiana's land area, making it the state's greatest single land use. Fifty-nine of the state's 64 parishes contain land capable of producing sufficient timber to support forest-industry activities as well as provide habitat for wildlife, recreational opportunity, scenic beauty, and all the other environmental benefits timberlands provide.

Who owns Louisiana's forestland?
There are 148,000 owners of Louisiana forestland. Private non-industrial landowners own 81% of the state's forestland, forest products industries own 10% and the public owns 9%.

Trees are Louisiana's No. 1 crop.
In 2010, forestry accounted for 57% of the total value of all plant commodities grown in Louisiana, including cotton, feed grain crops, fruit, soybeans, sugarcane, and others. When you look at total value of Louisiana plant and animal commodities—beef, milk, poultry plus farm wildlife and fisheries—forestry contributes 31% of the value of Louisiana's agricultural commodities. Timber is manufactured by local mills throughout Louisiana into building materials, a variety of paper products and numerous other products used in daily life.

Do we put the trees back?
Louisiana landowners (industrial and non-industrial) reforest the land each year with over 128 million seedlings, an average of 410,000 trees per day (six-day week), and at least 29 trees for each Louisiana citizen (official 2000 census shows a state population of 4,468,876).

What is the economic value of forestry to Louisiana?
The impact of forestry and forest-products industries on our economy in 2010 was $3.1 billion up from $2.5 billion in 2009 and less than $3.3 billion in 2008. Other recent figures were $4.22 billion in 2007, $5.3 billion in 2004,$3.7 billion in 2003 and $3.8 billion in 2002. In 1998 it hit a high of $5.4 billion and in 1997 it was $5.3 billion.

How much timber does Louisiana harvest?
In 2010, 811.9 million board feet of sawtimber and 6.3 million cords of wood were harvested compared to 710 million board feet of sawtimber and 6.1 million cords of wood in 2009. Other recent figures were 908 million board feet of sawtimber and 6.6 million cords of wood in 2008, 1.2 billion board feet of sawtimber and 6.5 million cords of wood in 2007, 1.4 billion board feet of sawtimber and 7 million cords of wood in 2006 and 1.2 billion board feet of sawtimber and 6.5 million cords of wood harvested in 2005. Other recent data includes :

2004	1.2 billion bf of sawtimber	6.3 million cords of wood	2002	1.2 billion bf of sawtimber	6.3 million cords
2003	1.3 billion bf of sawtimber	6.8 million cords	2001	1.2 billion bf of sawtimber	5.8 million cords

What is landowner income from forestry?
Louisiana forest landowners received $396.8 million in 2010 compared to $338.9 million in 2009. It was $471.2 million in 2008, $558 million in 2007 and $669 million in 2006, $582 million in 2005, $593 million in 2004 and $605 million in 2003. Other totals in recent years were:

2002	$573 million	2001	$519 million
2000	$655 million	1999	$680 million
1998	$744 million	1997	$610.3 million

How much do woods workers earn from timber?
Louisiana timber contractors and their employees earned $426.6 million in 2010 compared to $381.4 million in 2009. In 2008, the figure was $487.9 million. This was down from $534 million in 2007. They were paid $592 million in 2006. In 2005, they made $519 million. Other figures include:

2004	$441.7 million	2001	$373 million
2003	$349 million	2000	$404 million
2002	$423 million.	1999	$397 million

It is estimated that each loaded log truck pays the equivalent of $835 in local, state and federal taxes.

How many Louisiana industries depend directly on forests?
Louisiana's forests support some 180 primary wood-using industries (such as sawmills and paper mills) located throughout the state and 750 secondary wood-using industries (including furniture manufacturers, cabinet makers, millwork plants and others that use the products produced by primary wood-using industries).

How many people do Louisiana's forest industries employ?
Forest industries are the second largest manufacturing employer in Louisiana, providing about 12,694 jobs (2nd Qu 10) compared to 15,924 in 2008. This overall employment figure has declined from 25,802 in 2000 due to the closure of several mills. Several mills have closed in the last year due to the slump in home sales. In addition, an estimated 8,000 people are employed in the harvesting and transportation of timber.

How much do Louisiana citizens earn from forest-products manufacturing jobs?
Workers employed in forest products manufacturing earned $670.8 million in 2010 down from$680 million in 2009. The figure was $774.8 million in 2008. This compares to $864 million in 2007 and $900 million in 2006. Other recent totals were: $894.4 million in 2005; $854 million in wages in 2004; $800 million in 2003; $833 million in 2002;$840 million in 2001. The highest year in recent records was $927 million in 1998.

State and local governments benefit directly from timber revenues.
Severance taxes from timber sales totaled $13.6 million in 2010 up from $12.6 million in 2009. Severance taxes paid in 2008 were $14.6 million and in 2007 were $16 million . In 2006 the severance tax was $19.6 million, $15.9 million in 2005, $15.1 million in 2004 and $17.5 million in 2003. The 2003 figure was up from $16.4 million in 2002. In 2001, severance tax was $18.6 million and in 2000 severance taxes amounted to $18.6 million. Severance taxes were $20.8 million in 1999, an increase from $18.5 million in 1998, $16.8 million in 1997 and $16.6 million received in 1996. Parishes where the timber was grown received 75% of the monies; the state's general fund received the remaining 25% with a portion of the funds allotted to landowner cost share help for replanting.

Louisiana's forest industries are here for the long term.
Forest-products industries invested almost $1 billion in new equipment and plants in Louisiana during the last 20 years, reinforcing the long-term strength of forestry in our economy.

*Sources: Louisiana Forestry Association, Louisiana Dept. of Agriculture and Forestry, LSU AgCenter and the Louisiana Department of Employment and Training. For more information, call the Louisiana Forestry Association at (318) 443-2558. Published March, 2011.

EXHIBIT 1 TO DECLARATION OF MICHAEL STRAIN, D.V.M.

We have had several issues in the past with the various governmental agencies.

Example #1 For instance, we had one H2B employer that we submitted a 9141 request for wage determination, DOL had a question, told us they had requested information via email (request was never received in our office). DOL voided the PWD and employer had to restart the process again from the very beginning causing many delays and potentially being capped out.

Example #2 We know of one employer who has a seafood processing plant that specializes in the processing of wild alligator, which is the month of September in Louisiana yearly. Normally his work visa is from very late August through late September, this season he was asking for the following dates of 8/19/2015 – 9/26/2015 for 15 workers. For this 2015 alligator season he is **OUT before even being allowed to begin** the process according to regulation. He cannot begin to open a job order or advertise until 120 days prior to his start date which would be no earlier than the weekend of April 25, 2015. The cap was reached on March 26, 2015. (a month prior than his being able to even begin the recruitment process). This small Louisiana business will not even have a chance of obtaining a work visa as no more H2B visas will be allotted until October 1, 2015. This employer has workers who have been coming in excess of 10 years to process alligators. He is unable to find a local workforce that is willing to work this very short, seasonal processing time frame. The H2B program allowed him to have a reliable workforce and to keep his American workers employed as well. **THIS program is very unfair in the manner that the H2B work visas are being distributed.** The above are just two examples that have happened recently, however, we personally know of several different similar situations.

H2B 2014	Activity	Current Process	Problem
PWD DC	Employer prepares 9141 Prevailing Wage Determination Mail or upload via Icert website (begin min 6 mo before start date)	Estimated to take 60 days for H2B PWD will email receipt confirmation PWD will email wage response	Has been running smoothly via the icert system * long wait if you have problems ** when surveys were allowed you would start at the 7-8 months prior :(a long time to work and suddenly be out of the cap at the end! And have a much higher wage - without any warning!!
Employer	Upon receipt of PWD from DC employer opens a job order online with the SWA/no interaction or assistance from state level	Employer proceeds and performs all required newspaper activity and recruiting without assistance. JO must be open min 10 days at SWA Usually takes 30 days to complete app	a long time to prepare and suddenly If you don't know what you are doing you can run into trouble once app is submitted to CNPC. Employer must know FR regs ** If you have delays it can put you out !
DOL/CNPC Chicago	Employer prepares and submits 9142 to the CNPC for certification	Must include all required information from the Federal Register	Same as above
DOL	DOL review application and stamped approved - returned to petition with certified application	Approved application is returned to employer to then send off to DHS	seems to be slowing down ** I have received multiple DOL approvals since the cap has been reached :(

DHS/USCIS	I-129 Application Employer completes and mails to Vermont for adjudication	Vermont - fee is $325 for application Expedited premium process is $1225. and an additional $150 anti fraud fee guaranteed to start within 15 days 15 days - not guaranteed approval will email I797 approval notice will mail original to petitioner	do have the worry of cap release of 33,000 for April 1 and Oct 1 Numbers being being distributed four months prior to release date An occasional petition can be lost and not arrive, usually takes congressional inquiry to make things happen at that point
KCC	DHS sends approved application to Kentucky Consular Service center for Fraud Protection Screening and then forwards on to consulates for petition scheduling.	KCC does background check/screening on employer, most do not know this is taking place.	This does not usually cause delays
CSC	Appointments are scheduled online with CSC.	CSC - ** Added appx 4 years ago** The are to be allowed 3 business days before you can even question why you can't schedule yet). This is a contract agency with the government. They should be required to add staff for busy times, I called this office over 2 months ago and have yet to receive a return call, finally figured out scheduling system on our own. We DO NOT ask them to schedule our appointments, only to help us figure out their online website!	Kelly attended training in Atlanta in Dec with DOL/DHS/Consulates This system was "new and improved" is actually "difficult to navigate"

**note that worker cannot begin the DS 160 until he has employer EAC/WAC assigned number from DHS confirmation.

Consulate	Worker is screened/interviewed at the consulate - 2 day appts ASC - day 1 fingerprints & photos Consulate - day 2 - interview/visa	Relatively smooth - Visa is pasted into the passport book visa controls the date that worker may be employed and by which employer	Last week employer stated that consulate told a worker that system did not assign a consulate appointment - website states that this is automatically assigned - I had written proof of appt and worker still was not seen at the consulate.
Border	Workers received I-94	White card stapled in the back of passport	This is the document that controls date that the employee must leave US (no later)
Travel	Travel to worksite	Paid for by the employer	
Arrive	Worker must complete employment paperwork		

** Dec DoI/DHS mtg gov stated that less than 2% of the agricultural community use the H2A program. However this is 2% is the target group for the audits.

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

2. Process for Determining Wage Level

The NPWHC shall use O*NET information to identify the tasks, work activities, knowledge, and skills generally required for performance in an occupation. A comparison between the particulars of the employer's job offer to the requirements for similar (O*NET) occupations shall be used to determine the appropriate wage level. It

Foreign Labor Certification Data Center
Online Wage Library www.flcdatacenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure
Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level Explanation

SVP Explanation

FLC Wage Data updated July 1, 2014

Job Zones updated July 1, 2014
See change history

Technical Support & Help FAQ page.

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2014 - 6/2015.

Your search returned the following: Print Format

Area Code:	29180
Area Title:	Lafayette, LA MSA
OES/SOC Code:	53-7064
OES/SOC Title:	Packers and Packagers, Hand
Geo Level:	1
Level 1 Wage:	$8.02 hour - $16,682 year
Level 2 Wage:	$8.67 hour - $18,034 year
Level 3 Wage:	$9.32 hour - $19,386 year
Level 4 Wage:	$9.97 hour - $20,738 year
Mean Wage (H-2B):	$9.32 hour - $19,386 year

H2B wage is equal to a level 3

This wage applies to the following O*Net occupations:

53-7064.00 Packers and Packagers, Hand

Pack or package by hand a wide variety of products and materials.
O*Net™ JobZone: 2
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

Example 1

Foreign Labor Certification Data Center
- Online Wage Library www.flcdatacenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level Explanation

SVP Explanation

FLC Wage Data updated July 1, 2014

Job Zones updated July 1, 2014
See change history

Technical Support & Help FAQ page.

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2014 - 6/2015.

Your search returned the following: Print Format

Area Code:	2200004
Area Title:	New Iberia nonmetropolitan area
OES/SOC Code:	51-3022
OES/SOC Title:	Meat, Poultry, and Fish Cutters and Trimmers
GeoLevel:	1
Level 1 Wage:	$8.07 hour - $16,786 year
Level 2 Wage:	$8.82 hour - $18,346 year
Level 3 Wage:	$9.57 hour - $19,906 year
Level 4 Wage:	$10.32 hour - $21,466 year
Mean Wage (H-2B):	$9.57 hour - $19,906 year

level 3

This wage applies to the following O*Net occupations:

51-3022.00 Meat, Poultry, and Fish Cutters and Trimmers

Use hand or hand tools to perform routine cutting and trimming of meat, poultry, and seafood.
O*Net™ JobZone: 1
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

The Foreign Labor Certification Data Center is developed and maintained by the State of Utah under contract with the US Department of Labor, Office of Foreign Labor Certification.

Example 2

Foreign Labor Certification Data Center
Online Wage Library www.flcdatacenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level Explanation

SVP Explanation

FLC Wage Data updated July 1, 2014

Job Zones updated July 1, 2014
See change history

Technical Support & Help FAQ page.

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2014 - 6/2015.

Your search returned the following: Print Format

Area Code:	29340
Area Title:	Lake Charles, LA MSA
OES/SOC Code:	53-7062
OES/SOC Title:	Laborers and Freight, Stock, and Material Movers, Hand
GeoLevel:	1
Level 1 Wage:	$8.35 hour - $17,368 year
Level 2 Wage:	$10.08 hour - $20,966 year
Level 3 Wage:	$11.81 hour - $24,565 year
Level 4 Wage:	$13.54 hour - $28,163 year
Mean Wage (H-2B):	$11.81 hour - $24,565 year

This wage applies to the following O*Net occupations:

53-7062.00 Laborers and Freight, Stock, and Material Movers, Hand

Manually move freight, stock, or other materials or perform other general labor. Includes all manual laborers not elsewhere classified.
O*Net™ JobZone: 2
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level Explanation

SVP Explanation

FLC Wage Data updated July 1, 2014

Job Zones updated July 1, 2014
See change history

Technical Support & Help FAQ page.

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2014 - 6/2015.

Your search returned the following: Print Format

Area Code:	29180
Area Title:	Lafayette, LA MSA
OES/SOC Code:	51-3022
OES/SOC Title:	Meat, Poultry, and Fish Cutters and Trimmers
GeoLevel:	1
Level 1 Wage:	$8.14 hour - $16,931 year
Level 2 Wage:	$9.00 hour - $18,720 year
Level 3 Wage:	$9.87 hour - $20,530 year
Level 4 Wage:	$10.73 hour - $22,318 year
Mean Wage (H-2B):	$9.87 hour - $20,530 year

This wage applies to the following O*Net occupations:

51-3022.00 Meat, Poultry, and Fish Cutters and Trimmers

Use hand or hand tools to perform routine cutting and trimming of meat, poultry, and seafood.
O*Net™ JobZone: 1
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

O*NET OnLine

Updated 2010

Summary Report for:
51-3022.00 - Meat, Poultry, and Fish Cutters and Trimmers

Use hand or hand tools to perform routine cutting and trimming of meat, poultry, and seafood.

Sample of reported job titles: Meat Cutter, Trimmer, Deboner, Wing Scorer, Breast Trimmer

View report: Summary | Details | Custom

Tasks | Tools & Technology | Knowledge | Skills | Abilities | Work Activities | Work Context | Job Zone | Education | Interests | Work Styles | Work Values | Related Occupations | Wages & Employment | Job Openings | Additional Information

Tasks

- Use knives, cleavers, meat saws, bandsaws, or other equipment to perform meat cutting and trimming.
- Clean, trim, slice, and section carcasses for future processing.
- Cut and trim meat to prepare for packing.
- Remove parts, such as skin, feathers, scales or bones, from carcass.
- Inspect meat products for defects, bruises or blemishes and remove them along with any excess fat.
- Produce hamburger meat and meat trimmings.
- Process primal parts into cuts that are ready for retail use.
- Obtain and distribute specified meat or carcass.
- Separate meats and byproducts into specified containers and seal containers.
- Weigh meats and tag containers for weight and contents.

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Tools & Technology

Tools used in this occupation:

Commercial use cutlery — Boning knives; Butcher knives; Meat cleavers; Meat tenderizing tools

Cutting machinery — Derinding machines; Meat saws; Meat-cutting bandsaws; Shredding machines

Dicing machinery — Cubing machines

Filling machinery — Needle machines

Forming machine — Hamburger patty makers; Pressing machines

Staple guns — Pneumatic staple guns

Technology used in this occupation:

Data base user interface and query software — Data entry software

Internet browser software — Web browser software

Inventory management software — Meat inventory software

Point of sale POS software — Sales software

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Knowledge

Production and Processing — Knowledge of raw materials, production processes, quality control, costs, and other techniques for maximizing the effective manufacture and distribution of goods.

Food Production — Knowledge of techniques and equipment for planting, growing, and harvesting food products (both plant and animal) for consumption, including storage/handling techniques.

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Skills

Active Listening — Giving full attention to what other people are saying, taking time to understand the points being made, asking questions as appropriate, and not interrupting at inappropriate times.

Coordination — Adjusting actions in relation to others' actions.

Critical Thinking — Using logic and reasoning to identify the strengths and weaknesses of alternative solutions, conclusions or approaches to problems.

Monitoring — Monitoring/Assessing performance of yourself, other individuals, or organizations to make improvements or take corrective action.

Speaking — Talking to others to convey information effectively.

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Abilities

Problem Sensitivity — The ability to tell when something is wrong or is likely to go wrong. It does not involve solving the problem, only recognizing there is a problem.

Arm-Hand Steadiness — The ability to keep your hand and arm steady while moving your arm or while holding your arm and hand in one position.

Manual Dexterity — The ability to quickly move your hand, your hand together with your arm, or your two hands to grasp, manipulate, or assemble objects.

Oral Comprehension — The ability to listen to and understand information and ideas presented through spoken words and sentences.

Oral Expression — The ability to communicate information and ideas in speaking so others will understand.

Finger Dexterity — The ability to make precisely coordinated movements of the fingers of one or both hands to grasp, manipulate, or assemble very small objects.

Information Ordering — The ability to arrange things or actions in a certain order or pattern according to a specific rule or set of rules (e.g., patterns of numbers, letters, words, pictures, mathematical operations).

Near Vision — The ability to see details at close range (within a few feet of the observer).

Speech Clarity — The ability to speak clearly so others can understand you.

Speech Recognition — The ability to identify and understand the speech of another person.

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Work Activities

Handling and Moving Objects — Using hands and arms in handling, installing, positioning, and moving materials, and manipulating things.

Performing General Physical Activities — Performing physical activities that require considerable use of your arms and legs and moving your whole body, such as climbing, lifting, balancing, walking, stooping, and handling of materials.

Training and Teaching Others — Identifying the educational needs of others, developing formal educational or training programs or classes, and teaching or instructing others.

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Work Context

Spend Time Standing — 87% responded "Continually or almost continually."

Spend Time Using Your Hands to Handle, Control, or Feel Objects, Tools, or Controls — 60% responded "Continually or almost continually."

Wear Common Protective or Safety Equipment such as Safety Shoes, Glasses, Gloves, Hearing Protection, Hard Hats, or Life Jackets — 76% responded "Every day."

Physical Proximity — 56% responded "Moderately close (at arm's length)."

Contact With Others — 60% responded "Constant contact with others."

Indoors, Environmentally Controlled — 70% responded "Every day."

Face-to-Face Discussions — 49% responded "Every day."

Responsibility for Outcomes and Results — 36% responded "High responsibility."

Time Pressure — 61% responded "Every day."

Responsible for Others' Health and Safety — 38% responded "High responsibility."

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Job Zone

Title	Job Zone One: Little or No Preparation Needed
Education	Some of these occupations may require a high school diploma or GED certificate.
Related Experience	Little or no previous work-related skill, knowledge, or experience is needed for these occupations. For example, a person can become a waiter or waitress even if he/she has never worked before.
Job Training	Employees in these occupations need anywhere from a few days to a few months of training. Usually, an experienced worker could show you how to do the job.
Job Zone Examples	These occupations involve following instructions and helping others. Examples include taxi drivers, amusement and recreation attendants, counter and rental clerks, nonfarm animal caretakers, continuous mining machine operators, and waiters/waitresses.
SVP Range	(Below 4.0)

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Education

Percentage of Respondents	Education Level Required
65	

Less than high school diploma

35 High school diploma or equivalent

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Interests

Interest code: R

Realistic — Realistic occupations frequently involve work activities that include practical, hands-on problems and solutions. They often deal with plants, animals, and real-world materials like wood, tools, and machinery. Many of the occupations require working outside, and do not involve a lot of paperwork or working closely with others.

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Work Styles

Dependability — Job requires being reliable, responsible, and dependable, and fulfilling obligations.

Attention to Detail — Job requires being careful about detail and thorough in completing work tasks.

Concern for Others — Job requires being sensitive to others' needs and feelings and being understanding and helpful on the job.

Cooperation — Job requires being pleasant with others on the job and displaying a good-natured, cooperative attitude.

Self Control — Job requires maintaining composure, keeping emotions in check, controlling anger, and avoiding aggressive behavior, even in very difficult situations.

Adaptability/Flexibility — Job requires being open to change (positive or negative) and to considerable variety in the workplace.

Integrity — Job requires being honest and ethical.

Stress Tolerance — Job requires accepting criticism and dealing calmly and effectively with high stress situations.

Persistence — Job requires persistence in the face of obstacles.

Achievement/Effort — Job requires establishing and maintaining personally challenging achievement goals and exerting effort toward mastering tasks.

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Work Values

Support — Occupations that satisfy this work value offer supportive management that stands behind employees. Corresponding needs are Company Policies, Supervision: Human Relations and Supervision: Technical.

Relationships — Occupations that satisfy this work value allow employees to provide service to others and work with co-workers in a friendly non-competitive environment. Corresponding needs are Co-workers, Moral Values and Social Service.

Working Conditions — Occupations that satisfy this work value offer job security and good working conditions. Corresponding needs are Activity, Compensation, Independence, Security, Variety and Working Conditions.

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Related Occupations

35-2011.00	Cooks, Fast Food
35-2014.00	Cooks, Restaurant
35-2015.00	Cooks, Short Order
35-2021.00	Food Preparation Workers Bright Outlook
35-3021.00	Combined Food Preparation and Serving Workers, Including Fast Food
35-3041.00	Food Servers, Nonrestaurant
35-9011.00	Dining Room and Cafeteria Attendants and Bartender Helpers
35-9021.00	Dishwashers
51-3021.00	Butchers and Meat Cutters
51-3023.00	Slaughterers and Meat Packers

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Wages & Employment Trends

Median wages (2013)	$11.12 hourly, $23,120 annual
State wages	Local Salary Info
Employment (2012)	163,000 employees
Projected growth (2012-2022)	Slower than average (3% to 7%)
Projected job openings (2012-2022)	49,000
State trends	Employment Trends
Top industries (2012)	Manufacturing Retail Trade

Source: Bureau of Labor Statistics 2013 wage data and 2012-2022 employment projections. "Projected growth" represents the estimated change in total employment over the projections period (2012-2022). "Projected job openings" represent openings due to growth and replacement.

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Job Openings on the Web

Find Jobs Job Banks

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Sources of Additional Information

Disclaimer: Sources are listed to provide additional information on related jobs, specialties, and/or industries. Links to non-DOL Internet sites are provided for your convenience and do not constitute an endorsement.

- Slaughterers, Meat Packers, and Meat, Poultry, and Fish Cutters and Trimmers. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2014-15 Edition.*

Foreign Labor Certification Data Center
Online Wage Library www.flcdatacenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level Explanation

SVP Explanation

FLC Wage Data updated July 1, 2014

Job Zones updated July 1, 2014
See change history

Technical Support & Help FAQ page.

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2014 - 6/2015.

Your search returned the following: Print Format

Area Code:	29180
Area Title:	Lafayette, LA MSA
OES/SOC Code:	53-7062
OES/SOC Title:	Laborers and Freight, Stock, and Material Movers, Hand
GeoLevel:	1
Level 1 Wage:	$8.56 hour - $17,805 year
Level 2 Wage:	$10.46 hour - $21,757 year
Level 3 Wage:	$12.35 hour - $25,688 year
Level 4 Wage:	$14.25 hour - $29,640 year
Mean Wage (H-2B):	$12.35 hour - $25,688 year

This wage applies to the following O*Net occupations:

53-7062.00 Laborers and Freight, Stock, and Material Movers, Hand

Manually move freight, stock, or other materials or perform other general labor. Includes all manual laborers not elsewhere classified.
O*Net™ JobZone: 2
Education & Training Code: No Level Set

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the Skill Level page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is $7.25/hr effective July 24, 2009.

I-cert

O*NET OnLine

Summary Report for:
53-7062.00 - Laborers and Freight, Stock, and Material Movers, Hand

Updated 2013

Bright Outlook

green

Manually move freight, stock, or other materials or perform other general labor. Includes all manual laborers not elsewhere classified.

Sample of reported job titles: Dock Worker, Laborer, Line Tender, Loader, Material Handler, Merchandise Pickup/Receiving Associate, Receiver, Receiving Associate, Shipping and Receiving Materials Handler, Warehouse Worker

View report: Summary | Details | Custom

Tasks | Tools & Technology | Knowledge | Skills | Abilities | Work Activities | Work Context | Job Zone | Education | Credentials | Interests | Work Styles | Work Values | Related Occupations | Wages & Employment | Job Openings | Additional Information

Tasks

- Move freight, stock, or other materials to and from storage or production areas, loading docks, delivery vehicles, ships, or containers, by hand or using trucks, tractors, or other equipment.
- Sort cargo before loading and unloading.
- Attach identifying tags to containers or mark them with identifying information.
- Read work orders or receive oral instructions to determine work assignments or material or equipment needs.
- Stack cargo in locations such as transit sheds or in holds of ships as directed, using pallets or cargo boards.
- Record numbers of units handled or moved, using daily production sheets or work tickets.
- Install protective devices, such as bracing, padding, or strapping, to prevent shifting or damage to items being transported.
- Direct spouts and position receptacles, such as bins, carts, or containers so they can be loaded.
- Attach slings, hooks, or other devices to lift cargo and guide loads.
- Maintain equipment storage areas to ensure that inventory is protected.

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Tools & Technology

Tools used in this occupation:

Forklifts — Lift trucks

Hammers — Claw hammers

Hoists — Power hoists

Pallet trucks — Pallet jacks; Pallet transport trucks

Track cranes — Overhead cranes

Wrapping machinery — Banding machines

Technology used in this occupation:

Data base user interface and query software — Data entry software

Industrial control software — Machine control software

Inventory management software — Inventory tracking software

Spreadsheet software

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Knowledge

No knowledge met the minimum score.

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Skills

No skills met the minimum score.

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Abilities

Static Strength — The ability to exert maximum muscle force to lift, push, pull, or carry objects.

Multilimb Coordination — The ability to coordinate two or more limbs (for example, two arms, two legs, or one leg and one arm) while sitting, standing, or lying down. It does not involve performing the activities while the whole body is in motion.

Trunk Strength — The ability to use your abdominal and lower back muscles to support part of the body repeatedly or continuously over time without 'giving out' or fatiguing.

Control Precision — The ability to quickly and repeatedly adjust the controls of a machine or a vehicle to exact positions.

Manual Dexterity — The ability to quickly move your hand, your hand together with your arm, or your two hands to grasp, manipulate, or assemble objects.

Near Vision — The ability to see details at close range (within a few feet of the observer).

Oral Comprehension — The ability to listen to and understand information and ideas presented through spoken words and sentences.

Stamina — The ability to exert yourself physically over long periods of time without getting winded or out of breath.

Deductive Reasoning — The ability to apply general rules to specific problems to produce answers that make sense.

Dynamic Strength — The ability to exert muscle force repeatedly or continuously over time. This involves muscular endurance and resistance to muscle fatigue.

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Work Activities

Performing General Physical Activities — Performing physical activities that require considerable use of your arms and legs and moving your whole body, such as climbing, lifting, balancing, walking, stooping, and handling of materials.

Handling and Moving Objects — Using hands and arms in handling, installing, positioning, and moving materials, and manipulating things.

Identifying Objects, Actions, and Events — Identifying information by categorizing, estimating, recognizing differences or similarities, and detecting changes in circumstances or events.

Controlling Machines and Processes — Using either control mechanisms or direct physical activity to operate machines or processes (not including computers or vehicles).

Operating Vehicles, Mechanized Devices, or Equipment — Running, maneuvering, navigating, or driving vehicles or mechanized equipment, such as forklifts, passenger vehicles, aircraft, or water craft.

Establishing and Maintaining Interpersonal Relationships — Developing constructive and cooperative working relationships with others, and maintaining them over time.

Evaluating Information to Determine Compliance with Standards — Using relevant information and individual judgment to determine whether events or processes comply with laws, regulations, or standards.

Communicating with Supervisors, Peers, or Subordinates — Providing information to supervisors, co-workers, and subordinates by telephone, in written form, e-mail, or in person.

Getting Information — Observing, receiving, and otherwise obtaining information from all relevant sources.

Making Decisions and Solving Problems — Analyzing information and evaluating results to choose the best solution and solve problems.

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Work Context

Face-to-Face Discussions — 93% responded "Every day."

Work With Work Group or Team — 71% responded "Extremely important."

Spend Time Using Your Hands to Handle, Control, or Feel Objects, Tools, or Controls — 55% responded "Continually or almost continually."

Wear Common Protective or Safety Equipment such as Safety Shoes, Glasses, Gloves, Hearing Protection, Hard Hats, or Life Jackets — 87% responded "Every day."

Time Pressure — 72% responded "Every day."

Frequency of Decision Making — 71% responded "Every day."

Indoors, Environmentally Controlled — 81% responded "Every day."

Importance of Being Exact or Accurate — 29% responded "Extremely important."

In an Open Vehicle or Equipment — 75% responded "Every day."

Contact With Others — 58% responded "Constant contact with others."

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Job Zone

Title	Job Zone Two: Some Preparation Needed
Education	These occupations usually require a high school diploma.
Related Experience	Some previous work-related skill, knowledge, or experience is usually needed. For example, a teller would benefit from experience working directly with the public.
Job Training	Employees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations.

Job Zone Examples	These occupations often involve using your knowledge and skills to help others. Examples include sheet metal workers, forest fire fighters, customer service representatives, physical therapist aides, salespersons (retail), and tellers.
SVP Range	(4.0 to < 6.0)

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Education

Percentage of Respondents	Education Level Required
70	High school diploma or equivalent
19	Less than high school diploma
5	Some college, no degree

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Credentials

Find Certifications | Find Licenses | Find Apprenticeships

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Interests

Interest code: R

Realistic — Realistic occupations frequently involve work activities that include practical, hands-on problems and solutions. They often deal with plants, animals, and real-world materials like wood, tools, and machinery. Many of the occupations require working outside, and do not involve a lot of paperwork or working closely with others.

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Work Styles

Dependability — Job requires being reliable, responsible, and dependable, and fulfilling obligations.

Stress Tolerance — Job requires accepting criticism and dealing calmly and effectively with high stress situations.

Achievement/Effort — Job requires establishing and maintaining personally challenging achievement goals and exerting effort toward mastering tasks.

Integrity — Job requires being honest and ethical.

Attention to Detail — Job requires being careful about detail and thorough in completing work tasks.

Cooperation — Job requires being pleasant with others on the job and displaying a good-natured, cooperative attitude.

Adaptability/Flexibility — Job requires being open to change (positive or negative) and to considerable variety in the workplace.

Self Control — Job requires maintaining composure, keeping emotions in check, controlling anger, and avoiding aggressive behavior, even in very difficult situations.

Initiative — Job requires a willingness to take on responsibilities and challenges.

Persistence — Job requires persistence in the face of obstacles.

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Work Values

Relationships — Occupations that satisfy this work value allow employees to provide service to others and work with co-workers in a friendly non-competitive environment. Corresponding needs are Co-workers, Moral Values and Social Service.

Support — Occupations that satisfy this work value offer supportive management that stands behind employees. Corresponding needs are Company Policies, Supervision: Human Relations and Supervision: Technical.

Working Conditions — Occupations that satisfy this work value offer job security and good working conditions. Corresponding needs are Activity, Compensation, Independence, Security, Variety and Working Conditions.

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Related Occupations

43-5041.00	Meter Readers, Utilities
47-2151.00	Pipelayers
47-2171.00	Reinforcing Iron and Rebar Workers
47-4031.00	Fence Erectors Bright Outlook
47-4061.00	Rail-Track Laying and Maintenance Equipment Operators Green
51-5113.00	Print Binding and Finishing Workers
51-7041.00	Sawing Machine Setters, Operators, and Tenders, Wood
51-9111.00	Packaging and Filling Machine Operators and Tenders
51-9195.07	Molding and Casting Workers
53-7051.00	Industrial Truck and Tractor Operators

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Wages & Employment Trends

Median wages (2013)	$11.52 hourly, $23,970 annual
State wages	Local Salary Info
Employment (2012)	2,197,000 employees
Projected growth (2012-2022)	Average (8% to 14%)
Projected job openings (2012-2022)	922,500
State trends	Employment Trends
Top industries (2012)	Transportation and Warehousing

Administrative and Support Services

Source: Bureau of Labor Statistics 2013 wage data and 2012-2022 employment projections. "Projected growth" represents the estimated change in total employment over the projections period (2012-2022). "Projected job openings" represent openings due to growth and replacement.

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Job Openings on the Web

Find Jobs Job Banks

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Sources of Additional Information

Disclaimer: Sources are listed to provide additional information on related jobs, specialties, and/or industries. Links to non-DOL Internet sites are provided for your convenience and do not constitute an endorsement.

- Hand Laborers and Material Movers. Bureau of Labor Statistics, U.S. Department of Labor. *Occupational Outlook Handbook, 2014-15 Edition.*
- Industrial Truck Association (ITA), 1750 K St. NW, Suite 460, Washington, DC 20006. Phone: (202) 296-9880. Fax: (202) 296-9884.

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Area Code: 29180

Area Name: Lafayette, LA MSA

Counties / Townships:
LAFAYETTE; ST MARTIN

U.S. Citizenship and Immigration Services

Cap Count for H-2B Nonimmigrants

The H-2B Program

The H-2B non-agricultural temporary worker program allows U.S. employers to bring foreign nationals to the United States to fill temporary non-agricultural jobs.

For more information about the H-2B program, see the link "H-2B Non-Agricultural Workers."

What is the H-2B Cap?

There is a statutory numerical limit, or "cap," on the total number of foreign nationals who may be issued an H-2B visa or otherwise granted H-2B status during a fiscal year. Currently, Congress has set the H-2B cap at 66,000 per fiscal year, with 33,000 for workers who begin employment in the 1st half of the fiscal year (October 1 - March 31) and 33,000 for workers who begin employment in the 2nd half of the fiscal year (April 1 - September 30). Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H-2B workers during the second half of the fiscal year. However, unused H-2B numbers from one fiscal year do not carry over into the next.

Workers who are exempt from the H-2B cap

Petitions for the following workers are exempt from the H-2B cap:

- H-2B workers in the United States or abroad who have been previously counted towards the cap in the same fiscal year;
- Current H-2B workers seeking an extension of stay;
- Current H-2B workers seeking a change of employer or terms of employment;
- Fish roe processors, fish roe technicians and/or supervisors of fish roe processing; and
- H-2B workers performing labor or services from November 28, 2009, until December 31, 2019, in the Commonwealth of Northern Mariana Islands and/or Guam.

Additionally, the spouse and children of H-2B workers classified as H-4 nonimmigrants are not counted against this cap.

Once the H-2B cap is reached, USCIS will only accept petitions for H-2B workers who are exempt from the H-2B cap.

Fiscal Year 2015 H-2B Cap

USCIS has reached the congressionally mandated H-2B cap for fiscal year (FY) 2015. March 26, 2015 was the final receipt date for cap-subject H-2B worker petitions requesting an employment start date before October 1, 2015. The final receipt date is the date USCIS received enough cap-subject petitions to reach the annual limit of 66,000 H-2B workers for FY 2015.

Cap Type	Cap Amount	Beneficiaries Approved	Beneficiaries Pending	Target Beneficiaries[1]	Total	Date of Last Count
H-2B: 1st Half FY 2015	33,000		On Jan. 26, 2015, the cap for the 1st half of FY 2015 was reached.			1/26//2015
H-2B: 2nd Half FY 2015	33,000[2]		On March 26, 2015, the annual cap for FY 2015 was reached.			3/26/2015

[1] Refers to the estimated number of beneficiaries needed to be included on petitions filed with USCIS to reach the H-2B cap, with an allowance for withdrawals, denials, and revocations. This number will always be higher than the actual cap.

[2] If the cap is not reached for the 1st half of the fiscal year, those unused numbers will be available for use during the 2nd half of the fiscal year. In some fiscal years, depending on demand for H-2B workers, more than 33,000 cap-subject persons may be granted H-2B status during the 2nd half of the fiscal year.

This page can be found at http://www.uscis.gov/h-2b_count

U.S. Citizenship and Immigration Services

Cap Count for H-2B Nonimmigrants

The H-2B Program

The H-2B non-agricultural temporary worker program allows U.S. employers to bring foreign nationals to the United States to fill temporary non-agricultural jobs.
For more information about the H-2B program, see the link to the left under "H-2B Non-Agricultural Workers."

What is the H-2B Cap?

There is a statutory numerical limit, or "cap," on the total number of aliens who may be issued a visa or otherwise provided H-2B status (including through a change of status) during a fiscal year. Currently, the H-2B cap set by Congress is 66,000 per fiscal year, with 33,000 to be allocated for employment beginning in the 1st half of the fiscal year (October 1 - March 31) and 33,000 to be allocated for employment beginning in the 2nd half of the fiscal year (April 1 - September 30). Any unused numbers from the first half of the fiscal year will be made available for use by employers seeking to hire H-2B workers during the second half of the fiscal year. There is no "carry over" of unused H-2B numbers from one fiscal year to the next.

Persons who are exempt from the H-2B cap

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H-2B: 2nd Half FY 2015	33,000[2]	14,740	1,779		16,519	2/27/2015

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U.S. Citizenship and Immigration Services

Cap Count for H-2B Nonimmigrants

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U.S. Citizenship and Immigration Services

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U.S. Citizenship and Immigration Services

USCIS Temporarily Suspends Adjudication of H-2B Petitions Following Court Order

As of March 5, 2015, U.S. Citizenship and Immigration Services (USCIS) is temporarily suspending adjudication of Form I-129 H-2B petitions for temporary non-agricultural workers while the government considers the appropriate response to the court order entered March 4, 2015, in *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015).

Due to this decision, starting March 4, the Department of Labor (DOL) is no longer accepting or processing requests for prevailing wage determinations or applications for temporary labor certifications in the H-2B program. DOL is considering its options in light of the court's decision. (See DOL Office of Foreign Labor Certification for more details.)

Because H-2B petitions require temporary labor certifications issued by DOL, USCIS has also temporarily suspended adjudication of H-2B petitions. USCIS will continue adjudicating H-2B petitions for non-agricultural temporary workers on Guam if the petitions are accompanied by temporary labor certifications issued by the Guam Department of Labor.

Starting March 6, 2015, USCIS has also suspended premium processing for all H-2B petitions until further notice. If a petitioner has already filed H-2B petitions using the premium processing service and the agency did not act on the case within the 15-calendar-day period, USCIS will issue a refund.

Please continue to check www.uscis.gov for updates.

Last Reviewed/Updated: 03/09/2015

U.S. Citizenship and Immigration Services

Cap Count for H-2B Nonimmigrants

The H-2B Program

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Kelly J. Couch

From: Laurie Flanagan <lflanagan@dclrs.com>
Sent: Thursday, February 12, 2015 8:05 AM
To: Laurie Flanagan
Subject: H-2B Cap Count as of 2/6

Cap Count for H-2B Nonimmigrants

The H-2B Program

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H-2B: 2nd Half FY 2015	33,000[2]	5,810	2,574		8,384	2/6/2015

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Last Reviewed/Updated: 02/10/2015

More Information

- H-2A and H-2B - Signature Requirements For Electronically Filed Temporary Labor Certifications and the H Classification Supplement to Form I-129 Questions & Answers
- Calculating Interrupted Stays for the H-2 Classifications
- USCIS Announces 58 Countries Whose Nationals are Eligible for H-2A and H-2B Participation
- Reminder: Certain Fees May Not Be Collected From H-2A and H-2B Workers

Forms

- I-129, Petition for a Nonimmigrant Worker
- Premium Processing
- Employment Based Forms

Other USCIS Links

- VIBE Program
- Public Releases: Visas: H-2A and H-2B
- TITLE 8 CODE OF FEDERAL REGULATIONS (8 CFR)
- Numerical Limitation Exemption for H Nonimmigrants Employed in the CNMI and Guam (51 KB PDF)

U.S. Citizenship and Immigration Services

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Kelly J. Couch

From:	tlc.chicago@dol.gov
Sent:	Thursday, April 16, 2015 3:16 PM
To:	kellyjcouch1@gmail.com
Cc:	kellyjcouch1@gmail.com
Subject:	H2B: WITHDRAWAL NOTIFICATION TO REQUESTOR POINT OF CONTACT

Re: Withdrawal of Case Number: H-400-15011-726210

This is an official notification that the ETA Form 9142 - Application for Temporary Employment Certification, filing date 01/11/2015, covering 25
worker(s) for the position of Crab and crawfish seafood processors during the period of employment beginning 02/16/2015 through 12/05/2015 (case number H-400-15011-726210) has been WITHDRAWN in accordance with your request received on 04/02/2015.

Reason:
Other Acceptable Withdrawal Reason

No further action will be taken by the U.S. Department of Labor on this case.

Rec'd in CWA 4/3/15
Withdrew for 4/14/15

Withdrew case on 4-2-15. Notification email not rec'd until 4-16-15.

April 2, 2015

Randol, Inc.
2320 Kaliste Saloom Road
Lafayette, LA 70508
337-981-7080

STATEMENT REQUESTING WITHDRAWL OF CERTIFIED APPLICATION

Dear CNPC,

This is to confirm that we are requesting to WITHDRAW our certified application H-400-15011-726210. In addition, we will be mailing today via priority mail a package that contains the same previously certified ETA 9142B application for H2B employees.

Should you need anything further please do not hesitate.

Thank You,

Frank Randol

Please note we withdrew 1st application as cap had already been reached. This would allow us to resubmit a 2nd application (all new paperwork) to try for 4-1-15 start date.

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USPS Tracking™

Customer Service ›
Have questions? We're here to help.

Tracking Number: 9470103699300012358607

Updated Delivery Day: Saturday, April 4, 2015
Scheduled Delivery Day: Friday, April 3, 2015, 10:30 am
Money Back Guarantee
Signed for By: WAIVED // CHICAGO, IL 60699 // 11:03 am

Product & Tracking Information

Postal Product: Priority Mail Express 1-Day™

Extra Svc: PO to Addressee

Up to $100 insurance included
Restrictions Apply

DATE & TIME	STATUS OF ITEM	LOCATION
April 3, 2015 , 11:03 am	**Delivered**	**CHICAGO, IL 60699**
Your item was delivered at 11:03 am on April 3, 2015 in CHICAGO, IL 60699. Waiver of signature was exercised at time of delivery.		
April 3, 2015 , 10:59 am	Arrived at Post Office	CHICAGO, IL 60603
April 3, 2015 , 7:40 am	Arrived at USPS Facility	CHICAGO, IL 60701
April 2, 2015 , 8:31 pm	Departed USPS Facility	BATON ROUGE, LA 70826
April 2, 2015 , 7:16 pm	Arrived at USPS Origin Facility	BATON ROUGE, LA 70826
April 2, 2015 , 5:05 pm	Departed Post Office	NEW ROADS, LA 70760
April 2, 2015 , 3:28 pm	Acceptance	NEW ROADS, LA 70760

Available Actions

Proof of Delivery

Text Updates

Email Updates

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4/3/15

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Tracking (or receipt) number

Track It

mailed 4-2-15

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No Delivery ☐ Saturday ☒ Sunday/ Holiday	Contents Value	COD Fee	Ins. Fee: $0.00
			Total Postage & Fees: $23.11

9470 1036 9930 0012 3585 07

Signature Service:

Ship Date: 04/02/2015
Scheduled Delivery Date: 04/03/2015

LABEL INFORMATION

FROM:

KELLY J COUCH
COUCH APPLICATION SERVICE ASSISTANCE LLC
231 PECAN AVE
NEW ROADS LA 70760-2513

TO:

CERTIFYING OFFICER H2B - H-400-15085-521079
US DEPT OF LABOR, ETA, FOREIGN LABOR CERTIF -
CNPC
11 W QUINCY CT
CHICAGO IL 60604-2098

LAB-FEB 201 FOR PICKUP OR TRACKING GO TO USPS.COM USPS.COM

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U.S. Department of Labor Employment and Training Administration
Office Foreign Labor Certification
National Prevailing Wage Center
1341 G Street, NW
Suite 201
Washington, D.C. 20005-3105

January 28, 2015

Randol, Inc.
C/O COUCH KELLY J.
COUCH APPLICATION SERVICE ASSISTANCE, LLC.
231 PECAN AVENUE

NEW ROADS, LA 70760

Case Number: H-400-15011-726210
Job Title: Crab and crawfish seafood processors

Dear Employer :

On December 5, 2014, the United States Court of Appeals for the Third Circuit issued a decision *in Comite de Apoyo a los Trabajadores Agricolas et al v. Solis*, No. 14-3557. That order vacated the portion of the Department's H-2B wage rule (20 CFR § 655.10(f)) that permits the use of employer-provided wage surveys in making prevailing wage determinations. The prevailing wage determination that was previously issued to you and which was based on an employer provided survey is therefore invalid. The correct prevailing wage determination is set forth below. **In accordance with the employer's declaration in Appendix B.1, the employer is responsible for compliance with this supplemental prevailing wage determination (PWD) upon receipt of notification by DOL.**

The National Prevailing Wage Center identified the appropriate Application(s) for PWD (ETA Form 9141) associated with the occupation:

P-400-14227-355546
Additional Note:
The employer's job duties represent a combination of 53-7062 - Laborers and Freight, Stock, and Material Movers, Hand and 51-3022.00 - Meat, Poultry, and Fish Cutters and Trimmers.

STATE: LA
COUNTY/NECTA: Lafayette Parish
AREA: 2320 Kaliste Saloom Rd
WAGE SOURCE: OES
PREVAILING WAGE: $12.35 per hour
SOC CODE: 53-7062 SOC TITLE: Laborers and Freight, Stock, and Material Movers, Hand

Wage increase per hour from Survey rate of 7.25/hr to 12.35 hourly

Request for Redetermination

An employer who desires to utilize an appropriate Service Contract Act or Davis Bacon Act wage determinations or a wage based on a Collective Bargaining Agreement (CBA) should file a redetermination request in accordance with DOL's regulations at 20 CFR § 655.10(g). Such a request must be submitted within 30 days of the date of this letter. The redetermination request must clearly identify the prevailing wage determination for which review is sought and the grounds on which redetermination is sought. The employer must submit the request via email to FLC.PWD@dol.gov or to the following address:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
National Prevailing Wage Center
Attn: SPW Redetermination
1341 G Street, NW
Suite 201
Washington, D.C. 20005-3105

Should the employer choose to file a new request for redetermination as a means for requesting use of an alternative prevailing wage source (SCA/DBA/CBA), the NPWC will accept requests for the purposes of this determination only. For any future prevailing wage determination requests, the employer must include a request for an alternative source with its original request. Should the employer seek to use an SCA or DBA wage determination, the request must specify precisely which SCA or DBA wage determination is being used. Redetermination cannot be requested on issues related to the ability to utilize an employer provided wage survey.

No prevailing wage issued by the U.S. Department of Labor permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

Sincerely,

NPWC

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
11 West Quincy Court
Chicago, IL 60604

FINAL DETERMINATION

January 28, 2015

Kelly J. Couch
Couch Application Service
Assistance, LLC
231 Pecan Avenue
New Roads, LA 70760

Case Number: H-400-15011-726210

RE: Randol, Inc.

Dear Sir/Madam:

Your application seeking temporary labor certification under the H-2B temporary nonagricultural program has been reviewed and certified. The Department of Labor (Department) has made a final determination on your *Application for Temporary Employment Certification* in accordance with Departmental regulations at 20 Code of Federal Regulations (CFR) sec. 655, Subpart A. Based on the documentation and attestations provided by the employer, the Department hereby certifies that a sufficient number of able, willing and qualified U.S. workers have not been identified as being available at the time and place needed to fill the job opportunities for which certification is sought, and the employment of the H-2B temporary workers in such labor or services will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The *Application for Temporary Employment Certification*, ETA Form 9142, has been certified and is enclosed.

Upon receipt of this notification, you will need to submit Form I-129 and all required documentation, including the original, certified H-2B *Application for Temporary Employment Certification* to the appropriate U.S. Citizenship and Immigration Service (USCIS) office. The USCIS application form and additional information can be obtained at http://www.uscis.gov.

IMPORTANT NOTE: The employer must sign and date the ETA Form 9142 prior to submission to USCIS.

Important Reminders:

In accordance with Departmental regulations at 20 CFR sec. 655.24(a), the Department has the authority to conduct audits of certified H-2B applications. Employers selected for audit examination will receive an official letter from our office requesting documentation in support of the certified H-2B application. Failure to comply with the audit process may result in the employer being placed on supervised recruitment in accordance with Departmental regulations at 20 CFR sec. 655.30, or debarment in accordance with Departmental regulations at 20 CFR sec. 655.31.

In accordance with Departmental regulations at 20 CFR sec. 655.22(f), upon separation from employment of H-2B worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. An abandonment or abscondment shall be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. Employees may be terminated for cause.

Terminations and job abandonment notifications sent to the Department must be sent to the email address at TLC.Chicago@dol.gov. Employers without internet access may also send written notification via facsimile to (312) 886-1688 (ATTN: H-2B Abandonment and Termination).

Questions concerning this case can be directed via e-mail to TLC.Chicago@dol.gov, via phone at (312) 886-8000, or via facsimile at (312) 886-1688.

Sincerely,

OFLC Certifying Officer

CC: Randol, Inc.

Enclosures: ETA Form 9142

OMB Approval: 1205-0509
Expiration Date: 03/31/2015

H-2B Application for Temporary Employment Certification
ETA Form 9142B
U.S. Department of Labor

*Please read and review the filing instructions carefully before completing the ETA Form 9142B. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/. In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. If submitting this form non-electronically, ALL required fields/items containing an asterisk (*) must be completed as well as any fields/items where a response is conditional as indicated by the section (§) symbol.*

A. Employment-Based Nonimmigrant Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)* *	H-2B

B. Temporary Need Information

1. Job Title * Crab and crawfish seafood processors

2. SOC (ONET/OES) code *	3. SOC (ONET/OES) occupation title *
53-7062	Laborers and Freight, Stock, and Material Movers, Hand

4. Is this a full-time position? *	Period of Intended Employment	
☑ Yes ☐ No	5. Begin Date * 02/16/2015 *(mm/dd/yyyy)*	6. End Date * 12/05/2015 *(mm/dd/yyyy)*

7. Worker positions needed/basis for the visa classification supported by this application

25 **Total Worker Positions Being Requested for Certification ***

Basis for the visa classification supported by this application
(Indicate the total workers in each applicable category based on the total workers identified above)

25	a. New employment *	0	d. New concurrent employment *
0	b. Continuation of previously approved employment * without change with the same employer	0	e. Change in employer *
0	c. Change in previously approved employment *	0	f. Amended petition *

8. Nature of Temporary Need: (Choose only one of the standards) *

☑ Seasonal ☐ Peakload ☐ One-Time Occurrence ☐ Intermittent or Other Temporary Need

9. Statement of Temporary Need *

SEE ADDENDUM

We are a small plant who processes Louisiana seafood products crab and crawfish. In a typical day about 3000 to 6000 pounds of fresh seafood is unloaded for processing at our plant. All work is done by hand, one piece at a time. We end up with a completed product having head, shells and all waste removed. This is a time consuming and very tedious work. These seafood processor employment positions are by nature, both temporary and seasonal. Beginning in Feb, when the waters begin to warm up, the season begins and these workers will assist our permanent employees throughout the warm spring and summer months throughout the fall until normally the end of Nov or beginning of Dec when the waters will begin to cool off again. The seafood catch normally falls off until the war waters return again in the spring usually late Feb-Mar yearly. Therefore workers will be needed Feb-early Dec for this seasonal, temporary need and not needed through out the remainder of Dec, Jan and early Feb. We will use these off season months for maintenance, repairs and general plant upkeep in order to be prepared for the arrival of crab and crawfish the following spring. Without these

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Expiration Date: 03/31/2016

H-2B Application for Temporary Employment Certification
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C. Employer Information

Important Note: Enter the full name of the individual employer, partnership, or corporation and all other required information in this section. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, identify the main or primary employer in the section below and then submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application.

1. Legal business name * Randol, Inc.		
2. Trade name/Doing Business As (DBA), if applicable N/A		
3. Address 1 * 2320 Kaliste Saloom Road		
4. Address 2 N/A		
5. City * Lafayette	6. State * LA	7. Postal code * 70508
8. Country * UNITED STATES OF AMERICA	9. Province Lafayette parish	
10. Telephone number * 337-981-7080	11. Extension N/A	
12. Federal Employer Identification Number (FEIN from IRS) * 720796114	13. NAICS code (must be at least 4-digits) * 311712	
14. Number of non-family full-time equivalent employees 3	15. Annual gross revenue	16. Year established 1971

17. Type of employer application (choose only one box below) *

- [x] Individual Employer
- [ ] H-2A Labor Contractor or Job Contractor
- [ ] Association – Sole Employer (H-2A only)
- [ ] Association – Joint Employer (H-2A only)
- [ ] Association – Filing as Agent (H-2A only)

D. Employer Point of Contact Information

Important Note: The information contained in this Section must be that of an employee of the employer who is authorized to act on behalf of the employer in labor certification matters. The information in this Section must be different from the agent or attorney information listed in Section E, unless the attorney is an employee of the employer. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, enter only the contact information for the main or primary employer (e.g., contact for an association filing as joint employer) under the application.

1. Contact's last (family) name * Randol	2. First (given) name * Frank	3. Middle name(s) * Beaullieu
4. Contact's job title * President		
5. Address 1 * 2320 Kaliste Saloom Road		
6. Address 2 N/A		
7. City * Lafayette	8. State * LA	9. Postal code * 70508
10. Country * UNITED STATES OF AMERICA	11. Province Lafayette	
12. Telephone number * 337-981-7080	13. Extension N/A	14. E-Mail address kellyjcouch1@gmail.com

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H-2B Application for Temporary Employment Certification
ETA Form 9142B
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E. Attorney or Agent Information (If applicable)

1. Is/are the employer(s) represented by an attorney or agent in the filing of this application (including associations acting as agent under the H-2A program)? If "Yes", complete Section E. *			☑ Yes ☐ No
2. Attorney or Agent's last (family) name §	3. First (given) name §	4. Middle name(s) §	
COUCH	KELLY	J.	
5. Address 1 §			
231 PECAN AVENUE			
6. Address 2			
N/A			
7. City §	8. State §	9. Postal code §	
NEW ROADS	LA	70760	
10. Country §	11. Province		
UNITED STATES OF AMERICA	POINTE COUPEE PARISH		
12. Telephone number §	13. Extension	14. E-Mail address	
225-638-7218	N/A	kellyjcouch1@gmail.com	
15. Law firm/Business name §		16. Law firm/Business FEIN §	
COUCH APPLICATION SERVICE ASSISTANCE, LLC		272490856	
17. State Bar number (only if attorney) §		18. State of highest court where attorney is in good standing (only if attorney) §	
N/A		N/A	
19. Name of the highest court where attorney is in good standing (only if attorney) §			
N/A			

F. Job Offer Information

a. Job Description

1. Job Title *		
Crab and crawfish seafood processors		
2. Number of hours of work per week	3. Hourly Work Schedule *	
Basic * 35 Overtime:	A.M. (h.mm) 8 00	P.M. (h.mm) 4 : 00
4. Does this position supervise the work of other employees? *	☐ Yes ☑ No	4a. If yes, number of employees worker will supervise (if applicable) §
5. Job duties – A description of the duties to be performed MUST begin in this space. If necessary, add attachment to continue and complete description. *		

Workers needed to dehead, dump sacks, extract meat, fill baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks, and cleanup/sanitize worksite.

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H-2B Application for Temporary Employment Certification
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F. Job Offer Information *(continued)*

b. Minimum Job Requirements

1. Education: minimum U.S. diploma/degree required *

☑ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)

1a. If "Other degree" in question 1, specify the diploma/degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
N/A	N/A

2. Does the employer require a second U.S. diploma/degree? * ☐ Yes ☑ No

2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §

N/A

3. Is training for the job opportunity required? * ☐ Yes ☑ No

3a. If "Yes" in question 3, specify the number of months of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
N/A	N/A

4. Is employment experience required? * ☐ Yes ☑ No

4a. If "Yes" in question 4, specify the number of months of experience required §	4b. Indicate the occupation required §
N/A	N/A

5. Special Requirements - List specific skills, licenses/certifications, and requirements of the job opportunity *

SEE ADDENDUM

1. After initial 60 hours of processing employee must be able to peel 4.25 or more per hour.

c. Place of Employment Information

1. Worksite address 1 *
2320 Kaliste Saloom Road

2. Address 2
N/A

3. City *	4. County *
Lafayette	Lafayette parish
5. State/District/Territory * LA	6. Postal code * 70508

7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? * ☐ Yes ☑ No

7a. If Yes in question 7, identify the geographic place(s) of employment with as much specificity as possible. If necessary, submit an attachment to continue and complete a listing of all anticipated worksites. §

N/A

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H-2B Application for Temporary Employment Certification
ETA Form 9142B
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G. Rate of Pay

1. Basic Rate of Pay Offered *	1a. Overtime Rate of Pay (if applicable) §
From: $ 12 . 35 To (Optional): $ 12 . 35	From: $ 18 . 53 To (Optional): $ 18 . 53

2. Per: (Choose only one) * ☑ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate

2a. If Piece Rate is indicated in question 2, specify the wage offer requirements: §
N/A

3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures). If necessary, add attachment to continue and complete description. §

SEE ADDENDUM

On December 5, 2014, the United States Court of Appeals for the Third Circuit issued a decision in Comite de Apoyo a los Trabajadores Agricolas et al v. Solis, No. 14-3557. That order vacated the portion of the Department's H-2B wage rule (20 CFR §

H. Recruitment Information

1. Name of State Workforce Agency (SWA) serving the area of intended employment *
Louisiana Workforce Commission

2. SWA job order identification number *	2a. Start date of SWA job order *	2b. End date of SWA job order * (If H-2A this date is 50% of contract period)
512024	11/07/2014	11/18/2014

3. Is there a Sunday edition of a newspaper (of general circulation) in the area of intended employment? * ☑ Yes ☐ No

Name of Newspaper/Publication (in area of intended employment for H-2B only) *	Dates of Print Advertisement §	
4. The Lafayette Daily Advertiser	From: 11/12/2014	To: 11/12/2014
5. The Lafayette Daily Advertiser	From: 11/09/2014	To: 11/09/2014

6. Additional Recruitment Activities for H-2B program. Use the space below to identify the type(s) or source(s) of recruitment, geographic location(s) of recruitment, and the date(s) on which recruitment was conducted. If necessary, add attachment to continue and complete description. *

In addition we ran online with the Advertiser on the same dates of Nov 9 and again on November 12, 2014.

We also ran online with the Louisiana Workforce Commission from November 7 - November 18, 2014.

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H-2B Application for Temporary Employment Certification
ETA Form 9142B
U.S. Department of Labor

I. Declaration of Employer and Attorney/Agent

In accordance with Federal regulations, the employer must attest that it will abide by certain terms, assurances and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Applications that fail to attach Appendix A or Appendix B will be considered incomplete and not accepted for processing by the ETA application processing center.

1. For H-2A Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in **Appendix A**. §	☐ Yes ☐ No ☐ N/A
2. For H-2B Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in **Appendix B**. §	☑ Yes ☐ No ☐ N/A

J. Preparer

Complete this section if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Last (family) name §	2. First (given) name §	3. Middle initial §
N/A	N/A	N/A
4. Job Title § N/A		
5. Firm/Business name § N/A		
6. E-Mail address § N/A		

K. U.S. Government Agency Use (ONLY)

Pursuant to the provisions of Section 101 (a)(15)(h)(ii) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. By virtue of the signature below, the Department of Labor hereby acknowledges the following:

This certification is valid from 02/16/2015 to 12/05/2015

William A. Kemp Jr.
Department of Labor, Office of Foreign Labor Certification

01/28/2015
Determination Date (date signed)

H-400-15011-726210
Case number

CERTIFIED
Case Status

L. Public Burden Statement *(1205-0509)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Public reporting burden for this collection of information is estimated to average 1.5 hours to complete the form and 25 minutes per response for all other H-2B information collection requirements, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this data collection is required to obtain/retain benefits (Immigration and Nationality Act, 8 U.S.C. 1101, et seq.). Please send comments regarding this burden estimate or any other aspect of this information collection to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW. * Washington, DC * 20210 or by email ETA.OFLC.Forms@dol.gov. **Please do not send the completed application to this address.**

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H-2B Application for Temporary Employment Certification
ETA Form 9142B
U.S. Department of Labor

ADDENDUM

ADDENDUM SECTION B.9: Additional Notes Regarding Statement of Temporary Need

workers it would be impossible for us to purchase the entire daily full catch from our local fishermen farmers. In the past we have submitted for certification the following items and all have been revised and are on file for review to justify our temporary, seasonal need for 25 H2B workers. Seafood sales logs, payroll records, attachment A for 2012, 2013 and 2014, and a letter of support from the Louisiana Department of Ag & Forestry validating the temporary, seasonal need of this crab/crawfish seafood processor position. We attest to having performed all of the required steps to the recruitment process as specified in the Federal Register pre-filing recruitment process. We were assigned multiple codes on our 9141 PWD, however we have been certified by the DOL as meat, poultry and fish cutters and trimmers at soc code 51-3022 and attest that over 95% of our job duties are within this classification.

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Expiration Date 03/31/2016

H-2B Application for Temporary Employment Certification
ETA Form 9142B
U.S. Department of Labor

ADDENDUM

ADDENDUM SECTION F.b.5 Special Requirements

2. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid
3. Overtime, hours and schedule may vary
4. Payroll deductions required by law
5. May be paid per pound at employer discretion, which at all times meets or exceeds ETA 9142 certified hourly wage
6. Unpaid 30 min breaks available at employees discretion.
7. No on the job training
8. No education requirement.
9. M-F, some Sat/Sun, 8p - 4 am
10. and any other activities as related to PWD/ODL assigned SOC code as per onet online org
11. Must not be allergic to crab or crawfish

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H-2B Application for Temporary Employment Certification
ETA Form 9142B
U.S. Department of Labor

ADDENDUM

ADDENDUM SECTION G.3 Additional Notes Regarding Wage Information

655.10(f) and 2009 Wage Guidance that permits the use of employer provided wage surveys in making prevailing wage determinations. The prevailing wage determination that was previously issue to you and which was based on an employer provided survey is therefore invalid. The correct prevailing wage determination is set forth in this PWD based on the OES mean for the occupation.

May be paid per pound @ employer discretion, which at all times will meet or exceed ETA 9142 certified hourly wage

Please refer to PWD P-400-14227-355546

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H-2B Application for Temporary Employment Certification
ETA Form 9142B – APPENDIX B
U.S. Department of Labor

For Use in Filing Applications Under the H-2B Non-Agricultural Program ONLY

A. Attorney or Agent Declaration

I hereby certify that I am an employee of, or hired by, the employer listed in Section C of the ETA Form 9142B, and that I have been designated by that employer to act on its behalf in connection with this application. I also certify that to the best of my knowledge the information contained herein is true and correct. I understand that to knowingly furnish false information in the preparation of this form and any supplement hereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in a Federal penitentiary or both (18 U.S.C. 1001).

1. Attorney or Agent's last (family) name	2. First (given) name	3. Middle initial
COUCH	KELLY	J
4. Firm/Business name		
COUCH APPLICATION SERVICE ASSISTANCE, LLC.		
5. E-Mail address		
kellyjcouch1@gmail.com		
6. Signature		7. Date signed
Couch Application Service Assistance, LLC By Kelly J Couch Mgr		01-29-2015

B. Employer Declaration

By virtue of my signature below, ***I HEREBY CERTIFY*** the following conditions of employment:

1. The job opportunity is a bona fide, full-time temporary position; the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.
2. The job opportunity is not vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage.
3. The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.
4. The offered terms and working conditions of the job opportunity are normal to workers similarly employed in the area(s) of intended employment and are not less favorable than those offered to the foreign worker(s) and are not less than the minimum terms and conditions required by Federal regulation at 20 CFR 655, Subpart A.
5. The offered wage equals or exceeds the highest of the most recent prevailing wage that is or will be issued by the Department to the employer for the time period the work is performed, or the applicable Federal, State, or local minimum wage, and the employer will pay the offered wage.
6. The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage, or the legal Federal or State minimum wage, whichever is highest.
7. During the period of employment that is the subject of the labor certification application, the employer will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;
8. The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment within the period beginning 120 days before the date of need, except where the employer also attests that it offered the job opportunity that is the subject of the application to those laid-off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons.

OMB Control Number 1205-0509
Expiration Date 03/31/2016

H-2B Application for Temporary Employment Certification

ETA Form 9142B – APPENDIX B
U.S. Department of Labor

9. The employer and its agents and/or attorneys have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

10. Unless the H-2B worker is being sponsored by another subsequent employer, the employer will inform H-2B workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.35, and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.

11. Upon the separation from employment of any foreign worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than forty-eight (48) hours after such separation is discovered by the employer.

12. The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the Application for Temporary Employment Certification unless the employer has obtained a new temporary labor certification from the Department.

13. The dates of temporary need, reason(s) for temporary need, and number of worker positions being requested for certification have been truly and accurately stated on the application.

14. If the application is being filed as a job contractor, the employer will not place any H-2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless:

    (i) The employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the period beginning 120 days before and throughout the entire placement of the H-2B worker, the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers; and
    (ii) All worksites are listed on the certified Application for Temporary Employment Certification.

I hereby designate the agent or attorney identified in section D (if any) of the ETA Form 9142B to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).

1. Last (family) name	2. First (given) name	3. Middle initial
Randol	Frank	Beaullieu
4. Title		
President		
5. Signature		6. Date signed

Public Burden Statement *(1205-0509)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Public reporting burden for this collection of information is estimated to average 1.5 hours to complete the form and 25 minutes per response for all other H-2B information collection requirements, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The obligation to respond to this data collection is required to obtain/retain benefits (Immigration and Nationality Act, 8 U.S.C. 1101, et seq.). Please send comments regarding this burden estimate or any other aspect of this information collection to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW. * Washington, DC * 20210 or by email ETA.OFLC.Forms@dol.gov. Please do not send the completed application to this address.

LOUISIANA DEPARTMENT OF AGRICULTURE & FORESTRY
MIKE STRAIN DVM
COMMISSIONER

November 21, 2014

Randols
2320 Kaliste Saloom Road
Lafayette, LA 70508

Re: Crawfish Season

Dear Randols:

The crawfish industry in the United States is a seasonal industry that is vital to Louisiana aquaculture and fisheries.

The early live crawfish are from farmed ponds and are sold primarily to the whole live restaurant market. Once the main season arrives, the wild basin crawfish start appearing on the market and the prices drop so the processing plants may start peeling for the fresh and frozen tail meat markets.

Louisiana produces approximately 126 million pounds of live weight crawfish a year. Last season the farm gate value of that crop was almost $209 million. The majority of those crawfish were managed by our processors whether destined for the live or tail meat market.

Frozen tail meat is available to the consumer year round thanks to the efforts of our processing plants. Even though our processing plants only operate for a portion of the year, consumers can count on having crawfish available whenever they desire an etouffee, a pot of jambalaya or savory bowl of gumbo.

Thank you for your dedication to this industry and best regards!

Sincerely yours,

Carrie Castille

Carrie Castille, PhD
Associate Commissioner

Randols, Inc.
2320 Kaliste Saloom Road
Lafayette, LA 70508
337-981-7080

Designated occupation: Cannery worker for seafood process plant
Payroll Reporting Period: Calendar Year 2012

	Permanent Employment			Temporary Employment		
Month	Total Workers	Total Hours Worked	Total Earning Received	Total Workers	Total Hours Worked	Total Earnings Received
January				0	0	0
February				0	0	0
March				24	11123.12	$24,455.58
April				24	23618.82	$49,782.19
May				25	11104.47	$25,144.08
June				23	5901.4	$16,166.62
July				20	8261.69	$20,716.53
August				19	4440.19	$11,192.10
September				20	3109.96	$11,020.80
October				19	4393.86	$13,011.14
November				18	3684.68	$12,949.60
December				0	0	0

Designated occupation: Cannery worker for seafood process plant
Payroll Reporting Period: Calendar Year 2013

	Permanent Employment			Temporary Employment		
Month	Total Workers	Total Hours Worked	Total Earning Received	Total Workers	Total Hours Worked	Total Earnings Received
January				0	0	0
February				0	0	0
March				21	3255.17	9722
April				21	18998.82	42719.7
May				21	21541.05	48507.63
June				21	21490.29	49575.63
July				19	7376.39	18107.35
August				18	3813.89	9942.3
September				16	3848.02	10655.46
October				16	5202.73	13758.9
November				17	4865.77	12751.52
December				15	2137.51	6509.73

I Certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by Randol, Inc. for Calendar Year(s) 2012 and 2013.

Frank Randol, President
Randols Inc.

1-30-2014
Date

Randols, Inc.
2320 Kaliste Saloom Road
Lafayette, LA 70508
337-981-7080

2010		2011		2012		2013	
10-Jan	*	11-Jan	$15,985.00	12-Jan	$30.00	13-Jan	$1,467.00
10-Feb	*	11-Feb	$13,556.00	12-Feb	$18,681.00	13-Feb	$72,885.00
10-Mar		11-Mar	$25,788.00	12-Mar	$29,365.00	13-Mar	$156,820.00
10-Apr		11-Apr	$70,866.00	12-Apr	$68,456.00	13-Apr	$172,023.00
10-May		11-May	$131,130.00	12-May	$82,734.00	13-May	$43,915.00
10-Jun		11-Jun	$104,659.00	12-Jun	$82,542.00	13-Jun	$86,606.00
10-Jul		11-Jul	$68,712.00	12-Jul	$29,168.00	13-Jul	$33,636.00
10-Aug		11-Aug	$61,941.00	12-Aug	$94,817.00	13-Aug	$26,838.00
10-Sep		11-Sep	$43,987.00	12-Sep	$24,925.00	13-Sep	$84,153.00
10-Oct		11-Oct	$37,572.00	12-Oct	$27,140.00	13-Oct	$40,154.00
10-Nov		11-Nov	$66,259.00	12-Nov	$31,385.00	13-Nov	$31,860.00
10-Dec	*	11-Dec	$12,124.00	12-Dec	$16,361.00	13-Dec	$38,760.00
	#VALUE!		$ 652,549.00		$ 505,604.00		$ 789,117.00

* OFF SEASONS SALES - FROZEN

This being true and correct monthly sales record for Randols, Inc.

Frank Randol, President
Randols, Inc.

1-30-2014
Date

**A/R Receipts Normally 30 Days

Kelly J. Couch

From: Randols <randols@aol.com>
Sent: Monday, November 10, 2014 11:42 AM
To: Kelly J. Couch
Subject: Re: Randol's Sunday tear sheet

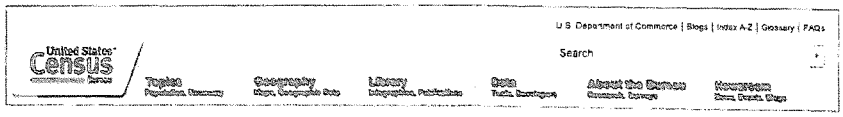
Randol,Inc does NOT have Union affiliation...

Frank

Sent from Frank Randol iPhone 6+

On Nov 10, 2014, at 11:08 AM, Kelly J. Couch <kellyjcouch1@gmail.com> wrote:

> Frank,
>
> 1. Do you have any UNION affiliation?
>
> 2. Here is a copy of Sunday 11/9/14 tearsheet.
>
> Thanks! kc
>
> **From:** Edgerson, Adrian [mailto:aedgerson@gannett.com]
> **Sent:** Monday, November 10, 2014 10:39 AM
> **To:** Kelly Couch
> **Subject:** RE: Contact Information Lafayette
>
> Kelly,
>
> Here is the tear sheet from Sunday. I will send the other tear sheet Thursday as well as get the physical tear sheets sent out to you as well.
>
> Let me know if you need anything else.
>
> Adrian Edgerson
> Sales Consultant
> Gannett | CareerBuilder.com
> 888-692-4349 Toll Free
> aedgerson@gannett.com
>
> **From:** Kelly Couch [mailto:kellyjcouch1@gmail.com]
> **Sent:** Monday, November 10, 2014 11:33 AM
> **To:** Edgerson, Adrian
> **Subject:** Re: Contact Information Lafayette
>
> Can you shoot me the sun run...then I'll need hard copies for sun and we'd.



North American Industry Classification System

2007 NAICS Definition

311712 Fresh and Frozen Seafood Processing

This U.S. industry comprises establishments primarily engaged in one or more of the following: (1) eviscerating fresh fish by removing heads, fins, scales, bones, and entrails; (2) shucking and packing fresh shellfish; (3) manufacturing frozen seafood; and (4) processing fresh and frozen marine fats and oils.

Cross-References. Establishments primarily engaged in--

- Establishments primarily engaged in canning and curing seafood are classified in U.S. Industry 311711, Seafood Canning.

2002 NAICS	2007 NAICS	2012 NAICS	Corresponding Index Entries
311712	311712	311710	Dinners, frozen seafood, manufacturing
311712	311712	311710	Fish freezing (e.g., blocks, fillets, ready-to-serve products)
311712	311712	311710	Freezing fish (e.g., blocks, fillets, ready-to-serve products)
311712	311712	311710	Picking crab meat
311712	311712	311710	Seafood dinners, frozen, manufacturing
311712	311712	311710	Shucking and packing fresh shellfish

[PDF] or denotes a file in Adobe's Portable Document Format. To view the file, you will need the Adobe® Reader® available free from Adobe. [Excel] or the letters [xls] indicate a document is in the Microsoft® Excel® Spreadsheet Format (XLS). To view the file, you will need the Microsoft® Excel® Viewer available for free from Microsoft®. This symbol indicates a link to a non-government web site. Our linking to these sites does not constitute an endorsement of any products, services or the information found on them. Once you link to another site you are subject to the policies of the new site.

Source: U.S. Census Bureau | North American Industry Classification System (NAICS) | (888) 756-2427 | naics@census.gov | Last Revised: May 13, 2013

Couch Application Service - Kelly

From: TLC, Chicago - ETA SVC <tlc.chicago@dol.gov>
Sent: Monday, January 12, 2015 12:58 PM
To: Couch Application Service - Kelly
Subject: RE: Randols Inc. H-400-15011-726210 #H22

Dear Kelly Couch,

Thank you for your inquiry. Your application was received on January 11, 2015 and assigned for processing.

You will be receiving correspondence about your case soon.

Sincerely,
Chicago National Processing Center

From: Couch Application Service - Kelly [mailto:couchapplicationservice@gmail.com]
Sent: Sunday, January 11, 2015 8:12 PM
To: TLC, Chicago - ETA SVC
Subject: Randols Inc. H-400-15011-726210

Dear TLC,

The website gave me this pasted error (exception occurred) however the portal shows that this case is in process.

Could you please verify that this case has been submitted for certification as I have conflicting responses from this DOL website submission. Should you need, feel free to phone. Thank you, Kelly Couch 225-638-7218

An Exception Occurred

The iCERT System is unable to process your request at this time.

Some exceptions are temporary and may resolve on your next attempt. If a second attempt does not resolve the problem, please refrain from further attempts and email iCERT Help Desk. Please refer to No. 1419608 and include a detailed explanation of your actions in the application at the time when you received this message

Up to 10 are shown

H-400-15011-726210	H-2B	Randol, Inc. 01/11/2015	in process

Couch Application Service - Kelly

From: Couch Application Service - Kelly <couchapplicationservice@gmail.com>
Sent: Sunday, January 11, 2015 8:12 PM
To: TLC, Chicago - ETA SVC
Subject: Randols Inc. H-400-15011-726210

Dear TLC,

The website gave me this pasted error (exception occurred) however the portal shows that this case is in process.

Could you please verify that this case has been submitted for certification as I have conflicting responses from this DOL website submission. Should you need, feel free to phone. Thank you, Kelly Couch 225-638-7218

An Exception Occurred

The iCERT System is unable to process your request at this time.

Some exceptions are temporary and may resolve on your next attempt. If a second attempt does not resolve the problem, please refrain from further attempts and email iCERT Help Desk. Please refer to No. 1413608 and include a detailed explanation of your actions in the application at the time when you received this message

---

Up to 10 are shown

H-400-15011-726210	H-2B	Randol, Inc. 01/11/2015	in process

Please note new email address: kellyjcouch1@gmail.com

Couch Application Service Assistance, LLC.
Kelly J. Couch
231 Pecan Avenue
New Roads, LA 70760
225-638-7218 phone
225-638-7217 preferred fax
225-638-7219 alternate fax

Submitted 1/11/15

LA JO # 512024 Open 11/07/2014–11/18/2014 Randol Inc. Recruitment Report Page 1 of 1

Source, Name, Address, and contact phone, disposition of each worker referred – include any laid off workers (if any)

Advertisements ran in The Advertiser (Lafayette) on Sunday, November 9, 2014 and again on Wednesday, November 12, 2014. Advertisement also ran online with the Advertiser on these two dates as well. Online with LA SWA from November 7 – November 18, 2014. Please note that we do not have any laid off workers to contact to return to the job. In addition, We have had only two applicant referrals from the online SWA website. All applicants were mailed a priority package including position information, instructions and employer info to the address applicants provided to the State of Louisiana Workforce Commission. No one has called or came in to apply for these positions available. Please find source, name, address, contact and disposition of each listed below:

1. SWA Dawn Richard, 326 Travailleur Road, Lafayette, LA 70506, 337-981-4139 Mailed to Dawn a priority package with position information with no response from Dawn to date. Dawn has listed prior experience as a barmaid and cashier. To date no response from Dawn. Not hired.
2. SWA Aaron J.Brooks, 301 Cameron Street, Apartment A, Lafayette, LA 70501, 337-322-8269. Mailed to Aaron a priority package with information regarding the position available with Randol's. Desired occupation is listed as an Assessor. To date no response from Aaron. Not hired.

This recruitment report with the information listed above denotes that as of today, there has only been these two online referrals from the State of LA SWA, neither of which have responded to our request. We have had no applicants or calls or walk ins regarding our position available.

I certify that the foregoing information is true and correct and understand that this information will be used in labor certification.

Frank B. Randol, President
Signature of Employer (Attorney/Agent CANNOT sign)

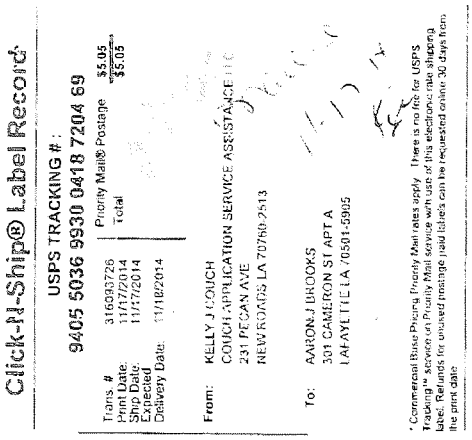
12-22-2014
Date Signed

Randols Inc.
2320 Kaliste Saloom Road
Lafayette, LA 70508
337-981-7080

Aaron J. Brooks
301 Cameron Street Apartment A
Lafayette, LA 70501

November 17, 2014

Dear Aaron,


Click-N-Ship® Label Record

USPS TRACKING #:
9405 5036 9930 0418 7204 69

Trans #: 31693726
Print Date: 11/17/2014
Ship Date: 11/17/2014
Expected Delivery Date: 11/18/2014

Priority Mail® Postage $5.05
Total $5.05

From: KELLY J COUCH
COUCH APPLICATION SERVICE ASSISTANCE LLC
231 PECAN AVE
NEW ROADS LA 70760-2513

To: AARON J BROOKS
301 CAMERON ST APT A
LAFAYETTE LA 70501-5905

* Commercial Base Pricing, Priority Mail rates apply. There is no fee for USPS Tracking™ service on Priority Mail service with use of this electronic rate shipping label. Refunds for unused postage paid labels can be requested online 30 days from the print date.

Recently you applied online for a position with Randols, Inc. to date you have not called or came in to apply. If you are interested in the below position offered, please complete the attached application and give us a call. Thank You.

s/Frank Randol
Randols, Inc.

Job Description and advertisement:

25 temp H2B positions as crab and crawfish seafood processors (53-7062, 51-3022) approx. 10 months duration. Begins 2/16/2015 thru 12/05/2015 $7.35 hrly, (11.03 OT) 8 pm – 4 am, M-F, some Sat/Sun, hrs/schedule/overtime may vary. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid. Payroll deductions as required by law. No on the job training, no education requirement. Workers needed to dehead, dump sacks, extract meat, fil baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks and cleanup/sanitize worksite and any other activities as related to PWD/DOL assigned SOC code as per onet online.org. Must not be allergic to crab or crawfish. 35 hrs wk, No experience required. After initial 60 hours of processing employee must be able to peel 4.25 lb or more per hour. May be paid per lb @ employer discretion, which at all times will meet or exceed ETA 9142 certified hourly wage. Unpaid 30 minute breaks available at employee discretion. Job offered by Randol Inc, contact Frank Randol, 2320 Kaliste Saloom Road, Lafayette, LA 70508, 337-981-7080 JO # 512024.

Contact Information

Applicant Name:	AARON J. BROOKS
Address:	301 Cameron st apt a Lafayette, LA 70501 US
Primary Phone:	(337) 322-8269(Cell/Mobile Phone)
Alternate Phone:	(337) 371-6042(Cell/Mobile Phone)

Candidate Summary

Name and Location:	AARON BROOKS of Lafayette, LA
Occupation Experience: *(Job requires 0 month(s) of experience as Meat, Poultry, and Fish Cutters and Trimmers)*	
Highest Level of Education: *(Job requires No Minimum Education Requirement)*	11th Grade Completed
Indicators:	
Auto Rank:	0%
Your Rating:	Not yet rated

Candidate Location

Distance from Location/Work Site:	Estimated 5.2 miles
Willing to Travel:	Not Specified
Willing To Relocate:	Not Specified
Willing To Telecommute:	Not Specified

Specialized Qualifications

Certificates:	Not Specified
Security Clearance:	Not Specified
Typing Speed:	Not Specified
Language/Proficiency:	Not Specified

Application Status

Application Method:	By Phone on 11/15/2014 10:31:32 AM
Applicant Status:	Status unknown
Comments:	None

Type of Job Desired

Desired Occupation: *(Job is for Meat, Poultry, and Fish Cutters and Trimmers)*	Assessors
Desired Salary: *(Job listed for $7.35 per Hour to $11.03 per Hour)*	ANY
Desired Job Locations:	Louisiana
Desired Employment Type: *(Job Type is Seasonal)*	Not Specified
Full Time or Part Time: *(Job is Full Time (30 Hours or More))*	Not Specified
Shifts Willing to Work: *(Job is for the Other, see job description shift)*	Not Specified
Days Available for Work:	Not Specified

Additional Information Regarding Type of Desired Job:

Not Specified

Employment History

Company Name	Location	Job Title (Occupation)	Start/End Dates	Duration of Job	Gross Salary	Reason for Separation
WINN-DIXIE MONTGOMERY LLC	P O BOX 283 %TALX UC EXPRESS SAINT LOUIS, MO	stocker (Assessors)	03/2014 - 10/2014	7months	*Confidential*	*Confidential*
CHECKERS OF LAFAYETTE AREA	113 W WILLOW ST LAFAYETTE, LA	Cashier (Cashiers)	04/2014 - 08/2014	4months	*Confidential*	*Confidential*
I HOP 2006	3230 NE EVANGELINE THRUWAY LAFAYETTE, LA	Cooking Chef (Chefs and Head Cooks)	03/2012 - 11/2013	1year, 8months	*Confidential*	*Confidential*
MOTEL 6 OPERATING LP	P O BOX 283 %TALX UCM SERVICES SAINT LOUIS, MO	Housekeeper/Custodian/Laundry Worker (Maids and Housekeeping Cleaners)	06/2012 - 09/2013	1year, 3months	*Confidential*	*Confidential*
lafayette parish school board	lafayette, LA	Custodial Laborer (Janitors and Cleaners, Except Maids and Housekeeping Cleaners)	01/2010 - 01/2011	1year	*Confidential*	*Confidential*
Hog Wild Bar-B-Q LLC	lafayette, LA	Dishwasher (Dishwashers)	05/2007 - 12/2010	3years, 7months	*Confidential*	*Confidential*
Super 8	Baton Rouge, LA	House Keeper (Janitors and Cleaners, Except Maids and Housekeeping Cleaners)	01/2008 - 08/2008	7months	*Confidential*	*Confidential*
Copeland	Lafayette, LA	Dishwasher (Dishwashers)			*Confidential*	*Confidential*

			05/2006 - 06/2007	1year, 1month		
Dickie Brennan Steak House	New Orleans, LA	Dishwasher (Dishwashers)	06/2006 - 10/2006	4months	*Confidential*	*Confidential*
logans Road House	lafayette, LA	Dishwasher (Dishwashers)	01/2005 - 08/2006	1year, 7months	*Confidential*	*Confidential*
Araunds	New Orleans, LA	Dishwasher (Cooks, All Other)	01/2005 - 07/2005	6months	*Confidential*	*Confidential*
Shoney's	Lafayette, LA	Dishwasher (Dishwashers)	10/2002 - 04/2003	6months	*Confidential*	*Confidential*
Burger King	Lafayette, LA	Porter (Unknown Occupation)	02/2000 - 07/2000	5months	*Confidential*	*Confidential*
			Total	13years, 5months		

Occupational Experience

Occupation	Experience
No Occupational Experience	

Education and Training

Qualification	Course of Study	Issuing Institution	Location	Completion Date
High School Equivalency Diploma	General High School Curriculum	lousiana tech	lafayette, LA	12/11/2012

Occupational Licenses & Certificates

Certificate / License	Issuing Organization	Completion Date	State	Country
No Occupational License(s) - Certificates				

Skills

List View: Job Skills

There are no skills to display

Career Readiness Certificate Assessment

WorkKeys® Skill	Individual Score	Job Order Minimum	Difference
Applied Mathematics		No Score Recommended	
Locating Information		No Score Recommended	
Reading for Information		No Score Recommended	
Career Readiness Certificate:			

Other Foundational Skills Assessments

WorkKeys® Skill	Individual Score	Job Order Minimum	Difference
Applied Technology		No Score Recommended	
Business Writing		No Score Recommended	
Listening		No Score Recommended	
Observation		No Score Recommended	
Teamwork		No Score Recommended	
Writing		No Score Recommended	

Typing Speed

No data available for this item.

Languages and Proficiency

No data available for this item.

Current Technology

Technology
a la mode Pocket TOTAL
a la mode WinTOTAL
ADP eTIME
Akanda field operations collaborative user system FOCUS software
Apex IV Assessor
Apex IV Fee Appraiser
Apex MobileSketch
Ascend Property Assessment

atValue Narrative Report Software
Axxya Systems Nutritionist Pro software
Barrington Software CookenPro Commercial
Bradford ClickFORMS
Bruno Realty eNeighboorhoods
Business Management Systems Municipal Geographic Management System MGMS
Compass Municipal Services CAMAlot
Computer assisted mass appraisal CAMA software
Computerized bed control system software
Computerized maintenance management system CMMS software
Concierge Systems Report Concierge
CostGuard software
Culinary Software Services ChefTec
CustomCAMA software
Data entry software
EGS CALCMENU software
EGS F&B Control
Email software
Emerald Data Deed-Chek
eTrac software
FBS Data Systems Flexmls
Food Software.com IPro Restaurant Inventory, Recipe & Menu Software
GCS Property Assessment and Tax Billing
Geomechanical design analysis GDA software
GNOME Gnutrition
Govern Software GovMap
Govern Software Land and Permits Management System
Greenbrier Graphics Deed Plotter
Hansen CAMA
HomeValue Plus software
Howard and Friends Computer CMA Plus
HP 49G+ Appraiser Fee Calculator
Informatik MapDraw Deed Mapper
Internet browser software
Inventory tracking software
Manatron MVP Tax
Manatron ProVal Plus
Mass appraisal records system MARS software
Menu planning software

Microsoft Excel
Microsoft Office software
Microsoft PowerPoint
Microsoft Word
MicroSolve CAMA
Midwest Appraisal Network software
Modellium PariTOP
Multiple listing service software
Nutrition analysis software
Online title search and property report software
ProMatch software
Real Edge Software
RealData Comparative Lease Analysis
Realty Tools Toolkit for Market Share
REI Wise Commercial
ReServe Interactive Table Management Software
RPIS Silent CMA
Sage MAS 90 ERP
SoftCafe MenuPro
Softree Technical Systems Terrain Tools
ValueTech Report Builder
Visual PAMSPro
Web browser software
Wilson's Computer Applications RealEasy Appraisals
Wilson's Computer Applications RealEasy Photos Plus
WinGap software

Current Tools

Tools
Apple corers
Appraisal, mapping, and comparison data reporting systems
Backpack vacuums
Blast chillers
Blenders
Bone saws
Boning knives
Box graters
Braziers

Bread slicers
Broilers
Cake decorating tools
Cappuccino makers
Carbonated beverage dispensers
Carpet shampooers
Carpet steamers
Chefs' knives
Cleaning brushes
Cleaning scrapers
Clothes ironing equipment
Commercial coffee grinders
Commercial coffeemakers
Commercial dishwashers
Convection ovens
Conveyer ovens
Cream whippers
Desktop computers
Double boilers
Dry or liquid measuring cups
Dust masks
Dust mops
Dusters
Electric deep-fat fryers
Electric ovens
Electric stoves
Electronic flood maps
Electronic maps
Fire suppression blankets
Flood Insights
Floor burnishers
Floor scrubbing machines
Food dicers
Food processors
Food shredders
Food smokers
Fruit zesters
Garbage compactors
Gas ovens

Gas stoves
Gas-powered deep-fat fryers
Griddles
Grills
Handheld distance meters
Hot dog cookers
Household dryers
Household washers
Housekeeping carts
Ice shaving or crushing equipment
Ice-making machines
Industrial dryers
Industrial sewing machines
Industrial vacuum cleaners
Infrared heat lamps
Instant-read pocket thermometers
Juice dispensers
Juice extractors
Kitchen fire extinguishers
Kitchen shears
Kitchen tongs
Knife sharpeners
Laptop computers
Laser measuring devices
Light commercial washing machines
Mandolines
Mapping and geographic analysis systems
Mapping or location-based analysis systems
Meat grinders
Meat slicers
Meat thermometers
Melon ballers
Microwave ovens
Mixers
Mop wringers
Multi-line telephone systems
Oyster knives
Paring knives
Parisian cutters

Pasta machines
Personal computers
Personal digital assistants PDA
Pizza ovens
Plane graters
Portion scales
Power floor buffers
Pressure washers
Pressurized steam cookers
Protective face shields
Push brooms
Real estate mapping and property description systems
Refrigerator thermometers
Rice cookers
Rolling pins
Rotisserie units
Safety blades
Safety goggles
Salamanders
Scouring pads
Serrated blade knives
Sieves
Sifters
Slicing machines
Sponges
Spray bottles
Squeegees
Standing HEPA vacuums
Steam kettles
Steam pressers
Steam tables
Steam-operated sterilizers
Step ladders
Strainers
Tile brushes
Toasters
Toilet brushes
Trash bags
Ultrasonic distance measurers

Vegetable brushes
Vegetable peelers
Vinyl gloves
Waffle makers
Washer extractors
Wet mops
Wet-dry vacuums
Woks
Work scrubs

References

Please Contact this Individual Regarding References

This job does not have a question set associated with it.

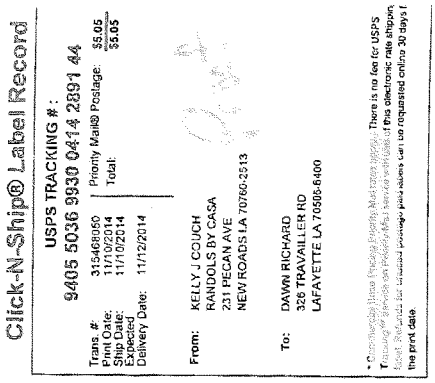
Driver's License Information

Do you have a valid Driver's license?	No
Do you have access to a motor vehicle?	Yes
Do you rely on public transportation?	No

View / Add Notes

Note	Create Date

No notes have been made.


Click-N-Ship® Label Record

USPS TRACKING #:
9405 5036 9930 0414 2891 44

Trans. #: 315468060 | Priority Mail® Postage: $5.05
Print Date: 11/10/2014 | Total: $5.05
Ship Date: 11/10/2014
Delivery Date: 11/12/2014

From: KELLY J COUCH
RANDOLS BY CASA
231 PECAN AVE
NEW ROADS LA 70760-2513

To: DAWN RICHARD
326 TRAVAILLER RD
LAFAYETTE LA 70508-6400

Randols Inc.
2320 Kaliste Saloom Road
Lafayette, LA 70508
337-981-7080

Dawn Richard
326 Travailleur Road
Lafayette, LA 70506

November 10, 2014

Dear Dawn,

Recently you applied online for a position with Randols, Inc. to date you have not called or come in to apply. If you are interested in the below position offered, please complete the attached application and give us a call. Thank You.

s/Frank Randol
Randols, Inc.

Job Description and advertisement:

25 temp H2B positions as crab and crawfish seafood processors (53-7062, 51-3022) approx. 10 months duration. Begins 2/16/2015 thru 12/05/2015 $7.35 hrly, (11.03 OT) 8 pm – 4 am, M-F, some Sat/Sun, hrs/schedule/overtime may vary. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid. Payroll deductions as required by law. No on the job training, no education requirement. Workers needed to dehead, dump sacks, extract meat, fil baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks and cleanup/sanitize worksite and any other activities as related to PWD/DOL assigned SOC code as per onet online.org. Must not be allergic to crab or crawfish. 35 hrs wk, No experience required. After initial 60 hours of processing employee must be able to peel 4.25 lb or more per hour. May be paid per lb @ employer discretion, which at all times will meet or exceed ETA 9142 certified hourly wage. Unpaid 30 minute breaks available at employee discretion. Job offered by Randol Inc, contact Frank Randol, 2320 Kaliste Saloom Road, Lafayette, LA 70508, 337-981-7080 JO # 512024.

Contact Information

Applicant Name:	Dawn Richard
Address:	326 Travailleur Rd. Lafayette, LA 70506 US
Primary Phone:	(337) 981-4139
Alternate Phone:	

Candidate Summary

Name and Location:	Dawn Richard of Lafayette, LA
Occupation Experience: *(Job requires 0 month(s) of experience as Meat, Poultry, and Fish Cutters and Trimmers)*	
Highest Level of Education: *(Job requires No Minimum Education Requirement)*	9th Grade Completed
Indicators:	
Auto Rank:	0%
Your Rating:	Not yet rated

Candidate Location

Distance from Location/Work Site:	Estimated 4.1 miles
Willing to Travel:	Not Specified
Willing To Relocate:	Not Specified
Willing To Telecommute:	Not Specified

Specialized Qualifications

Certificates:	Not Specified
Security Clearance:	Not Specified
Typing Speed:	Not Specified
Language/Proficiency:	Not Specified

Application Status

Application Method:	In Person on 11/8/2014 9:57:13 AM
Applicant Status:	Status unknown

Comments: None

Type of Job Desired

Desired Occupation:
(Job is for Meat, Poultry, and Fish Cutters and Trimmers)

Desired Salary: ANY
(Job listed for $7.35 per Hour to $11.03 per Hour)

Desired Job Locations: Lafayette Parish

Desired Employment Type: Not Specified
(Job Type is Seasonal)

Full Time or Part Time: Not Specified
(Job is Full Time (30 Hours or More))

Shifts Willing to Work: Not Specified
(Job is for the Other, see job description shift)

Days Available for Work: Not Specified

Additional Information Regarding Type of Desired Job:

Not Specified

Employment History

Company Name	Location	Job Title (Occupation)	Start/End Dates	Duration of Job	Gross Salary	Reason for Separation
Little Caesars	Decatur, AL	Cashier (Cashiers)	08/1986 - 02/1987	6months	*Confidential*	*Confidential*
High Chapperal	Lafayette, LA	Barmaid (Bartenders)	08/1983 - 05/1984	9months	*Confidential*	*Confidential*
			Total	1year, 3months		

Occupational Experience

Occupation	Experience

No Occupational Experience

Education and Training

Qualification	Course of Study	Issuing Institution	Location	Completion Date

High School Equivalency Diploma	High School	Calhoun Community State College	AL, US	02/01/1979

Occupational Licenses & Certificates

Certificate / License	Issuing Organization	Completion Date	State	Country

No Occupational License(s) - Certificates

Skills

List View: Job Skills

There are no skills to display

Career Readiness Certificate Assessment

WorkKeys® Skill	Individual Score	Job Order Minimum	Difference
Applied Mathematics		No Score Recommended	
Locating Information		No Score Recommended	
Reading for Information		No Score Recommended	
Career Readiness Certificate:			

Other Foundational Skills Assessments

WorkKeys® Skill	Individual Score	Job Order Minimum	Difference
Applied Technology		No Score Recommended	
Business Writing		No Score Recommended	
Listening		No Score Recommended	
Observation		No Score Recommended	
Teamwork		No Score Recommended	
Writing		No Score Recommended	

Typing Speed

No data available for this item.

Languages and Proficiency

No data available for this item.

Current Technology

You do not have any saved technology

Current Tools

You do not have any saved tools

References

Please Contact this Individual Regarding References

This job does not have a question set associated with it.

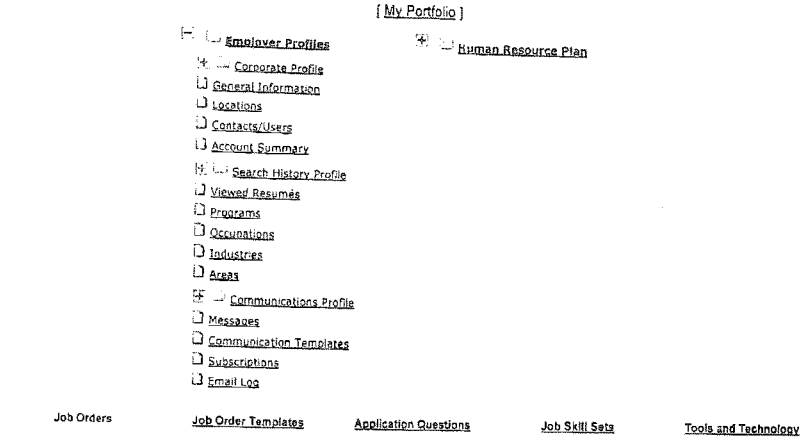
Driver's License Information

Do you have a valid Driver's license?	No
Do you have access to a motor vehicle?	Yes
Do you rely on public transportation?	No

View / Add Notes

Note	Create Date

No notes have been made.



Show Filter Criteria

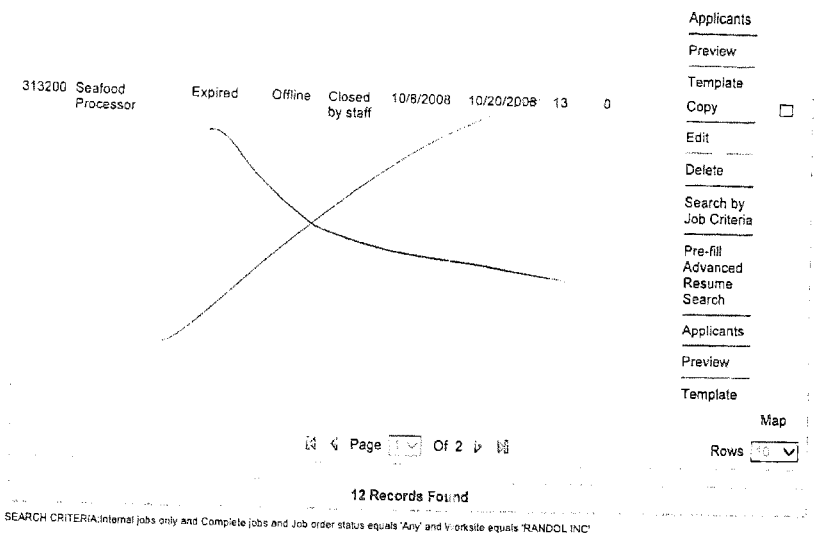
Results View: **Summary** | Detailed

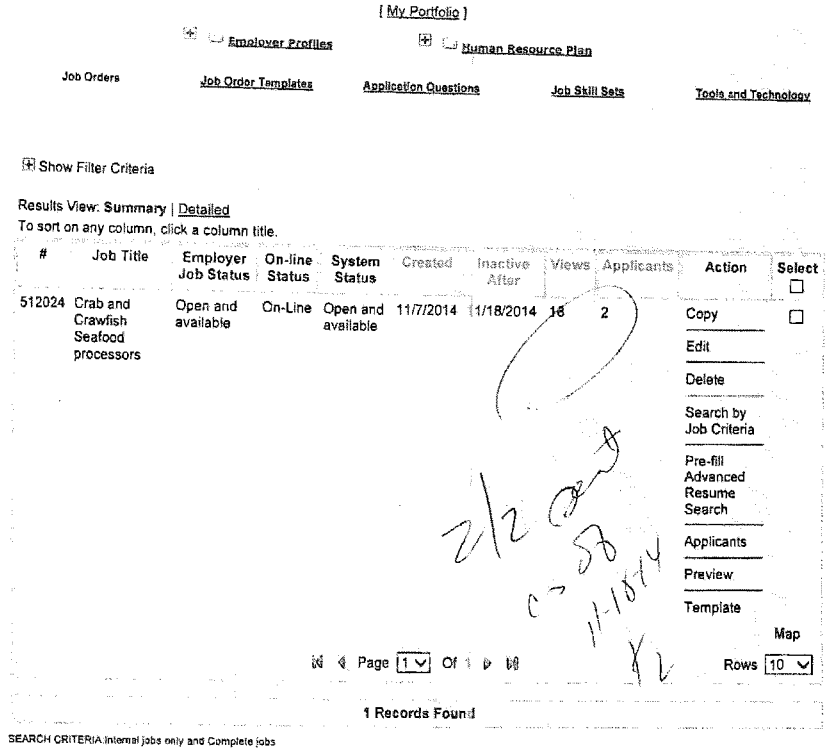
To sort on any column, click a column title.

#	Job Title	Employer Job Status	On-line Status	System Status	Created	Inactive After	Views	Applicants	Action	Select
166050	Bookkeeping, Accounting, and Auditing Clerks	Expired	Offline	Closed by staff	10/6/2005	10/19/2007 12:00:00 AM	0	0	Copy Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template	☐
166047	Chefs and Head Cooks	Expired	Offline	Closed by staff	10/6/2005	11/5/2005 12:00:00 AM	88	10	Copy Edit Delete Search by Job Criteria	☐

512024	Crab and Crawfish Seafood processors	Expired	Offline	Expired	11/7/2014	11/18/2014	18	2	Pre-fill Advanced Resume Search | Applicants | Preview | Template | Copy ☐ | Edit | Delete | Search by Job Criteria | Pre-fill Advanced Resume Search | Applicants | Preview | Template
172102	Dishwashers	Expired	Offline	Closed by staff	11/7/2005	12/7/2005 12:00:00 AM	19	2	Copy ☐ | Edit | Delete | Search by Job Criteria | Pre-fill Advanced Resume Search | Applicants | Preview | Template
177946	Dishwashers	Expired	Offline	Closed by staff	12/27/2005	1/26/2006 12:00:00 AM	31	16	Copy ☐ | Edit | Delete | Search by Job Criteria | Pre-fill Advanced Resume Search | Applicants | Preview | Template
228571	Dishwashers	Expired	Offline	Closed by staff	11/21/2006		22	4	Copy ☐

						12/21/2006 12:00:00 AM			Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template
429638	Experienced Kitchen Manager	Expired	Offline	Closed by staff	9/14/2012	10/1/2012 12:00:00 AM	17	3	Copy ☐ Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template
429471	RESTAURANT COOK	Expired	Offline	Closed by staff	9/12/2012	10/24/2012 12:00:00 AM	106	28	Copy ☐ Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template
398437	Seafood Processing Plant worker	Expired	Offline	Closed by staff	10/28/2011	11/5/2011 12:00:00 AM	163	24	Copy ☐ Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search


313200 Seafood Processor
Expired
Offline
Closed by staff
10/8/2008
10/20/2008
13
0
Applicants
Preview
Template
Copy
Edit
Delete
Search by Job Criteria
Pre-fill Advanced Resume Search
Applicants
Preview
Template
Map
Page 1 Of 2
Rows 10
12 Records Found
SEARCH CRITERIA:Internal jobs only and Complete jobs and Job order status equals 'Any' and Worksite equals 'RANDOL INC'



[My Portfolio]

Employer Profiles | Human Resource Plan

Job Orders | Job Order Templates | Application Questions | Job Skill Sets | Tools and Technology

Show Filter Criteria

Results View: **Summary** | Detailed

To sort on any column, click a column title.

#	Job Title	Employer Job Status	On-line Status	System Status	Created	Inactive After	Views	Applicants	Action	Select
512024	Crab and Crawfish Seafood processors	Open and available	On-Line	Open and available	11/7/2014	1/18/2014	16	2	Copy Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template	

Map

Page 1 Of 1 Rows 10

1 Records Found

SEARCH CRITERIA:Internal jobs only and Complete jobs

[My Portfolio]

Employer Profiles Human Resource Plan

Job Orders Job Order Templates Application Questions Job Skill Sets Tools and Technology

Show Filter Criteria

Results View: Summary | Detailed

To sort on any column, click a column title.

#	Job Title	Employer Job Status	On-line Status	System Status	Created	Inactive After	Views	Applicants	Action	Select
512024	Crab and Crawfish Seafood processors	Open and available	On-Line	Open and available	11/7/2014	11/18/2014	15	2	Copy Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template Map	☐

Page 1 Of 1 Rows 10

1 Records Found

SEARCH CRITERIA:Internal jobs only and Complete jobs

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Show Filter Criteria

Results View: **Summary** | Detailed

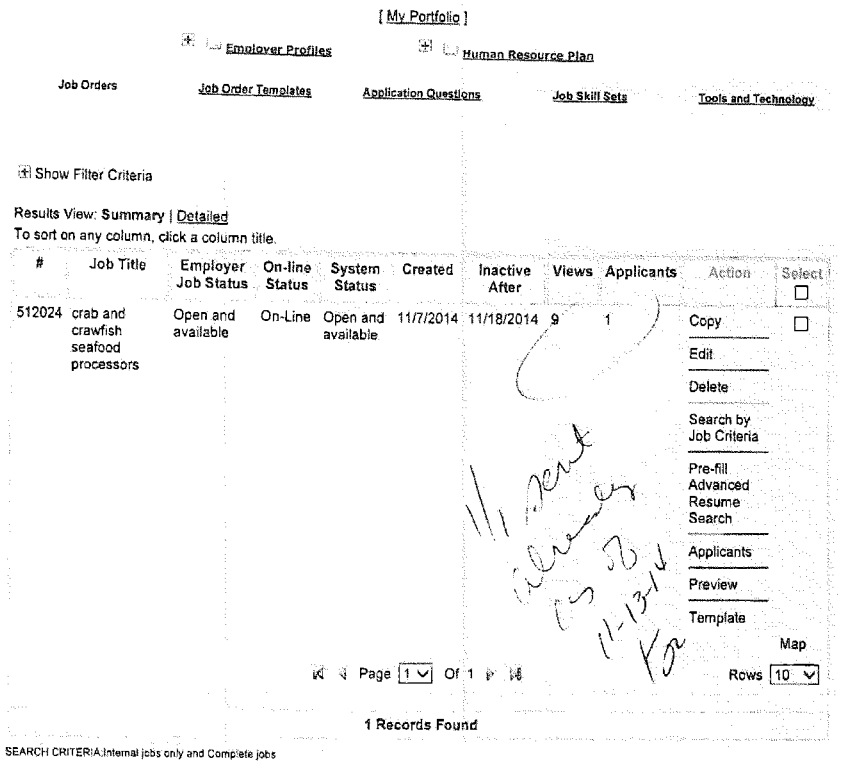
To sort on any column, click a column title.

#	Job Title	Employer Job Status	On-line Status	System Status	Created	Inactive After	Views	Applicants	Action	Select
512024	Crab and Crawfish Seafood processors	Open and available	On-Line	Open and available	11/7/2014	11/18/2014	10	1	Copy Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template Map	

Page 1 Of 1 Rows 10

1 Records Found

SEARCH CRITERIA:Internal jobs only and Complete jobs



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Show Filter Criteria

Results View: **Summary** | Detailed

To sort on any column, click a column title.

#	Job Title	Employer Job Status	On-line Status	System Status	Created	Inactive After	Views	Applicants	Action	Select
512024	crab and crawfish seafood processors	Open and available	On-Line	Open and available	11/7/2014	11/18/2014	9	1	Copy Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template	☐

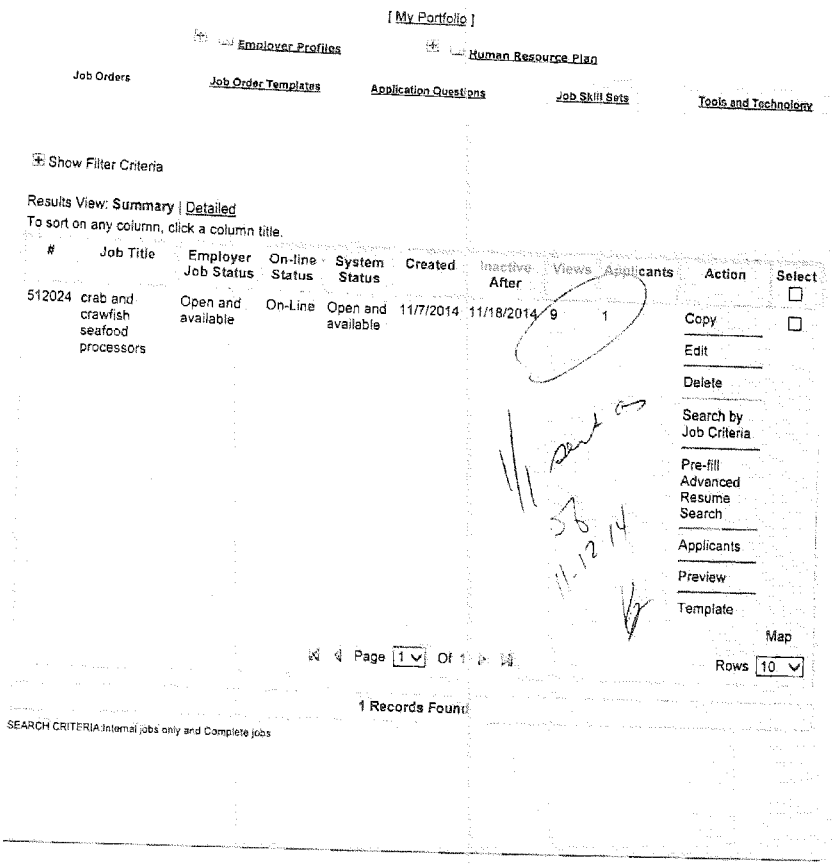
Map

Page 1 Of 1

Rows 10

1 Records Found

SEARCH CRITERIA:Internal jobs only and Complete jobs



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Job Orders | Job Order Templates | Application Questions | Job Skill Sets | Tools and Technology

Show Filter Criteria

Results View: **Summary** | Detailed

To sort on any column, click a column title.

#	Job Title	Employer Job Status	On-line Status	System Status	Created	Inactive After	Views	Applicants	Action	Select
512024	crab and crawfish seafood processors	Open and available	On-Line	Open and available	11/7/2014	11/18/2014	9	1	Copy Edit Delete Search by Job Criteria Pre-fill Advanced Resume Search Applicants Preview Template	☐

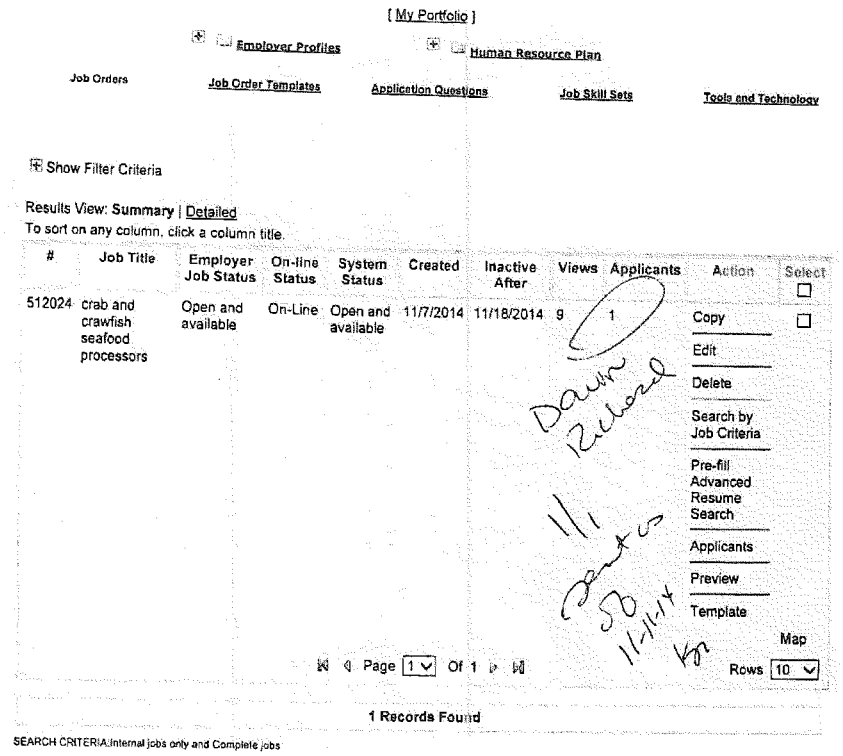
Map

Page 1 Of 1

Rows 10

1 Records Found

SEARCH CRITERIA:Internal jobs only and Complete jobs



[My Portfolio]

Employer Profiles | Human Resource Plan

Job Orders | Job Order Templates | Application Questions | Job Skill Sets | Tools and Technology

Show Filter Criteria

Results View: **Summary** | Detailed

To sort on any column, click a column title.

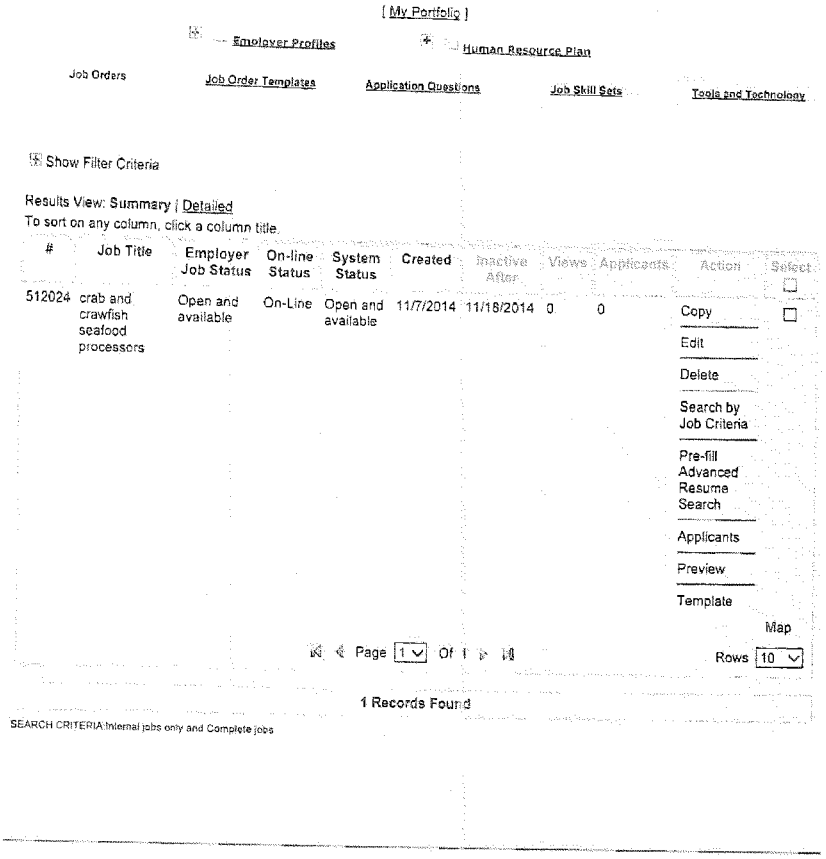
#	Job Title	Employer Job Status	On-line Status	System Status	Created	Inactive After	Views	Applicants	Action	Select
512024	crab and crawfish seafood processors	Open and available	On-Line	Open and available	11/7/2014	11/18/2014	9	1	Copy / Edit / Delete / Search by Job Criteria / Pre-fill Advanced Resume Search / Applicants / Preview / Template / Map	☐

Page 1 Of 1

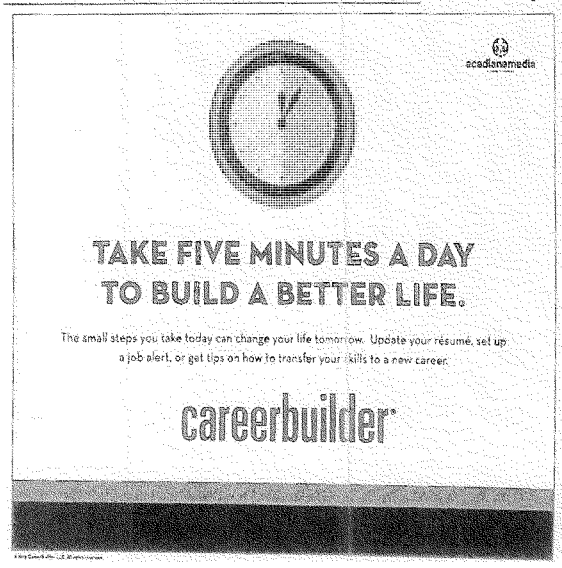
Rows 10

1 Records Found

SEARCH CRITERIA:Internal jobs only and Complete jobs


[My Portfolio]
Employer Profiles
Human Resource Plan
Job Orders
Job Order Templates
Application Questions
Job Skill Sets
Tools and Technology
Show Filter Criteria
Results View: Summary | Detailed
To sort on any column, click a column title.
Job Title Employer Job Status On-line Status System Status Created Inactive After Views Applicants Action Select
512024 crab and crawfish seafood processors Open and available On-Line Open and available 11/7/2014 11/18/2014 0 0
Copy
Edit
Delete
Search by Job Criteria
Pre-fill Advanced Resume Search
Applicants
Preview
Template
Map
Page 1 Of 1
Rows 10
1 Records Found
SEARCH CRITERIA:Internal jobs only and Complete jobs


Page 6C | Wednesday, November 12, 2014
Marketplace
careerbuilder.com
HomeFinder
Finance
Payroll/Billing Clerk
The Arc
Acadiana
DRIVERS NEEDED
The Arc
DIRECT SUPPORT
PERSON NEEDED
Easily apply for the job you want!
No profile creating!
No email subscriptions!
Upload your resume and apply for the job you want in one simple step.
theadvertiser.com/jobs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theadvertiser.com/jobs
Serious About A Job Change?
Looking for that New Career?
Begin your search with Classifieds,
the easy way to "Pound the Pavement."

Couch Application Service - Kelly

From: Edgerson, Adrian <aedgerson@gannett.com>
Sent: Friday, November 07, 2014 3:03 PM
To: Couch Application Service - Kelly
Subject: RE: OOPS -- forget the previous use this one.... should be copy and paste

Kelly,

Here is the receipt for the ad.

ACTIVE

Payment Recei

Friday, November 07, 2014

Transaction Type:	Payment	Customer Type:	C
Ad Number:	0001921021	Customer Category:	
Apply to Current Order:	Yes	Customer Status:	C
Payment Method:	Credit Card	Customer Group:	
Bad Debt:	-	Customer Trade:	
Credit Card Number:	XXXXXXXXXXXX3876 - MC	Account Number:	6
Credit Card Expire Date:	February 2016	Phone Number:	22
Payment Amount:	$990.00	Company / Individual:	C
Amount Due:	$0.00	Customer Name:	C
Reference Number:			
Charge to Company:	Lafayette	Customer Address:	23
Category:	Classified		23
Credit to Transaction Number:			N
Invoice Text:		Check Number:	
Invoice Notes:		Routing Number:	

Adrian Edgerson
Sales Consultant
Gannett | CareerBuilder.com
888-692-4349 Toll Free
aedgerson@gannett.com

From: Couch Application Service - Kelly [mailto:couchapplicationservice@gmail.com]
Sent: Friday, November 07, 2014 3:52 PM

Couch Application Service - Kelly

From: Edgerson, Adrian <aedgerson@gannett.com>
Sent: Friday, November 07, 2014 2:57 PM
To: Couch Application Service - Kelly
Subject: RE: OOPS -- forget the previous use this one.... should be copy and paste

Kelly,

I have the ad copy for you below. The cost is $990.00 and is set to run this Sunday and Wednesday the 12th.

SEAFOOD PROCESSOR

25 temp H2B positions as crab and crawfish seafood processors (53-7062, 51-3022) approx. 10 months duration. Begins 2/16/2015 thru 12/05/2015 $7.35 hrly, (11.03 OT) 6 pm - 4 am, M-F, some Sat/Sun, hrs/schedule/overtime may vary. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid. Payroll deductions as required by law. No on the job training, no education requirement. Workers needed to dehead, dump sacks, extract meat, fill baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks and cleanup/sanitize worksite and any other activities as related to PWD/DOL assigned SOC code as per onet online.org. Must not be allergic to crab or crawfish. 35 hrs wk, No experience required. After initial 60 hours of processing employee must be able to peel 4.25 lb or more per hour. May be paid per lb @ employer discretion, which at all times will meet or exceed ETA 9142 certified hourly wage. Unpaid 30 minute breaks available at employee discretion. Job offered by Randol Inc, contact Frank Randol, 2320 Kaliste Saloom Road, Lafayette, LA 70508, 337-981-7080 JO # 512024

Adrian Edgerson
Sales Consultant
Gannett | CareerBuilder.com
888-692-4349 Toll Free
aedgerson@gannett.com

From: Couch Application Service - Kelly [mailto:couchapplicationservice@gmail.com]
Sent: Friday, November 07, 2014 3:52 PM
To: Edgerson, Adrian
Subject: OOPS -- forget the previous use this one.... should be copy and paste

RUN THIS ADVERTISEMENT on Sunday and Wed Nov 9 and again on November 12, 2014.
Please call me for payment. 225-718-3586. Thanks! kc

25 temp H2B positions as crab and crawfish seafood processors (53-7062, 51-3022) approx. 10 months duration. Begins 2/16/2015 thru 12/05/2015 $7.35 hrly, (11.03 OT) 8 pm – 4 am, M-F, some Sat/Sun, hrs/schedule/overtime may vary. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid. Payroll deductions as required by law. No on the job training, no education requirement. Workers needed to dehead, dump sacks, extract meat, fil baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks and cleanup/sanitize worksite and any other activities as related to PWD/DOL assigned SOC code as per onet online.org. Must not be allergic to crab or crawfish. 35 hrs wk, No experience required. After initial 60 hours of processing employee must be able to peel 4.25 lb or more per hour. May be paid per lb @ employer discretion, which at all times will meet or exceed ETA 9142 certified hourly wage. Unpaid 30 minute breaks available at employee discretion. Job offered by Randol Inc, contact Frank Randol, 2320 Kaliste Saloom Road, Lafayette, LA 70508, 337-981-7080 JO # 512024.

Kelly J. Couch

From:	Couch Application Service <CouchApplicationService@gmail.com>
Sent:	Friday, November 07, 2014 2:43 PM
To:	MHESS@LWC.LA.GOV; KELLYJCOUCH1@GMAIL.COM
Subject:	RANDOLS H2B APPLICATION
Attachments:	scan.pdf

Please open the attached document. This document was digitally sent to you using an HP Digital Sending device.

Louisiana Job Order Print Document

Job Order: 512024
Print Date: 11/7/2014 2:39:50 PM
Office: Lafayette Career Solutions Center
LWIA/Region: Lafayette Parish
Employer Information:
Employer Name: Randol Inc
How to Apply: In Person
Company Website: http://www.randols.com
Application Comments:
Location:
Main Address:
RANDOL INC
2320 KALISTE SALOOM ROAD

Lafayette, LA 70508
Mailing Address:
2320 KALISTE SALOOM RD

LAFAYETTE, LA 70508
Contact:
Contact: Frank B. Randol
Title: President
Phone: (337) 981-7080 x Fax:
Email:
Job Details:
Occupational Code: 51302200 Meat, Poultry, and Fish Cutters and Trimmers
Job Title: crab and crawfish seafood processors
Industry Code:
Number of Positions: 25
Referrals: 50
Earliest Date to Display: 11/7/2014
Last Date Job Order Will Display: 11/18/2014
Type of Job: Seasonal
Job Time Type: Full Time (30 Hours or More)
Duration: Over 150 Days
Special Job Category:
Job Duties and Skills:
Description:

25 temp H2B positions as crab and crawfish seafood processors (53-7062, 51-3022) approx. 10 months duration. Begins 2/16/2015 thru 12/05/2015 $7.35 hrly, (11.03 OT) 8 pm - 4 am, M-F, some Sat/Sun, hrs/schedule/overtime may vary. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid. Payroll deductions as required by law. No on the job training, no education requirement. Workers needed to dehead, dump sacks, extract meat, fil baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks and cleanup/sanitize worksite and any other activities as related to PWD/DOL assigned SOC code as per onet online.org. Must not be allergic to crab or crawfish. 35 hrs wk, No experience required. After initial 60 hours of processing employee must be able to peel 4.25 lb or more per hour. May be paid per lb @ employer discretion, which at all times will meet or exceed ETA 9142 certified hourly wage. Unpaid 30 minute breaks available at employee discretion. Job offered by Randol Inc, contact Frank Randol, 2320 Kaliste Saloom Road, Lafayette, LA 70508, 337-981-7080 JO # 512024.

Special Software/Hardware Skills Needed: No
Special Skills:
Job Requirements:
Minimum Age:
Test Done By: No test required
Required Tests: NA
Hiring Requirements:
Hiring Requirements Other:
Education Level: No Minimum Education Requirement
Months of Experience: 0

Requires a Drivers License: **No**
Near Public Transportation: **Yes**
Drivers License Certification:
Drivers License Endorsements:

Compensation and Hours:

Minimum Salary: **7.35 Hour**
Maximum Salary: **11.03 Hour**
Pay Comments: **Will discuss with applicant**
Supplemental Compensation: **No**
Hours per Week: **Hours Vary**
Actual Hours:
Shift: **Other, see job description**
Benefits:
Other Benefits: **No Benefits Listed**

Job Order Information to be Displayed Online:

Job Order Information Online: **Company Name is displayed, One-stop staff does not screen applicants**

Job Application Information Needed:

Req Section

- ☑ Contact Information
- ☐ Employment History ☐ Allow individuals that have never had a job to apply (eg. College graduates)
- ☐ Education History
- ☐ Certifications
- ☐ Desired Job Type

Other Information:

Green Job: **No**
Subsidized by ARRA (Stimulus): **No**
Featured Job: **No**
In an Enterprise Zone: **No**
Federal Contractor: **No**
Court Ordered Affirmative Action: **No**

Staff Information:

Category: **Regular (Non Domestic)**
Job Developer Mandatory Listing: **NA**
Status: **Open and available**
Employer Status: **Open and available**
Reason: **NA**
Future Release From Hold:
Job Order Followup: **12/22/2014**

Post-it® Fax Note 7671

To [illegible]	Date 11/7/14 # of pages ▷ 2
Co./Dept. [illegible]	From [illegible]
Phone # 225-342-7632	Co. [illegible]
Fax # 225-342-3367	Phone # 225 638 7218
	Fax # 225 638 7217

1425 [illegible]

Louisiana Job Order Print Document

Job Order: 512024

Print Date: 11/7/2014 2:24:48 PM

Office: Lafayette Career Solutions Center

LWIA/Region: Lafayette Parish

Employer Information:

Employer Name: Randol Inc

How to Apply: In Person

Company Website: http://www.randolpx.com

Application Comments:

Location:

Main Address:

RANDOL INC
2320 KALISTE SALOOM ROAD

Lafayette, LA 70508

Mailing Address:

2320 KALISTE SALOOM RD

LAFAYETTE, LA 70508

Contact:

Contact: Frank B. Randol

Title: President

Phone: (337) 981-7080 x

Fax:

Email:

Job Details:

Occupational Code: 51302280 Meat, Poultry, and Fish Cutters and Trimmers

Job Title: crab and crawfish seafood processors

Industry Code:

Number of Positions: 25

Referrals: 50

Earliest Date to Display: 11/7/2014

Last Date Job Order Will Display: 11/18/2014

Type of Job: Seasonal

Job Time Type: Full Time (30 Hours or More)

Duration: Over 150 Days

Special Job Category:

Job Duties and Skills:

Description:

25 temp H2B positions as crab and crawfish seafood processors (53-7062, 51-3022) approx. 10 months duration. Begins 2/16/2015 thru 12/05/2015 $7.35 hrly, (11.03 OT) 8 pm - 4 am, M-F, some Sat/Sun, hrs/schedule/overtime may vary. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid. Payroll deductions as required by law. No on the job training, no education requirement. Workers needed to dehead, dump sacks, extract meat, fil baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks and cleanup/sanitize worksite and any other activities as related to PWD/DOL assigned SOC code as per onet online.org. Must not be allergic to crab or crawfish. 35 hrs wk, No experience required. After initial 60 hours of processing employee must be able to peel 4.25 lb or more per hour. May be paid per lb @ employer discretion, which at all times will meet or exceed ETA 9142 certified hourly wage. Unpaid 30 minute breaks available at employee discretion. Job offered by Randol Inc, contact Frank Randol, 2320 Kaliste Saloom Road, Lafayette, LA 70508, 337-981-7080 JO # 512024.

Special Software/Hardware Skills Needed: No

Special Skills:

Job Requirements:

Minimum Age:

Test Done By: No test required

Required Tests: NA

Hiring Requirements:

Hiring Requirements Other:

Education Level: No Minimum Education Requirement

Months of Experience: 0

Requires a Drivers License: No
Near Public Transportation: Yes
Drivers License Certification:
Drivers License Endorsements:
Compensation and Hours:
Minimum Salary: 7.35 Hour
Maximum Salary: 11.03 Hour
Pay Comments: Will discuss with applicant
Supplemental Compensation: No
Hours per Week: Hours Vary
Actual Hours:
Shift: Other, see job description
Benefits:
Other Benefits: No Benefits Listed
Job Order Information to be Displayed Online:
Job Order Information Online: Company Name is displayed, One-stop staff does not screen applicants
Job Application Information Needed:
Req Section
- [x] Contact Information
- [ ] Employment History — Allow individuals that have never had a job to apply (eg. College graduates)
- [ ] Education History
- [ ] Certifications
- [ ] Desired Job Type

Other Information:
Green Job: No
Subsidized by ARRA (Stimulus): No
Featured Job: No
In an Enterprise Zone: No
Federal Contractor: No
Court Ordered Affirmative Action: No
Staff Information:
Category: Regular (Non Domestic)
Job Developer Mandatory Listing: NA
Status: Open and available
Employer Status: Open and available
Reason: NA
Future Release From Hold:
Job Order Followup: 12/22/2014

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/.

A. Employment-Based Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)* *	H-2B

B. Requester Point-of-Contact Information

1. Contact's last (family) name * COUCH	2. First (given) name * KELLY	3. Middle name(s) * J.
4. Contact's job title * Owner/Manager Couch Application Service Assistance		
5. Address 1 * 231 PECAN AVENUE		
6. Address 2 N/A		
7. City * NEW ROADS	8. State * LA	9. Postal code * 70760
10. Country * UNITED STATES OF AMERICA	11. Province (if applicable) POINTE COUPEE PARISH	
12. Telephone number * 225-638-7218	13. Extension N/A	14. Fax Number 225-638-7219
15. E-Mail Address kellyjcouch1@gmail.com		

C. Employer Information

1. Legal business name * Randol Inc		
2. Trade name/Doing Business As (DBA), if applicable § N/A		
3. Address 1 * 2320 Kaliste Saloom Road		
4. Address 2 N/A		
5. City * Lafayette	6. State * LA	7. Postal code * 70508
8. Country * UNITED STATES OF AMERICA	9. Province (if applicable) N/A	
10. Telephone number * 337-981-7060	11. Extension 10	
12. Federal Employer Identification Number (FEIN from IRS) * 720796114	13. NAICS code (must be at least 4-digits) * 311712	

D. Wage Processing Information

1. Is the employer covered by ACWIA? *	☐ Yes ☑ No
2. Is the position covered by a Collective Bargaining Agreement (CBA)? *	☐ Yes ☑ No
3. Is the employer requesting consideration of Davis-Bacon (DBA) or McNamara Service Contract (SCA) Acts? *	☐ Yes ☑ No ☐ DBA ☐ SCA

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

D. Wage Processing Information (cont.)

4. Is the employer requesting consideration of a survey in determining the prevailing wage? *	☑ Yes ☐ No
4a. Survey Name: §	LSU Ag Research Center - Crab/Crawfish Processors
4b. Survey date of publication: §	10/29/2013

E. Job Offer Information

a. Job Description:

1. Job Title * Seafood processors for crab and crawfish		
2. *Suggested* SOC (ONET/OES) code * 53-7064	2a. *Suggested* SOC (ONET/OES) occupation title * Packers and Packagers, Hand	
3. Job Title of Supervisor for this Position (if applicable) § Owner or Manager		
4. Does this position supervise the work of other employees? * ☐ Yes ☑ No	4a. If "Yes", number of employees worker will supervise: § N/A	
4b. If "Yes", please indicate the level of the employees to be supervised.	☐ Subordinate ☐ Peer	

5. Job duties – Please provide a description of the duties to be performed with as much specificity as possible, including details regarding the areas/fields and/or products/industries involved. A description of the job duties to be performed MUST begin in this space. *

Worker needed to dehead, dump sacks, extract meat, fill baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks, and cleanup/sanitize worksite.

6. Will travel be required in order to perform the job duties? * ☐ Yes ☑ No	6a. If "Yes", please provide details of the travel required, such as the area(s), frequency and nature of the travel. § N/A

OMB Approval: 1205-0455
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

E. Job Offer Information (cont.)

b. Minimum Job Requirements:

1. Education: minimum U.S. diploma/degree required *

☑ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)

1a. If "Other degree" in question 1, specify the diploma/degree required §
N/A

1b. Indicate the major(s) and/or field(s) of study required §
(May list more than one related major and more than one field)
N/A

2. Does the employer require a second U.S. diploma/degree? * ☐ Yes ☑ No

2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §
N/A

3. Is training for the job opportunity required? * ☐ Yes ☑ No

3a. If "Yes" in question 3, specify the number of months of training required §
N/A

3b. Indicate the field(s)/name(s) of training required §
(May list more than one related field and more than one type)
N/A

4. Is employment experience required? * ☐ Yes ☑ No

4a. If "Yes" in question 4, specify the number of months of experience required §
N/A

4b. Indicate the occupation required §
N/A

5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *
SEE ADDENDUM

c. Place of Employment Information:

1. Worksite address 1 * 2320 Kaliste Saloom Rd

2. Address 2
N/A

3. City *
Lafayette

4. County *
Lafayette Parish

5. State/District/Territory * LA

6. Postal code * 70508-2320

7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? * ☐ Yes ☑ No

7a. If "Yes", identify the geographic place(s) of employment indicating each metropolitan statistical area (MSA) or the independent city(ies)/township(s)/county(ies) (borough(s)/parish(es)) and the corresponding state(s) where work will be performed. If necessary, submit a second completed ETA Form 9141 with a listing of the additional anticipated worksites. Please note that wages cannot be provided for unspecified/unanticipated locations. §
N/A

OMB Approval: 1205-0466
Expiration Date: 03/31/2015

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

F. Prevailing Wage Determination

FOR OFFICIAL GOVERNMENT USE ONLY

1. PW tracking number	2. Date PW request received
P-400-14227-355546	10/13/2014

3. SOC (ONET/OES) code	3a. SOC (ONET/OES) occupation title
53-7062	Laborers and Freight, Stock, and Material Movers, Hand

4. Prevailing wage	4a. OES Wage level
$ 7.35	☐ I ☐ II ☐ III ☐ IV ☑ N/A

5. Per: (Choose only one)
☑ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate

5a. If Piece Rate is indicated in question 5, specify the wage offer requirements *
N/A

6. Prevailing wage source (Choose only one)
☐ OES (All Industries) ☐ OES (ACWIA – Higher Education) ☐ CBA ☐ DBA ☐ SCA ☑ Other/Alternate Survey

6a. If "Other/Alternate Survey" in question 6, specify
Employer Provided Survey

7. Additional Notes Regarding Wage Determination
The employer's job duties represent a combination of the occupation in item F.3 and 51-3022.00 - Meat, Poultry, and Fish Cutters and Trimmers.

The wage determination was issued based on the employer submitted survey.

8. Determination date	9. Expiration date
11/07/2014	02/08/2015

F. OMB Paperwork Reduction Act (1205-0466)
Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 55 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW, * Washington, DC * 20210. **Do NOT send the completed application to this address.**

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

ADDENDUM

SECTION E.b.5: Special Requirements

1. After initial 60 hours of processing employee must be able to peel 4.25 or more per hour.
2. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid.
3. Overtime, hours and schedule may vary.
4. Payroll deductions required by law.
5. May be paid per pound at employer discretion, which at all times meet or exceed ETA 9142 certified hourly wage.
6. Unpaid 30 min breaks available at employee discretion.
7. No on the job training.
8. No education requirement.
9. M-F, some Sat/Sun, 8pm-4am
10. And any other activities as related to PWD/DOL assigned SOC code as per online.org.
11. Must not be allergic to crab or crawfish.

Kelly J. Couch

From: oflc.portal@dol.gov
Sent: Friday, November 07, 2014 11:01 AM
To: kellyjcouch1@gmail.com
Subject: PW: Determination Issued for Case Number P-400-14227-355546
Attachments: Determination9141-P-400-14227-355546_110714120046.pdf

To: KELLY COUCH
231 PECAN AVENUE
NEW ROADS, LA 70760

Re: Case Number: P-400-14227-355546 Received: Oct 13, 2014

We have completed your Prevailing Wage Request of Oct 13, 2014 and have issued a wage determination. The Department's prevailing wage determination for the position of Seafood processors for crab and crawfish can be found under Section E on the attached ETA Form 9141 and is valid between Nov 7, 2014 and Feb 8, 2015.
Should the employer disagree with this determination, the employer may either:

1) submit a redetermination request within 30 days of this letter in accordance with the Department's regulations. The process for seeking a redetermination of wages involving H-2B certifications is set out at 20 CFR § 655.10(g), and the process for seeking a redetermination of wages involving PERM certifications is found at 20 CFR § 656.40(h); or

2) submit a new ETA Form 9141, Application for Prevailing Wage Determination.

Sincerely,
Office of Foreign Labor Certification

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/.

A. Employment-Based Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)* *	H-2B

B. Requestor Point-of-Contact Information

1. Contact's last (family) name * COUCH	2. First (given) name * KELLY	3. Middle name(s) * J.
4. Contact's job title * Owner/Manager Couch Application Service Assistance		
5. Address 1 * 231 PECAN AVENUE		
6. Address 2 N/A		
7. City * NEW ROADS	8. State * LA	9. Postal code * 70760
10. Country * UNITED STATES OF AMERICA	11. Province (if applicable) POINTE COUPEE PARISH	
12. Telephone number * 225-638-7218	13. Extension N/A	14. Fax Number 225-638-7219
15. E-Mail Address kellyjcouch1@gmail.com		

C. Employer Information

1. Legal business name * Randol Inc		
2. Trade name/Doing Business As (DBA), if applicable § N/A		
3. Address 1 * 2320 Kaliste Saloom Road		
4. Address 2 N/A		
5. City * Lafayette	6. State * LA	7. Postal code * 70508
8. Country * UNITED STATES OF AMERICA	9. Province (if applicable) N/A	
10. Telephone number * 337-981-7080	11. Extension 10	
12. Federal Employer Identification Number (FEIN from IRS) * 720796114	13. NAICS code (must be at least 4-digits) * 311712	

D. Wage Processing Information

1. Is the employer covered by ACWIA? *	☐ Yes ☑ No
2. Is the position covered by a Collective Bargaining Agreement (CBA)? *	☐ Yes ☑ No
3. Is the employer requesting consideration of Davis-Bacon (DBA) or McNamara Service Contract (SCA) Acts? *	☐ Yes ☑ No ☐ DBA ☐ SCA

OMB Approved: 1205-0468
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

D. Wage Processing Information (cont.)

4. Is the employer requesting consideration of a survey in determining the prevailing wage? *	☑ Yes ☐ No
4a. Survey Name: §	LSU Ag Research Center - Crab/Crawfish Processors
4b. Survey date of publication: §	10/29/2013

E. Job Offer Information

a. Job Description:

1. Job Title * Seafood processors for crab and crawfish	
2. *Suggested* SOC (ONET/OES) code * 53-7064	2a. *Suggested* SOC (ONET/OES) occupation title * Packers and Packagers, Hand
3. Job Title of Supervisor for this Position (if applicable) § Owner or Manager	
4. Does this position supervise the work of other employees? * ☐ Yes ☑ No	4a. If "Yes", number of employees worker § will supervise: N/A
4b. If "Yes", please indicate the level of the employees to be supervised:	☐ Subordinate ☐ Peer

5. Job duties – Please provide a description of the duties to be performed with as much specificity as possible, including details regarding the areas/fields and/or products/industries involved. A description of the job duties to be performed MUST begin in this space. *

Worker needed to dehead, dump sacks, extract meat, fill baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze. load/unload trucks, and clean up/ sanitize worksite.

6. Will travel be required in order to perform the job duties? * ☐ Yes ☑ No	6a. If "Yes", please provide details of the travel required, such as the area(s), frequency and nature of the travel. § N/A

OMB Approval: 1205-0455
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

E. Job Offer Information (cont.)

b. Minimum Job Requirements:

1. Education: minimum U.S. diploma/degree required *

☑ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)

1a. If "Other degree" in question 1, specify the diploma/degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
N/A	N/A

2. Does the employer require a second U.S. diploma/degree? *	☐ Yes ☑ No

2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §

N/A

3. Is training for the job opportunity required? *	☐ Yes ☑ No

3a. If "Yes" in question 3, specify the number of months of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
N/A	N/A

4. Is employment experience required? *	☐ Yes ☑ No

4a. If "Yes" in question 4, specify the number of months of experience required §	4b. Indicate the occupation required §
N/A	N/A

5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *

SEE ADDENDUM

c. Place of Employment Information:

1. Worksite address 1 * 2320 Kaliste Saloom Rd

2. Address 2 N/A

3. City *	4. County *
Lafayette	Lafayette Parish
5. State/District/Territory * LA	6. Postal code * 70508-2320

7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	☐ Yes ☑ No

7a. If "Yes", identify the geographic place(s) of employment indicating each metropolitan statistical area (MSA) or the independent city(ies)/township(s)/county(ies) (borough(s)/parish(es)) and the corresponding state(s) where work will be performed. If necessary, submit a second completed ETA Form 9141 with a listing of the additional anticipated worksites. Please note that wages cannot be provided for unspecified/unanticipated locations. §

N/A

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

F. Prevailing Wage Determination

FOR OFFICIAL GOVERNMENT USE ONLY	
1. PW tracking number P-400-14227-355546	2. Date PW request received 10/13/2014
3. SOC (ONET/OES) code 53-7062	3a. SOC (ONET/OES) occupation title Laborers and Freight, Stock, and Material Movers, Hand
4. Prevailing wage $ 7.35	4a. OES Wage level ☐ I ☐ II ☐ III ☐ IV ☑ N/A
5. Per: (Choose only one) ☑ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate	
5a. If Piece Rate is indicated in question 5, specify the wage offer requirements * N/A	
6. Prevailing wage source (Choose only one) ☐ OES (All Industries) ☐ OES (ACWIA – Higher Education) ☐ CBA ☐ DBA ☐ SCA ☑ Other/Alternate Survey	
6a. If "Other/Alternate Survey" in question 8, specify Employer Provided Survey	
7. Additional Notes Regarding Wage Determination The employer's job duties represent a combination of the occupation in item F.3 and 51-3022.00 - Meat, Poultry, and Fish Cutters and Trimmers. The wage determination was issued based on the employer submitted survey.	
8. Determination date 11/07/2014	9. Expiration date 02/08/2015

F. OMB Paperwork Reduction Act *(1205-0466)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 55 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW, * Washington, DC * 20210. Do NOT send the completed application to this address.

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

ADDENDUM

SECTION E.b.5: Special Requirements

1. After initial 60 hours of processing employee must be able to peel 4.25 or more per hour.
2. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid.
3. Overtime, hours and schedule may vary.
4. Payroll deductions required by law.
5. May be paid per pound at employer discretion, which at all times meet or exceed ETA 9142 certified hourly wage.
6. Unpaid 30 min breaks available at employee discretion.
7. No on the job training.
8. No education requirement.
9. M-F, some Sat/Sun, 8pm-4am.
10. And any other activities as related to PWD/DOL assigned SOC code as per online.org.
11. Must not be allergic to crab or crawfish.

Case Number: I-430-14227-335545 Case Status: DETERMINATION ISSUED Validity Period: 11/7/2014 to 02/06/2015

Kelly J. Couch

From:	oflc.portal@dol.gov
Sent:	Friday, November 07, 2014 11:01 AM
To:	kellyjcouch1@gmail.com
Subject:	PW: Determination Issued for Case Number P-400-14227-355546
Attachments:	Determination9141-P-400-14227-355546_110714120046.pdf

To: KELLY COUCH
231 PECAN AVENUE
NEW ROADS, LA 70760

Re: Case Number: P-400-14227-355546 Received: Oct 13, 2014

We have completed your Prevailing Wage Request of Oct 13, 2014 and have issued a wage determination. The Department's prevailing wage determination for the position of Seafood processors for crab and crawfish can be found under Section E on the attached ETA Form 9141 and is valid between Nov 7, 2014 and Feb 8, 2015.
Should the employer disagree with this determination, the employer may either:

1) submit a redetermination request within 30 days of this letter in accordance with the Department's regulations. The process for seeking a redetermination of wages involving H-2B certifications is set out at 20 CFR § 655.10(g), and the process for seeking a redetermination of wages involving PERM certifications is found at 20 CFR § 656.40(h); or

2) submit a new ETA Form 9141, Application for Prevailing Wage Determination.

Sincerely,
Office of Foreign Labor Certification

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/.

A. Employment-Based Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)*: *	H-2B

B. Requestor Point-of-Contact Information

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
COUCH	KELLY	J.
4. Contact's job title * Owner/Manager Couch Application Service Assistance		
5. Address 1 * 231 PECAN AVENUE		
6. Address 2 N/A		
7. City * NEW ROADS	8. State * LA	9. Postal code * 70760
10. Country * UNITED STATES OF AMERICA	11. Province (if applicable) POINTE COUPEE PARISH	
12. Telephone number * 225-638-7218	13. Extension N/A	14. Fax Number 225-638-7219
15. E-Mail Address kellyjcouch1@gmail.com		

C. Employer Information

1. Legal business name * Randol Inc		
2. Trade name/Doing Business As (DBA), if applicable § N/A		
3. Address 1 * 2320 Kaliste Saloom Road		
4. Address 2 N/A		
5. City * Lafayette	6. State * LA	7. Postal code * 70508
8. Country * UNITED STATES OF AMERICA	9. Province (if applicable) N/A	
10. Telephone number * 337-981-7080	11. Extension 10	
12. Federal Employer Identification Number (FEIN from IRS) * 720796114	13. NAICS code (must be at least 4-digits) * 311712	

D. Wage Processing Information

1. Is the employer covered by ACWIA? *	☐ Yes ☑ No
2. Is the position covered by a Collective Bargaining Agreement (CBA)? *	☐ Yes ☑ No
3. Is the employer requesting consideration of Davis-Bacon (DBA) or McNamara Service Contract (SCA) Acts? *	☐ Yes ☑ No ☐ DBA ☐ SCA

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
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D. Wage Processing Information (cont.)

4. Is the employer requesting consideration of a survey in determining the prevailing wage? *	☑ Yes ☐ No
4a. Survey Name: §	LSU Ag Research Center - Crab/Crawfish Processors
4b. Survey date of publication: §	10/29/2013

E. Job Offer Information

a. Job Description:

1. Job Title * Seafood processors for crab and crawfish	
2. *Suggested* SOC (ONET/OES) code * 53-7064	2a. *Suggested* SOC (ONET/OES) occupation title * Packers and Packagers, Hand
3. Job Title of Supervisor for this Position (if applicable) § Owner or Manager	
4. Does this position supervise the work of other employees? * ☐ Yes ☑ No	4a. If "Yes", number of employees worker will supervise: § N/A
4b. If "Yes", please indicate the level of the employees to be supervised:	☐ Subordinate ☐ Peer

5. Job duties – Please provide a description of the duties to be performed with as much specificity as possible, including details regarding the areas/fields and/or products/industries involved. A description of the job duties to be performed **MUST** begin in this space. *

Worker needed to dehead, dump sacks, extract meat, fill baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks, and cleanup/ sanitize worksite.

6. Will travel be required in order to perform the job duties? * ☐ Yes ☑ No	6a. If "Yes", please provide details of the travel required, such as the area(s), frequency and nature of the travel. § N/A

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Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
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E. Job Offer Information (cont.)

b. Minimum Job Requirements:

1. Education: minimum U.S. diploma/degree required *

☑ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)

1a. If "Other degree" in question 1, specify the diploma/ degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
N/A	N/A

2. Does the employer require a second U.S. diploma/degree? *	☐ Yes ☑ No

2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §

N/A

3. Is training for the job opportunity required? *	☐ Yes ☑ No

3a. If "Yes" in question 3, specify the number of months of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
N/A	N/A

4. Is employment experience required? *	☐ Yes ☑ No

4a. If "Yes" in question 4, specify the number of months of experience required §	4b. Indicate the occupation required §
N/A	N/A

5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *

SEE ADDENDUM

c. Place of Employment Information:

1. Worksite address 1 * 2320 Kaliste Saloom Rd	
2. Address 2 N/A	
3. City * Lafayette	4. County * Lafayette Parish
5. State/District/Territory * LA	6. Postal code * 70508-2320
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	☐ Yes ☑ No

7a. If "Yes", identify the geographic place(s) of employment indicating each metropolitan statistical area (MSA) or the independent city(ies)/township(s)/county(ies) (borough(s)/parish(es)) and the corresponding state(s) where work will be performed. If necessary, submit a second completed ETA Form 9141 with a listing of the additional anticipated worksites. Please note that wages cannot be provided for unspecified/unanticipated locations. §

N/A

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
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F. Prevailing Wage Determination

FOR OFFICIAL GOVERNMENT USE ONLY	
1. PW tracking number P-400-14227-355546	2. Date PW request received 10/13/2014
3. SOC (ONET/OES) code 53-7062	3a. SOC (ONET/OES) occupation title Laborers and Freight, Stock, and Material Movers, Hand
4. Prevailing wage $ 7.35	4a. OES Wage level ☐ I ☐ II ☐ III ☐ IV ☑ N/A
5. Per: (Choose only one) ☑ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate	
5a. If Piece Rate is indicated in question 5, specify the wage offer requirements .* N/A	
6. Prevailing wage source (Choose only one) ☐ OES (All Industries) ☐ OES (ACWIA – Higher Education) ☐ CBA ☐ DBA ☐ SCA ☑ Other/Alternate Survey	
6a. If "Other/Alternate Survey" in question 6, specify Employer Provided Survey	
7. Additional Notes Regarding Wage Determination The employer's job duties represent a combination of the occupation in item F.3 and 51-3022.00 - Meat, Poultry, and Fish Cutters and Trimmers. The wage determination was issued based on the employer submitted survey.	
8. Determination date 11/07/2014	9. Expiration date 02/08/2015

F. OMB Paperwork Reduction Act *(1205-0466)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 55 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW, * Washington, DC * 20210. **Do NOT send the completed application to this address.**

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

ADDENDUM

SECTION E.b.5: Special Requirements

1. After initial 60 hours of processing employee must be able to peel 4.25 or more per hour.
2. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid.
3. Overtime, hours and schedule may vary.
4. Payroll deductions required by law.
5. May be paid per pound at employer discretion, which at all times meet or exceed ETA 9142 certified hourly wage.
6. Unpaid 30 min breaks available at employee discretion.
7. No on the job training.
8. No education requirement.
9. M-F, some Sat/Sun, 8pm-4am.
10. And any other activities as related to PWD/DOL assigned SOC code as per online.org.
11. Must not be allergic to crab or crawfish.

Kelly J. Couch

From: oflc.portal@dol.gov
Sent: Monday, October 13, 2014 9:31 AM
To: kellyjcouch1@gmail.com
Subject: PW: iCERT: Case Number: P-400-14227-355546 Received: 10/13/2014

To: KELLY COUCH
231 PECAN AVENUE

NEW ROADS,LA 70760

Re: Case Number: P-400-14227-355546 Received: 10/13/2014

This is a confirmation email that the ETA Form 9141 - Application for Prevailing Wage Determination covering the H-2B visa classification for the position of Seafood processors for crab and crawfish has been received and submitted for processing by the U.S. Department of Labor (Department).

The Department processes all requests for prevailing wage determinations on a First-In-First-Out (FIFO) basis using the date the application was received and submitted for processing. You have the ability to check the status of this application at any time by accessing your iCERT On-Line Account at http://iCERT.doleta.gov/.

iCERT Portal

Welcome, KELLY COUCH (logout)

Portal Home | Prevailing Wage | H-2B | My Account & Profiles | Forms & Instructions | Quick Links | Contact Us | Help

Prevailing Wage Portfolio Summary | Prevailing Wage Portfolio Details

ETA Home > iCERT Portal

Case was successfully submitted!

Case Number: P-400-14227-355546

Employer Name: Randol Inc

This is a confirmation that the above referenced ETA Form 9141 Application for Prevailing Wage Determination has been received and submitted for processing by the the U.S. Department of Labor (Department). In the interest of fairness and equity, all prevailing wage determination requests are processed by the Department on a first-in-first-out (FIFO) basis.

Important Notice: If you have submitted a request for a prevailing wage determination using the H-2B visa classification, the Department will make every effort to process your request in FIFO order within thirty (30) calendar days of receipt (20 CFR 655.10).

Create New Case | Return Home

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/.

A. Employment-Based Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)*: *	H-2B

B. Requestor Point-of-Contact Information

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
COUCH	KELLY	J.
4. Contact's job title * Owner/Manager Couch Application Service Assistance		
5. Address 1 * 231 PECAN AVENUE		
6. Address 2 N/A		
7. City * NEW ROADS	8. State * LA	9. Postal code * 70760
10. Country * UNITED STATES OF AMERICA	11. Province (if applicable) POINTE COUPEE PARISH	
12. Telephone number * 225-638-7218	13. Extension N/A	14. Fax Number 225-638-7219
15. E-Mail Address kellyjcouch1@gmail.com		

C. Employer Information

1. Legal business name * Randol Inc		
2. Trade name/Doing Business As (DBA), if applicable § N/A		
3. Address 1 * 2320 Kaliste Saloom Road		
4. Address 2 N/A		
5. City * Lafayette	6. State * LA	7. Postal code * 70508
8. Country * UNITED STATES OF AMERICA	9. Province (if applicable) N/A	
10. Telephone number * 337-981-7080	11. Extension 10	
12. Federal Employer Identification Number (FEIN from IRS) * 720796114	13. NAICS code (must be at least 4-digits) * 311712	

D. Wage Processing Information

1. Is the employer covered by ACWIA? *	☐ Yes ☑ No
2. Is the position covered by a Collective Bargaining Agreement (CBA)? *	☐ Yes ☑ No
3. Is the employer requesting consideration of Davis-Bacon (DBA) or McNamara Service Contract (SCA) Acts? *	☐ Yes ☑ No ☐ DBA ☐ SCA

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

D. Wage Processing Information (cont.)

4. Is the employer requesting consideration of a survey in determining the prevailing wage? *	☑ Yes ☐ No
4a. Survey Name: §	LSU Ag Research Center - Crab/Crawfish Processors
4b. Survey date of publication: §	10/29/2013

E. Job Offer Information

a. Job Description:

1. Job Title *
Seafood processors for crab and crawfish

2. *Suggested* SOC (ONET/OES) code *	2a. *Suggested* SOC (ONET/OES) occupation title *
53-7064	Packers and Packagers, Hand

3. Job Title of Supervisor for this Position (if applicable) §
Owner or Manager

4. Does this position supervise the work of other employees? *	4a. If "Yes", number of employees worker will supervise: §
☐ Yes ☑ No	N/A

4b. If "Yes", please indicate the level of the employees to be supervised: ☐ Subordinate ☐ Peer

5. Job duties – Please provide a description of the duties to be performed with as much specificity as possible, including details regarding the areas/fields and/or products/industries involved. A description of the job duties to be performed **MUST** begin in this space. *

Worker needed to dehead, dump sacks, extract meat, fill baskets/tables, grade, ice pack, package, peel, prepare, process, remove/discard waste, seal, wash, weigh. Box, refrigerate/freeze, load/unload trucks, and cleanup/ sanitize worksite.

6. Will travel be required in order to perform the job duties? *	6a. If "Yes", please provide details of the travel required, such as the area(s), frequency and nature of the travel. §
☐ Yes ☑ No	N/A

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

E. Job Offer Information (cont.)

b. Minimum Job Requirements:

1. Education: minimum U.S. diploma/degree required *

☑ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)

1a. If "Other degree" in question 1, specify the diploma/ degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
N/A	N/A

2. Does the employer require a second U.S. diploma/degree? *	☐ Yes ☑ No

2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §

N/A

3. Is training for the job opportunity required? *	☐ Yes ☑ No

3a. If "Yes" in question 3, specify the number of months of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
N/A	N/A

4. Is employment experience required? *	☐ Yes ☑ No

4a. If "Yes" in question 4, specify the number of months of experience required §	4b. Indicate the occupation required §
N/A	N/A

5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *

SEE ADDENDUM

c. Place of Employment Information:

1. Worksite address 1 * 2320 Kaliste Saloom Rd	
2. Address 2 N/A	
3. City * Lafayette	4. County * Lafayette Parish
5. State/District/Territory * LA	6. Postal code * 70508-2320
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	☐ Yes ☑ No

7a. If "Yes", identify the geographic place(s) of employment indicating each metropolitan statistical area (MSA) or the independent city(ies)/township(s)/county(ies) (borough(s)/parish(es)) and the corresponding state(s) where work will be performed. If necessary, submit a second completed ETA Form 9141 with a listing of the additional anticipated worksites. Please note that wages cannot be provided for unspecified/unanticipated locations. §

N/A

OMB Approval: 1205-0466
Expiration Date: 03/31/2016

Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

F. Prevailing Wage Determination

FOR OFFICIAL GOVERNMENT USE ONLY	
1. PW tracking number	2. Date PW request received
3. SOC (ONET/OES) code	3a. SOC (ONET/OES) occupation title
4. Prevailing wage $	4a. OES Wage level ☐ I ☐ II ☐ III ☐ IV ☐ N/A
5. Per: (Choose only one) ☐ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate	
5a. If Piece Rate is indicated in question 5, specify the wage offer requirements :*	
6. Prevailing wage source (Choose only one) ☐ OES (All Industries) ☐ OES (ACWIA – Higher Education) ☐ CBA ☐ DBA ☐ SCA ☐ Other/Alternate Survey	
6a. If "Other/Alternate Survey" in question 6, specify	
7. Additional Notes Regarding Wage Determination	
8. Determination date	9. Expiration date

F. OMB Paperwork Reduction Act *(1205-0466)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 55 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW, * Washington, DC * 20210. **Do NOT send the completed application to this address.**

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Application for Prevailing Wage Determination
ETA Form 9141
U.S. Department of Labor

ADDENDUM

SECTION E.b.5: Special Requirements

1. After initial 60 hours of processing employee must be able to peel 4.25 or more per hour.
2. Employer may require post hire, random drug screen, upon suspicion or post accident, employer paid.
3. Overtime, hours and schedule may vary.
4. Payroll deductions required by law.
5. May be paid per pound at employer discretion, which at all times meet or exceed ETA 9142 certified hourly wage.
6. Unpaid 30 min breaks available at employee discretion.
7. No on the job training.
8. No education requirement.
9. M-F, some Sat/Sun, 8pm-4am.
10. And any other activities as related to PWD/DOL assigned SOC code as per online.org.
11. Must not be allergic to crab or crawfish.

AGRICULTURAL EXPERIMENT STATION
Iberia Research Station
603 LSU Bridge Road
Post Office Box 466
Jeanerette, Louisiana 70544-0466
(337)276-5527
Fax: (337)276-9088
Website: www.agcir.lsu.edu

October, 2013

Determining the entry-level prevailing wages for non h-2b workers
Survey results of Louisiana South Central Region crabmeat/crawfish processors conducted the month of October , 2013.

	Column "A"	Column "B"	Column "C"	Column "D"
	Number of Respondents	Number of Employees	Hourly Rate of Pay for Entry Level Worker	Column "B" x Column "C"
	2	40	$7.25	$290.00
	2	26	$7.50	$195.00
Totals	4	66		$485.00

Column "D" divided by Column "B" ($485/66) = $7.35 (Average Wage)
Company names are not listed. Individual survey results can be provided by contacting Thomas Hymel, LSU AgCenter/Sea Grant thymel@agcenter.lsu.edu

1) Respondents – Companies included in the survey are holders of appropriate Louisiana certification to purchase, process and sell crab and crawfish products. These companies hire entry-level workers to process and clean the crabmeat and crawfish meat and package into containers for sale.

2) Job description – Job description: Crawfish/Crab /Seafood processing worker/dockworker : Duties may include any or all of the following : bagging, bait preparation, boxing, cleanup work site and sanitize, conveyor belt /steam room, de-back, de-head, dock work, dump sacks, extract meat from carcass (using hands, hand tools or knives), fill baskets/troughs/tables, grade, ice pack, load/unload crawfish /crabs and bait from trucks and docks, package, peel (remove shell), pre-grade, prepare, process, refrigerate or freeze, remove/discard waste products, seal, use washing machine, use vacuum pack machine, wash weigh, and any other activities as related to SOC code 53-7064.

3) Employer may use any/or all of the above steps, depending on each individual processing plant.

4) All workers are seasonal (mid April - late December with the peak season being June - August).

5) How survey was conducted – Based on a list of all licensed seafood processors in the south central part of Louisiana received from the Dept. of Health & Hospitals, attempts were made to contact seafood processors that picked and packed both crab and crawfish. The 4 companies contacted all were determined to not use h-2b employees. All 4 responded to the survey. The survey represents 66 workers during peak season.

LSU AgCenter/ Sea Grant Marine Extension Louisiana Direct Seafood Program Director,
Thomas Hymel Thomas Hymel Date 10/29/2013

Federal Register

Friday,
December 19, 2008

Part V

Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1205–AB54

Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes

AGENCY: Employment and Training Administration, Department of Labor, in concurrence with the Wage and Hour Division, Employment Standards Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL or the Department) is amending its regulations to modernize the procedures for the issuance of labor certifications to employers sponsoring H–2B nonimmigrants for admission to perform temporary nonagricultural labor or services and the procedures for enforcing compliance with attestations made by those employers. Specifically, this Final Rule re-engineers the application filing and review process by centralizing processing and by enabling employers to conduct pre-filing recruitment of United States (U.S.) workers. In addition, the rule enhances the integrity of the H–2B program through the introduction of post-adjudication audits and procedures for penalizing employers who fail to comply with program requirements. This rule also makes technical changes to the regulations relating to both the H–1B program and the permanent labor certification program to reflect operational changes stemming from this regulation.

Although Congress has conferred the statutory authority to enforce H–2B program requirements on the Department of Homeland Security (DHS), recent discussions between DHS and the Department have yielded an agreement for the delegation of H–2B enforcement authority from DHS to the Department. This Final Rule contains the Wage and Hour Division (WHD) regulations establishing the H–2B enforcement procedures that the Department will institute pursuant to that agreement. Separately, this Final Rule institutes conditions and procedures for the debarment of employers, attorneys, and agents participating in the H–2B foreign labor certification process. As discussed further below, the Department intends to exercise its inherent authority under case law and general principles of program administration to determine what entities practice before it.

DATES: This Final Rule is effective January 18, 2009.

FOR FURTHER INFORMATION CONTACT: For information on the H–2B labor certification process governed by 20 CFR 655.1 to 655.35, contact William L. Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210. Telephone: (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For information on the H–2B enforcement process governed by 20 CFR 655.50 to 655.80, contact Michael Ginley, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3502, Washington, DC 20210. Telephone (202) 693–0745 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background Leading to the NPRM

A. Statutory Standard and Current Department of Labor Regulations

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H–2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary nonagricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Section 214(c)(1) of the INA requires DHS to consult with "appropriate agencies of the Government" before granting any H–2B visa petition submitted by an employer. 8 U.S.C. 1184(c)(1). The regulations for the U.S. Citizenship and Immigration Services (USCIS), the agency within DHS charged with the adjudication of nonimmigrant benefits such as H–2B status, currently require, at 8 CFR 214.2(h)(6), that the intending employer (other than in the Territory of Guam) first apply for a temporary labor certification from the Secretary of Labor (the Secretary) advising USCIS whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers.

The Department's role in the H–2B visa program stems from its obligation, outlined in DHS regulations, to certify, upon application by a U.S. employer intending to petition DHS to admit H–2B workers, that there are not enough able and qualified U.S. workers available for the position sought to be filled and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1); see also 8 CFR 214.2(h)(6).

The Department's role in the H–2B process is currently advisory to DHS. 8 CFR 214.2(h)(6)(iii)(A). DHS regulations provide that an employer may not file a petition with DHS for an H–2B temporary worker unless it has received a labor certification from the Department (or the Governor of Guam, as appropriate), or received a notice from either that a certification cannot be issued. 8 CFR 214.2(h)(6)(iii)(C), (iv)(A), (vi)(A).

Currently, the Department's regulations at 20 CFR part 655, Subpart A, "Labor Certification Process for Temporary Employment in Occupations other than Agriculture, Logging or Registered Nursing in the United States (H–2B Workers)," govern the H–2B labor certification process. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in ETA, the agency to which the Secretary of Labor has delegated her advisory responsibilities described in the DHS H–2B regulations, after they are processed by the State Workforce Agency (SWA) having jurisdiction over the area of intended employment.[1] The SWA reviews the employer's application and job offer (comparing the employer's offered wage against the prevailing wage for the position); supervises U.S. worker recruitment; and forwards completed applications to OFLC for further review and final determination.

Under current procedures, the employer must demonstrate that its need for the services or labor is temporary as defined by one of four regulatory standards: (1) A one-time occurrence; (2) a seasonal need; (3) a

[1] The SWAs are agencies of State Government that receive Federal Workforce Investment Act (WIA), Wagner-Peyser Act, and other funds to administer our nation's state-based employment services system and perform certain activities on behalf of the Federal Government.

peakload need; or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). The employer or its authorized representative must currently submit to the SWA a detailed statement of temporary need and supporting documentation with the application for H–2B labor certification. Such documentation must provide a description of the employer's business activities and schedule of operations throughout the year, explain why the job opportunity and the number of workers requested reflects its temporary need, and demonstrate how the employer's need meets one of these four regulatory standards. Based on longstanding practice and DOL program guidance, the employer must also establish that the temporary position is full-time and that the period of need is generally one year or less, consistent with the standard under DHS regulations at 8 CFR 214.2h(6). This Final Rule clarifies that full-time employment, for purposes of temporary labor certification employment, means at least 30 hours per week, except that where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition governs.

Additionally, the employer must recruit from the U.S. labor market to determine if a qualified U.S. worker is available for the position. In addition, in order to ensure an adequate test of the labor market for the position sought to be filled, the employer must comply with other program requirements. For example, it must offer and subsequently pay throughout the period of employment a wage that is equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment; provide terms and conditions of employment that are not less favorable than those offered to the foreign worker(s); and not otherwise inhibit the effective recruitment and consideration of U.S. workers for the job.

Historically, the Department's review and adjudication of permanent and temporary labor certification applications (including H–2B) took place through ETA's Regional Offices. However, in December 2004, the Department opened two new National Processing Centers (NPCs), one each located in Atlanta, Georgia, and Chicago, Illinois, to centralize processing of permanent and temporary foreign labor certification cases at the Federal level. The Department published a notice in the **Federal Register**, at 70 FR 41430, Jul. 19, 2005, clarifying that employers seeking H–2B labor certifications must file two originals of Form ETA 750, Part A, directly with the SWA serving the area of intended employment. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA sends the complete application to the appropriate NPC. The NPC Certifying Officer (CO) issues a labor certification for temporary employment under the H–2B program, denies the certification, or issues a notice including the reasons why such certification cannot be made. Prior to June 1, 2008, the NPCs shared responsibility for processing of temporary labor certification applications; each NPC had jurisdiction over and processed applications from a different subset of states and territories. Effective June 1, 2008, the NPCs specialized, each assuming responsibility for different types of applications. Now, H–2B temporary labor certification applications approved by the SWAs are processed exclusively by the Chicago NPC. 73 FR 11944, Mar. 5, 2008.

Currently, the Department has no enforcement authority or process to ensure H–2B workers who are admitted to the U.S. are employed in compliance with H–2B labor certification requirements. Congress vested DHS with that enforcement authority in 2005. See 8 U.S.C. 1184, as amended by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Public Law 109–13, 119 Stat. 231. As described more fully below, the Department in this Final Rule establishes the H–2B regulatory enforcement regime proposed in the NPRM, consistent with the agreement for a delegation of enforcement authority reached by the Department and DHS pursuant to 8 U.S.C. 1184(c)(14)(B). This enforcement regime also includes debarment procedures for ETA and the Employment Standards Administration, Wage and Hour Division (WHD), under the Department's inherent debarment authority, which is explained in greater detail below.

B. Earlier Efforts To Reform the H–2B Regulatory Process

On January 27, 2005, DHS and the Department issued companion NPRMs to significantly revise each agency's H–2B processing procedures. 70 FR 3984, Jan. 27, 2005; 70 FR 3993, Jan. 27, 2005. As proposed, those changes to both agencies' regulations would have eliminated in whole the Department's adjudicatory role, ending the current labor certification process for most H–2B occupations and requiring employers to submit labor-related attestations directly to USCIS as part of a revised supplement accompanying the H–2B petition.

The two agencies received numerous comments on the joint NPRMs in 2005. Most commenters opposed the proposals to move the program adjudication to USCIS and to eliminate the Department's role in reviewing the need of employers and the recruitment of U.S. workers except in post-adjudication audits. Commenter concerns focused in part on the loss of the Department's experience in adjudicating issues of temporary need and the potential adverse impact on U.S. workers. Based on the significant concerns posed in those comments, and after further deliberation within each agency, the Department and DHS have not pursued their 2005 proposals. Consequently, the NPRM published by the Department on January 27, 2005 (RIN 1205–AB36) was withdrawn in the Department of Labor's Fall 2007 Regulatory Agenda. See *http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117.*

As stated in the May 22, 2008, NPRM preceding this Final Rule, the Department continued, however, to closely review the H–2B program procedures in order to determine appropriate revisions to the H–2B labor certification process. This ongoing systematic review was accelerated in light of considerable workload increases for both the Department and the SWAs (an approximate 30 percent increase in applications in Fiscal Year (FY) 2007 over those received in FY 2006, and a similar increase during the first half of FY 2008) as well as limited appropriations funding program-related operations.

On April 4, 2007, ETA issued Training and Employment Guidance Letter (TEGL) No. 21–06, 72 FR 19961, Apr. 20, 2007, to replace its previous guidance for the processing of H–2B applications (General Administration Letter No. 1–95, 60 FR 7216, Feb. 7, 1995) and update procedures for SWAs and NPCs to use in the processing of temporary labor certification applications. The Department then held national briefing sessions in Chicago and Atlanta on May 1 and May 4, 2007, respectively, to inform employers and other stakeholders of the updated processing guidance contained in TEGL 21–06. Attendees at those briefing sessions raised important questions and concerns with regard to the effective implementation of TEGL 21–06 by the SWAs and ETA's National Processing Centers (NPCs). In response to the

substantive concerns that were raised, the Department further refined the process of reviewing applications in TEGL 27–06 (June 12, 2007), providing special procedures for dealing with forestry related occupations, and TEGL No. 21–06, Change 1 (June 25, 2007), and updating procedures by allowing the NPC Certifying Officer (CO) to request additional information from employers to facilitate the processing of H–2B applications. 72 FR 36501, Jul. 3, 2007; 72 FR 38621, Jul. 13, 2007. Several issues were not addressed by those refinements, particularly concerns relating to increasing workload and processing delays, which required regulatory changes. This Final Rule addresses a number of those unresolved issues.

C. Current Process Involving Temporary Labor Certifications and the Need for a Redesigned System

As described in the May 22, 2008, NPRM, the process for obtaining a temporary labor certification has been described to the Department as complicated, time-consuming, inefficient, and dependent upon the expenditure of considerable resources by employers. The current, duplicative process requires the employer to first file a temporary labor certification with the SWA, which reviews the application, compares the wage offer to the prevailing wage for the occupation, oversees the recruitment of U.S. workers, and then transfers the application to the applicable ETA NPC, which conducts a final review of the application. This process has been criticized for its length, overlap of effort, and resulting delays. Application processing delays, regardless of origin, can lead to adverse results with serious repercussions for a business, especially given the numerical limitation or "cap" on visas under this program, as a result of which any processing delay may prevent an employer from securing visas for H–2B workers during any given half year period for which numbers are available. This occurs because employer demand for the limited number of visas greatly exceeds their supply, and all visas are typically allocated in the early weeks of availability. See 8 U.S.C. 1184(g)(1)(B) (setting H–2B annual visa cap at 66,000) and 8 U.S.C. 1184(g)(10) (setting a cap of 33,000 as the number of H–2B visas that may be allocated during each 6-month period of a fiscal year).

The increasing workload of the Department and SWAs poses a growing challenge to the efficient and timely processing of applications. As stated in the NPRM, the H–2B foreign labor certification program continues to increase in popularity among employers. While the annual number of visas available is limited by statute, the number of labor certifications is not. The number of H–2B labor certification applications has increased 129 percent since FY 2000. In FY 2007, the Department experienced a nearly 30 percent increase in H–2B temporary labor certification application filings over the previous fiscal year. This increasing workload is exacerbated because the INA does not authorize the Department to charge a fee to employers for processing H–2B applications.[2] At the same time, appropriated funds have not kept pace with the increased workload at the State or Federal level. This has resulted in significant disparities in processing times among the SWAs. Some observers have noted these disparities among States unfairly advantage one set of employers (those in which the SWAs are able to timely process applications) over others (those in which SWAs experience delays due to backlogs resulting from inadequate staffing or funding, or other causes).[3]

In light of these recurring experiences, this Final Rule institutes several significant measures to reengineer the Department's administration of the program. These changes improve the process by which employers obtain labor certification and where our program experience has demonstrated additional measures would assist the Department in protecting the job opportunities and wages of U.S. workers. The Final Rule also provides greater accountability for employers through penalties, up to and including debarment, as an additional safeguard against abuse of the program.

D. Overview of Redesigned H–2B Foreign Labor Certification Process

As proposed in the NPRM and finalized in this rule, the redesigned application process will require employers to complete recruitment steps similar to those now required, but will require them to do so prior to filing the application for labor certification. Once recruitment is complete, this Final Rule maintains the requirement proposed in the NPRM that the completed application be submitted directly to DOL instead of being filed with a SWA. This Final Rule eliminates the SWA duplicative review of the H–2B application. In association with this Final Rule, the Department has redesigned the application form currently used for the H–2A and H–2B temporary labor certification programs and proposed a new ETA Form 9142. Additional information about the new application form appears in the Administrative Information section of this preamble. This rule does not eliminate or federalize SWA activities (e.g., the job order and interstate clearance process) that may ultimately support an employer's H–2B application but are funded and governed independently under the Wagner-Peyser Act. This rule does federalize prevailing wage determinations, previously performed by the SWAs under this program.

To test the U.S. labor market appropriately, employers will be required to first obtain from the Chicago NPC a prevailing wage rate to be used in the recruitment of U.S. workers. To make this request, employers in the non-agricultural labor certification programs will use a new ETA Form 9141, which was designed and will be implemented in conjunction with this Final Rule. As with the Form 9142, additional information about the Form 9141 appears in the Administrative Information section of the preamble. The employer will then follow recruitment steps similar to those required under the current program. The NPRM proposed increasing the number of required advertisements to three. However, in response to comments, the Final Rule returns to the current requirement of two advertisements, although it retains the proposed requirement that one of those advertisements be placed on a Sunday.

Consistent with the NPRM, this Final Rule requires the employer to attest to and enumerate its recruitment efforts as part of the application but does not require the employer to submit

[2] On June 17, 2008, the Department transmitted draft legislation to the Congress that would amend the INA to provide the Department with authority to charge and retain a fee to recoup the costs of administering the H–2B labor certification program.

[3] The growth in the number of applications is explained in part by the increasing desire of employers for a legal temporary workforce and by legislation that permitted greater numbers of H–2B workers into the U.S. by exempting from the 66,000 annual cap any H–2B worker who had been counted against the numerical cap in previous years. See Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, Div. B, Title IV, 119 Stat. 318 (effective May 11, 2005) (exempting from numerical cap for FY 2005 and FY 2006 returning H–2B workers who had counted against the cap in one of the three fiscal years preceding the fiscal year in which the visa petition was filed), and Save Our Small and Seasonal Businesses Act of 2006, included in the Defense Authorization Act for FY 2007, Sec. 1074, Public Law 109–364 (making amendment retroactive to October 1, 2006, and extending the exemption through FY 2007). These returning worker provisions expired September 30, 2007. 8 U.S.C. 1184(g)(9) (2007); INA sec. 214(g)(9); see also Sec. 14006, Public Law 108–287, 118 Stat. 951, 1014 (August 5, 2004) (exempting some fish roe occupations from the cap).

supporting documentation with its application. To ensure the integrity of the process, the Final Rule requires the employer to retain documentation of its recruitment, as well as other documentation specified in the regulations, for 3 years from the date of certification. The employer will be required to provide this documentation in response to a request for additional information by the Certifying Officer (CO) before certification or by ETA pursuant to an audit or in the course of an investigation by the Wage and Hour Division (WHD) after a determination on the application has been issued. The Department has set the document retention requirement at 3 years rather than the proposed 5 years in response to comments received expressing concerns that five years would impose an unnecessary burden on small employers, especially those that are mobile or have a mobile component.

Employers or their authorized representatives (attorneys or agents) will be required to submit applications using a new form designed to demonstrate the employer's compliance with the obligations of the H–2B program. As described in the NPRM and the Final Rule, the application form will collect, in the form of attestations, information that is largely required already by the current H–2B labor certification process. These attestations are required from the employer to ensure adherence to program requirements and to establish accountability. As with recruitment, employers are required to retain records documenting their compliance with all program requirements. An application that is complete will be accepted by the NPC for processing and will undergo final review by the Department.

Based on the Department's experience, and in response to concerns voiced in public comments about the need for H–2B stakeholder guidance and ETA staff training, we have added a transition period to the Final Rule at new § 655.5. Although the Final Rule takes effect 30 days from publication, it phases in implementation based on employment start dates listed in the application. Employers with a date of need on or after October 1, 2009, will be governed by these new regulations. Employers with a date of need on or after the rule's effective date but prior to October 1, 2009, will follow the transitional process described in § 655.5. Additional information about the transition process appears below.

In order to further protect the integrity of the program, specific verification steps, such as verifying the employer's Federal Employer Identification Number (FEIN) to ensure the employer is a bona fide business entity, will occur during processing to ensure the accuracy of the information supplied by the employer. If an application does not appear to be complete or merit approval on its face but requires additional information in order to be adjudicated, the CO will issue a Request for Further Information (RFI), a process the program already employs. After Departmental review, an application will be certified or denied.

As proposed in the NPRM and adopted in the Final Rule, the introduction of new post-adjudication audits will serve, along with WHD investigations, as both a quality control measure and a means of ensuring program compliance. Audits will be conducted on adjudicated applications meeting certain criteria, as well as on randomly-selected applications. In the event of an audit or WHD investigation, employers will be required to provide information supporting the attestations made in the application. Failure to meet the required standards or to provide information in response to an audit or investigation may result in an adverse finding on the application in question, initiate Departmental supervised recruitment in future applications, and penalties.[4]

As stated in the NPRM, the Department expects the modernized processing of applications will yield a reduction in the overall average time needed to process H–2B labor certification applications. This process is expected to lead to greater certainty and predictability for employers by reducing processing times which have exceeded our historical 60-day combined State and Federal processing timeframe.

II. Discussion of Comments on the Proposed Rule

In response to the proposed rule, the Department received 134 comments, of which 88 were unique and another 46 were duplicate form comments. Commenters represented a broad range of constituencies for the H–2B program, including individual employers, agents, industry coalitions and trade groups, advocacy and legal aid organizations, labor unions, a bar association, congressional oversight and authorizing committees, and individual members of the public.

The Department received comments both in support and opposition to the proposed regulation. Comments supported, for example, the anticipated efficiencies of the proposed streamlined process and the potential conversion to electronic filing. Broadly, other commenters opposed the rule because they felt it would undermine program integrity or weaken worker protections and U.S. worker access to job opportunities. Still others believed the rulemaking untimely, given the general weakening of the economy, or that the proposed rule failed to address what they believed to be key problems underlying the program. Several of those problems, such as the annual cap of 66,000 H–2B visas per year, are statutory and cannot be changed through regulation.

In addition, as described in greater detail below, the Department received comments raising a variety of concerns with specific proposals and provisions within the rule. After reviewing those comments thoughtfully and systematically, the Department has modified several provisions and retained others as originally proposed in the NPRM.

Provisions of the NPRM that received comments are discussed below; provisions that were not commented on or revised for technical reasons have been adopted as proposed. The Department has made some technical changes to the regulatory text for clarity and to improve readability, but those changes were not designed to alter the meaning or intent of the regulation.

A. Section 655.2—Territory of Guam

In the Final Rule, the Department has revised the discussion on the authority of the Governor of Guam to clarify that the enforcement of the provisions of the H–2B visa program in Guam resides with the Governor, pursuant to DHS regulations.

B. Section 655.4—Definitions

Of the definitions proposed in the NPRM, comments were received on the definitions for "agent," "attorney," "employ," "employer," "full time," "representative," and "United States worker."

The proposed rule defined an agent as "a legal entity or person which is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and is not itself an employer as defined in this subpart. The term 'agent' specifically excludes associations or other organizations of employers." In response to comments, the Department has corrected the typographical error and replaced "agricultural" with "nonagricultural."

Some commenters supported the proposed definition of agent with regard to its barring of associations or organizations of employers. One bar

[4] Further sanctions may be imposed by DHS. See 8 U.S.C. 1184(c)(14).

association commented there had been many abuses by agents in the past, including the unauthorized practice of law, and recommended the Department adopt the definition under DHS regulations at 8 CFR 292.1. We have reviewed the guidelines under that section and concluded it is inappropriate for the labor certification process. The standard set by 8 CFR 292.1 is not tailored to the Department's needs. For example, it includes, among others, law students and "reputable individuals." We have determined such persons may not be appropriate to practice before the Department, in particular for purposes of foreign labor certification activities. That definition was designed to fit the needs of another Federal agency and would eliminate many current individuals who act on behalf of employers in the labor certification process with the Department.

The Department acknowledges that allowing agents who are not attorneys does not fit into the categories recognized by DHS and creates a difference between the two agencies. The Department has permitted agents who do not meet these criteria to appear before it for decades. Agents who are not attorneys have represented claimants before the Department in a wide variety of activities since long before the development of H–2A program, and DOL's programs, where they intersect with those of DHS, permit a broader range of representation. To change such a long-standing practice in the context of this rulemaking would represent a major change in policy that the Department is not prepared to make at this time and was suggested in the NPRM seeking comments. Consequently, the Department has not adopted this recommendation. The Department will maintain its long-standing practice and policy with respect to who may represent employers.

For greater clarity, a definition for "Administrator, Wage and Hour Division (WHD)" has been added to the definition section of the regulation to distinguish this official from the "Administrator, Office of Foreign Labor Certification (OFLC)." Regulatory text has been added where needed to distinguish between those officials.

The proposed rule defined an attorney as:

> Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the U.S. Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an attorney or representative for an employer under this part; however, an attorney who acts as a representative must do so only in accordance with the definition of "representative" in this section.

In the Final Rule, the Department has reworded the definition to provide more clarity regarding the bodies or courts that could suspend or disbar an attorney. The Department has also revised the final sentence in the definition to read: "Such a person is permitted to act as an agent or attorney for an employer and/or foreign worker under this subpart."

In the NPRM, the Department added a definition for "employ" and made revisions to the definition of "employer." A trade association suggested that the Department eliminate the definition of "employ" but retain the definition of "employer," stating that the definition of "employ" adds nothing to clarify status or legal obligations under the H–2B program and insinuates broad legal concepts that add unnecessary confusion. As suggested by commenters, the Department has deleted the definition of "employ." We agree this definition did not provide any additional clarification regarding status or legal obligations related to the H–2B program and may generate some confusion with other statutes.

The Department received comments that the requirement for a Federal Employer Identification Number (FEIN) as incorporated in the definition of "employer" could be problematic for some employers. One commenter recommended the use of the DUNS number as a complement to the FEIN. The "data universal numbering system" (DUNS), which is operated by Dunn & Bradstreet, issues nine-digit numbers that serve as unique identifiers and are used, in cases, by the Federal Government or individual businesses to track business entities. The Department has decided to retain the definition as proposed, and notes that it is easy for employers to obtain FEINs, which have the advantage of being assigned by the Internal Revenue Service, although in paragraph (1)(iii) of the definition we have added the phrase "for purposes of the filing of an application," to clarify the FEIN is information gathered specifically at the point of application for H–2B labor certification. In paragraph (1)(i) of the definition, the Department has replaced "may" with "must" to clarify U.S. workers must be referred to a U.S. location for employment.

Commenters supported the inclusion of a definition for "full time." The Department agrees with one commenter's assertion that, consistent with program practice, the definition should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week. The parameters set forth in the definition of "full time" refer to the number of hours that are generally perceived to constitute that type of employment, as distinguished from "part time," and are not a requirement that an employer offer a certain number of hours or any other terms or conditions of employment.

The Department has also made changes to the definition of a job contractor for purposes of clarity. The changes make clear that the job contractor, rather than the contractor's client, must control the work of the individual employee.

One trade association commented that to the extent the intent of the rule is to define the respective liability of agents and representatives, it should articulate a clear set of standards for liability. The association found the definition of "representative" to be problematic and suggested deleting or revising it. The commenter questioned whether the intent of the regulation was to make the representative liable for any misrepresentations in an attestation made on behalf of an employer. Because of potential overlaps with the definition and role of agent, the commenter also requested the rule clarify if, and under what circumstances, an agent is liable for activities undertaken on behalf of an employer. The commenter recommended the Department delete the provision on the representative's role in the consideration of U.S. workers, questioning what rationale the Department had for dictating under what circumstances an attorney or other person can interview U.S. applicants for the job, and why the Department is "singling out" attorneys within the definition.

The Department disagrees with the commenter's interpretation of the liability of an agent or attorney for the acts of the employer. The duties of an agent or attorney may vary widely and not all duties that an agent or attorney undertakes may lead to liability. The Department recognizes, however, that some of an agent's or attorney's duties in representing an employer may put the agent or attorney in the role of the employer and be a basis for assigning liability for the employer's acts or omissions. For example, in undertaking to represent an employer in the H–2A program, an agent or attorney not only performs administrative tasks but also

submits attestations regarding the employer's obligations under the program. Attorneys and agents undertake a significant duty in making such representations. They are, therefore, responsible for reasonable due diligence in ensuring that employers understand their responsibilities under the program and are prepared to execute those obligations. Agents and attorneys do not themselves make the factual attestations and are not required to have personal knowledge that the attestations they submit are accurate. They are, however, required to inform the employers they represent of the employers' obligations under the program, including the employers' liability for making false attestations, and the prohibition on submitting applications containing attestations they know or should know are false. Failure to perform these responsibilities may render the agent or attorney personally liable for false attestations. The Department has decided to retain the definition as proposed.

One commenter believed that the definition of "United States worker" presented in the NPRM was too narrow and that there are other persons in the United States legally entitled to work in addition to those in the categories listed. The Department disagrees and has retained the proposed definition, as it is inclusive and consistent with other provisions of immigration law and regulations that define U.S. workers and persons authorized to work in the U.S.

The Department also added definitions for the terms "Administrative Law Judge," "Chief Administrative Law Judge," "Department of Homeland Security," and "United States Citizenship and Immigration Services," mirroring the definitions in the Department's H–2A Final Rule. These terms and definitions were inadvertently omitted from the proposed rule.

The Department has added a definition of the term "*strike*" to the Final Rule. The definition clarifies that the Department will evaluate whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individualized, position-by-position basis.

The Department also has added a definition of "successor in interest" to make clear that the Department will consider the facts of each case to determine whether the successor and its agents were personally involved in the violations that led to debarment in determining whether the successor constitutes a "successor in interest" for purposes of the rule.

C. Section 655.5—Transition

The Department recognizes that implementing the provisions of the Final Rule may be somewhat difficult for employers who have already filed their applications with the SWA to begin recruiting U.S. workers. Even though the NPRM put current and future users of H–2B workers on notice regarding the Department's intention to publish a Final Rule, the rule represents a departure from the current administration of the program. H–2B employers, including those who expressed concern regarding the time frame for a Final Rule, will require some period of time to prepare and adjust their requests for nonimmigrant workers to perform temporary or seasonal nonagricultural services or labor, particularly in tandem with changes to DHS processing of cases, and understand how to complete the Department's new forms for requesting a prevailing wage and applying for temporary employment certification.

In response to comments, the Department is accordingly adopting a transition period, outlined in new § 655.5 (previously reserved). Employers filing applications for H–2B workers on or after the effective date of these regulations where the date of need for the services or labor to be performed is before October 1, 2009, will be required to obtain a prevailing wage determination from the SWA serving the area of intended employment, rather than the NPC, but must meet all of the other pre-filing recruitment requirements outlined in this regulation before an *Application for Temporary Employment Certification* can be filed with the NPC. However, employers filing applications on or after the effective date of these regulations where the date of need for H–2B workers is on or after October 1, 2009, must obtain a prevailing wage determination from the NPC and comply with all of the obligations and assurances detailed in this subpart. The SWAs will no longer accept for processing applications filed by employers for H–2B workers on or after the effective date of these regulations. Rather, the SWAs will assist the Department's transition efforts by issuing prevailing wage determinations where the employer's need for H–2B workers is prior to October 1, 2009. This will allow the rest of the pre-filing recruitment requirements, obligations and assurances to become effective immediately. During this transition period, the Department expects that SWAs will continue to allow employers to file prevailing wage requests on forms they currently use in other visa programs in order to minimize any confusion and expedite the prevailing wage review process.

In order to complete the processing of applications filed with the SWAs prior to the effective date of these regulations, the transition procedures require the SWAs to continue to process all active applications under the former regulations and transmit all completed applications to the NPC for review and issuance of a final determination. In circumstances where the SWA has already transmitted the completed application to the NPC, the NPC will complete its review in accord with the former regulations and issue a final determination. OFLC intends to conduct several national stakeholder briefings to familiarize program users with these requirements.

D. Section 655.6—Temporary Need

Congress mandated the H–2B program be used to fill only the temporary needs of employers where no unemployed U.S. workers capable of performing the work can be found. 8 U.S.C. 1101(a)(15)(H)(ii)(b). Therefore, as explained in the NPRM, the Department will continue to determine whether the employer has demonstrated that it has a need for foreign labor that cannot be met by U.S. workers and that the need is temporary in nature.

The controlling factor continues to be the employer's temporary need and not the nature of the job duties. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982); *cf. Global Horizons, Inc.* v. *DOL*, 2007–TLC–1 (Nov. 30, 2006) (upholding the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H–2A application).

DHS regulations at 8 CFR 214.2(h)(6)(ii)(B) provide that a petitioner's need be one of the following: (1) A one-time occurrence, in which an employer demonstrates it has not had a need in the past for the labor or service and will not need it in the future, but needs it at the present time; (2) a seasonal need, in which the employer establishes that the service or labor is recurring and is traditionally tied to a season of the year; (3) a peakload need, in which the employer needs to supplement its permanent staff on a temporary basis due to a short-term demand; or (4) an intermittent need, in which the employer demonstrates it occasionally or intermittently needs temporary workers to perform services or labor for short periods.

As proposed in the NPRM, for purposes of a one-time occurrence, under this Final Rule the Department will consider a position to be temporary

as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need—as demonstrated by the employer's attestations, temporary need narrative, and other relevant information—is less than 3 consecutive years. This interpretation is consistent with the rule proposed by USCIS on August 20, 2008, 73 FR 49109, which is being finalized in conjunction with this regulation.

Consistent with the final USCIS regulations, the Department proposed—and the Final Rule permits—a one-time occurrence to include one-time temporary events that have created the need for temporary workers for up to 3 years. The Final Rule requires those employers to request annual labor certifications based on new tests of the U.S. labor market. As stated in the NPRM, we believe this is the best method by which to ensure U.S. worker access to these job opportunities, but recognize that an employer's need for workers to fill positions could, in some cases, last more than one year.

The Department received a number of comments in response to the proposed expansion of the one-time occurrence definition. A job contractor commented that it did not believe the Department needed to specifically authorize the possibility of a 3-year, one-time need, since it could be inferred as already having the authority to certify such situations as long as the employer's situation as described in the application was compelling. However, the commenter believed that establishing a maximum 3-year stay may be limiting under certain circumstances such as rebuilding after natural disasters. It also creates confusion and complexity for the employer applicants who may not understand the distinction between a 3-year labor need broadly speaking and a one-time occurrence. Under the NPRM and this Final Rule, the extension of the temporary need definition from 1 year or less to potentially up to 3 years does not apply to all categories of need. The Department believes employers should understand that an H–2B visa will only be granted for longer than 1 year in the case of a one-time occurrence.

Neither the Department nor DHS is changing the long-established definition of one-time occurrence which encompasses both unique non-recurring situations but also any "temporary event of a short duration [that] has created the need for a temporary worker." For example, an employer could utilize the H–2B program to secure a worker to replace a permanent emplnyee who was injured. Further, if that permanent employee, upon returning to work, subsequently suffered another injury, the same employer could utilize the H–2B program again to replace the injured employee on the basis of a one-time occurrence. A one-time occurrence might also arise when a specific project creates a need for additional workers over and above an employer's normal workforce. For example, if a shipbuilder got a contract to build a ship that was over and above its normal workload, that might be a one-time occurrence. However, the Department would not consider it a one-time occurrence if the same employer filed serial requests for H–2B workers for each ship it built.

The NPRM required that employers request recertification annually where their one-time occurrence extends beyond 1 year. The Department agrees with public comments that, where the need is one-time only, the added burden and expense of an additional labor market test does not make sense where the total period of need is less than 18 months. Therefore, an employer with a one-time need that has been approved for more than 1 year but less than 18 months will receive a labor certification covering the entire period of need, and will not be required to conduct another labor market test for the portion of time beyond 12 months. An employer requesting certification based on a one-time occurrence it expects to last 18 months or longer, however, will be required to conduct one or more additional labor market tests.

A number of individual small business commenters were concerned that the proposed changes went beyond the original intent of the program and would leave the seasonal and peakload businesses for which it was intended without adequate numbers of visas. They raised longstanding concerns with what many believe is an arbitrarily low visa cap and the strong competition among industries for the limited visas. These commenters posited that expanding the term to 3 years would open up the program to a wider number of industries, further increasing competition for visas and effectively crowding out those employers for which these commenters believe the visa was intended. One small employer thought it would allow high tech businesses to participate in the H–2B program to use up all the visas and leave other employers with real peakload needs wanting. This employer also thought it would create a security threat by letting visas be sold on the black market. SWAs commenting also questioned the change in definition as being what they described as a significant program change. While most employers of highly skilled workers currently avail themselves of the H–1B visa program, they are not precluded from seeking, as an alternative, H–2B nonimmigrant status, if they otherwise meet the requirements of the H–2B program. None of the changes proposed by the Department would make the H–2B visa program any more or less available to highly skilled workers or provide employers who might wish to use such persons as H–2B workers with any greater advantage than other H–2B employers. In addition, with respect to visas issued by the State Department based on an approved DHS petition, the Department is unaware of any contemplated change in this or the DHS rulemaking that would create an automatic 3-year H–2B visa. Depending on reciprocity schedules, under current State Department regulations, an initial H–2B visa is generally issued for a year or less, or for the validity period of the approved H–2B petition, but can be extended for additional periods of time to correspond to any period of time DHS might extend such H–2B petition. Nothing in this rule would change that.

Several Members of Congress submitted separate comments on behalf of congressional committees. One U.S. Senator opposed the expansion of the definition of a one-time occurrence as contrary to the 1987 legal opinion of the Department of Justice, Office of the Legal Counsel. The comment stated that the Department of Justice considered various views of the proposed construction of "temporarily" in the context of the H–2A visa program and declined to define temporary as up to 3 years. According to the comment, the Justice opinion concluded that the statutory text, Congressional intent, and sound policy compelled a definition of temporary to be 1 year or less for all H–2 classifications. The comment also pointed to the Department's and DHS's proposed rules on the H–2A program that retained the one year or less definition of temporary (absent extraordinary circumstances) as evidence that the current construction should be retained. The commenter was concerned that the regulation would lead to abuse of the H–2B program by encouraging some employers who want to take advantage of the program to characterize long-term or permanent jobs as temporary. The commenter believed that these longer-term jobs should be filled by U.S. workers and, if none are available, only then through the employment-based immigration visa process.

Several labor unions also commented on this provision, largely in opposition.

One believed the proposal to be at odds with years of precedent and immigration and workforce policy, as well as current law. The commenter asserted that expanding the definition conflicts with DHS regulations, runs counter to the purpose of the H–2B program, and undermines the Congressional mandate to protect U.S. workers. Another labor organization contended that if an employer's need is longer than a short duration it is not a temporary need, and a period longer than a year is not of short duration. This commenter opposed the inclusion of this provision and urged the Department to withdraw this proposed change. Another union proposed temporary employment be limited to six months and "certainly no longer than [1] year." Another labor organization opposing the proposed provision did not believe that the requirement that employers retest the labor market each year represented a meaningful safeguard for domestic workers, particularly if the Department were to adopt an attestation-based system where recruitment of U.S. workers is not actively supervised by the SWAs. It recommended the H–2B program be made consistent with the H–2A program concerning the definition of temporary.

Several worker advocacy organizations also opposed this provision, indicating their belief it was not in keeping with the objectives of the program and would open most construction jobs in the country to be potentially part of the program. An individual employer commented that seasonal should mean 8 months or less so as to not compete with local permanent jobs.

A law firm commented that the proposed changes went beyond what it believed Congress intended and claimed anecdotally it would directly and proportionally adversely affect the industries for which it felt the program was designed. It believed that the problems with the program are more associated with the delays and uncertainties related to the inadequate number of visas as well as inadequate budget and staffing at all levels of the application process. The commenter recommended these problems would be best addressed by Congress and by increased fees at each step. It also believed that this expansion of the definition would encourage additional industries, most notably the information technology industry, to participate and to put undue pressure on an already pressured program.

Conversely, several employer and trade associations supported the expanded provision. One employer association welcomed the change as long in coming. Another supported it as a means to provide greater flexibility across industries and regions. Still another recommended that the 3-year provision be expanded beyond "one-time need" to the other three categories of temporary need.

A legal association supported the proposal to expand temporary need but suggested the Department rethink the requirement that employers retest the market each year. According to the comment, requiring employers to get a new prevailing wage and perform additional recruitment and filing each year would increase workload for the Department, increase costs to employers, and fails to recognize the advantages of the employer having the availability of trained, experienced workers. It recommended that a reasonable alternative would be for employers to check the prevailing wage determination annually to ensure that the workers are being paid the appropriate wage but not to have to undertake further recruitment efforts.

Many SWAs commented on the proposed rule. On the issue of temporariness, one SWA stated its support for retesting the labor market each year. An employer association supported retesting the labor market each year only in situations where there was a significant time period beyond the ordinary 10-month period left on the labor certification. It believed that this requirement would be too onerous on employers if applied to jobs lasting only 18 months, for example.

Finally, a worker advocacy group recommended the addition of a process either through the Department or the SWAs under which workers could challenge the determination that the jobs are temporary.

The Department defers to the Department of Homeland Security and will use their definition of temporary need as published in their Final Rule on H–2B. Currently, that definition, including the four categories of need, appears at 8 CFR 214.2(h)(6)(ii), and requires the employer show extraordinary circumstances in order to establish a need for longer than 1 year. DHS's Final Rule amends 8 CFR 214.2(h)(6)(ii)(B) to eliminate the requirement for extraordinary circumstances and clarify that a temporary need is one that ends in the near, definable future, which in the case of a one-time occurrence could last longer than 1 year and up to 3 years. Accordingly, we have deleted the definitions we had in our regulatory text in the NPRM and instead provided a reference to the DHS regulations.

E. Section 655.10—Determination of Prevailing Wage for Labor Certification Purposes

1. Federalizing Prevailing Wage Determinations

The Department proposed a new reengineered system to federalize the issuance of prevailing wages, under which employers would obtain the prevailing wage for the job opportunity directly from the NPC. As proposed, the new federalized process would allow employers to file prevailing wage requests with the appropriate NPC—designated as the Chicago NPC for prevailing wage requests—no more than 90 days before the start of recruitment. The proposed rule also clarified the validity period for wage determinations. Based on annual updates to the Occupational Employment Survey (OES) database, and depending on the time of year that the prevailing wage determination (PWD) was obtained from the Department, relative to the date of the most recent update, the wage determination provided could be valid from several months up to 1 year. The NPRM sought comments from employers who had utilized the program in the past on the efficacy of this proposed action.

The Department received numerous comments on this new process. After consideration of all comments, we have decided to implement the PWD process as proposed in the NPRM. However, to reflect the transition from the current system to the new, the Final Rule now clarifies that employers with a date of need on or after October 1, 2009, must seek a PWD from the Chicago NPC prior to beginning recruitment, while employers with prior dates of need will continue to seek PWDs from the SWAs. However, consistent with the Department's intent to immediately implement the Final Rule, and as set forth in § 655.5 of this Final Rule, SWAs will be required to follow the procedures instituted under § 655.10 for any prevailing wage determination requests submitted on or after the date this Final Rule takes effect.

Overwhelmingly, commenters were concerned about the capability of the NPC to provide timely and accurate prevailing wage determinations. Commenters supporting the new centralized process included trade associations, employer-based organizations, businesses, and individual professionals with significant experience in the foreign labor certification field. Of those, some requested reassurance that the Department would allocate sufficient resources and training to the PWD

activity at the NPCs to prevent processing delays. They urged the Department to institute mechanisms to ensure consistency between NPCs and across job titles, descriptions, and requirements; and to offer comprehensive training to employers, attorneys, and agents prior to implementation.

Many commenters, including labor unions, advocacy organizations, academic institutions, and SWAs expressed concern that the NPC staff would not possess the same level of expertise, particularly locally-oriented expertise, required to provide accurate, context-appropriate prevailing wage determinations as the SWA staff. They believed this could lead to reduced scrutiny, inaccuracy, backlogs, and delays, and adversely affect U.S. worker wages and job opportunities. The SWAs that commented on this issue were concerned that transferring the determination to the NPCs would also degrade customer service, and some questioned whether OES really keeps pace with changes in local standards. One state has had success with its own system and recommended the Department replicate that system on a national scale.

One advocacy organization expressed the view that centralization would be particularly harmful to amusement park industry workers, which currently use a weekly rate rather than an hourly rate. One employer was concerned that NPC-issued PWDs would be inaccurate and biased in favor of higher wages, raising program costs. Several commenters opposed PWD federalization in its entirety and proposed full funding of SWAs for these activities. In the alternative, they recommended that, if the Department were to move forward, it hire staff with strong PWD backgrounds and create a separate PWD unit within the NPC.

To guard against potential delays, some commenters requested that a timeframe for the process be established, or recommended adjustments to the process as proposed. A small business coalition recommended the Department permit employers to recruit without first getting the PWD from the NPC, so long as the employer accompanied its H–2B application with a printout of a current and appropriate wage from O*NET, which is the Internet wage survey the Department updates on an annual basis. A large trade association made a similar recommendation, with a proviso that if the employer has not used the correct wage from the database, it would be required to restart the application process after obtaining a PWD from the NPC. The Department also received a suggestion that employers be allowed to get the OES rate themselves unless they want a safe harbor which would be provided by getting the wage rate from the NPC or SWA. Another commenter was concerned that employer surveys do not provide the same safe harbor as SWA determinations and another commentor was concerned that eliminating the SWA from the process meant that the safe harbor would also be eliminated.

This Final Rule establishes rules under which employers may provide their own information. Apart from those instances, the Department believes there is greater value and potential for greater consistency and efficiency in having the NPC provide the wage. The Department believes that continued oversight at the Federal level is essential to ensuring that the job opportunities are advertised and paid at the required wage and therefore does not adversely affect U.S. worker wages.

A number of commenters urged that within this new process, the Department provide a vehicle for communication between program users and NPC staff to resolve disagreements on the job opportunity or wage level and educate program users on the Department's methodology. One trade association recommended the Department disclose its methodology for a PWD upon request from an employer with sufficient time to avoid delaying the application. Other organizations conditioned their support of the new process specifically on the creation of a mechanism for communicating or interacting with the public. Some commenters observed that the appeal process for wage determinations can be quite lengthy, and not a viable option in the context of H–2B or H–1B, where timing is critical; those commenters were particularly concerned that without such communication the timeframe for resolving any prevailing wage determination issues would be lengthened.

The Department recognizes its responsibility to provide an efficient process for prevailing wage determinations. Now that the backlog in the permanent labor program has been eliminated, resources are being redirected to other OFLC priorities, including offsetting some costs associated with the re-engineering of the temporary labor certification programs. As the new program design is implemented, we will allocate available appropriated resources to key activities, including the PWD function. As part of this process, the Department will focus on identifying areas where improvements could be made, including developing and providing needed training. The Department will also look to its stakeholder community for input and suggestions for improvements.

The Department will provide stakeholder briefings on H–2B Final Rule, is updating its Prevailing Wage Guidance for agricultural and nonagricultural programs, and will provide additional training and educational material as appropriate.

The Department will, to the extent feasible and within available resources, seek to hire qualified staff, will train staff already on board, and if appropriate, will consider establishing a separate PWD unit at the Chicago NPC. In addition, the Department will strive to provide timely, appropriate guidance to program users and SWAs to ensure a successful transition and implementation. We remain confident that federalizing the prevailing wage application component will instill a high level of efficiency and consistency in the process which has been a past problem. This increased efficiency and consistency will help ensure more accurate wage determinations, which result in improved protections for U.S. workers.

As stated in the NPRM, the Department strongly believes that shifting wage determination activities to NPC staff will reduce the risk of job misclassification because of centralized staff experience, thereby not only strengthening program integrity, but also ensuring consistency in classification across States, resulting in improved protections for U.S. workers.

As discussed in the NPRM, the Department has received numerous reports that in cases where job descriptions are complex and contain more than one different and definable job opportunity, some SWAs have made inconsistent classifications that resulted in inconsistent PWDs. Furthermore, where H–2B workers are required to work in several different geographic areas that may be in the jurisdiction of several SWAs (examples include the New York, New Jersey, Connecticut "Tri-state Region" or the Washington, DC-Maryland-Virginia metropolitan area), questions have arisen about where to file a prevailing wage request and how that wage should be determined. Utilizing a federalized system will alleviate such confusion. Moreover, the Department's current prevailing wage guidance requires SWAs refer—with certain exceptions—to federally provided OES data to determine the appropriate prevailing wage for jobs. Therefore, the NPC can provide the data

and there is no requirement for any local input or expertise.

The Department understands the desire for a fixed timeframe within which an employer will receive a prevailing wage determination. The timeframe depends on a number of factors, including the volume and timing of requests received, the method by which the requests are received (whether paper or electronic), the complexity of the request, and the resources available. Nevertheless, the Department has committed as part of the Final Rule to processing employer requests for prevailing wage determinations within 30 days of receipt.

However, the Department acknowledges that this process of obtaining a prevailing wage may endure a period of processing time fluctuation as a result of the transition. We therefore recommend that, as an initial matter, employers filing H–2B applications should file a Prevailing Wage Determination Request, Form 9141, with the NPC at least 60 days in advance of their initial recruitment efforts. The Department will make every effort to process these requests within the 60 days. The Department will analyze its experience with application patterns and workload, as the NPCs take on the prevailing wage determinations in the other programs handled by OFLC. During that time, the Department will review not only the level of requests it receives, but the information contained in the requests and whether the information received is typically sufficient to be able to generate accurate prevailing wages, or whether employers are providing deficient information. The Department's intent is to substantially reduce the response time for prevailing wage determinations and to design procedures, based upon the results of its analyses to provide employers with greater certainty in their expectation of response time from the NPC.

One commenter thought the prevailing wages would be based on a national average as a result of the centralization in the NPC. That commenter misunderstood the proposal; the wages will continue to be based on applicable data for the area of intended employment. The Department did not propose any change to the methodology used to determine the wage rates under the H–2B program and continues to support the use of OES data as the basis for the prevailing wage determinations. The OES program produces occupational estimates by geographic area and by industry. Estimates based on geographic areas are available at the national, State, and metropolitan area levels. Industry estimates are available for over 450 industry classifications at the national level. The industry classifications correspond to the sector, 3, 4, and 5-digit North American Industry Classification System industrial groups. The OES program also provides data at the substate level in addition to the State level. Data is compiled for each metropolitan statistical area and for additional areas that completely cover the balance of each state. It also offers the ability to establish four wage-level benchmarks commonly associated with the concepts of experience, skill, responsibility and difficulty variations within each occupation.

In the Final Rule, the Department has revised § 655.10(d) to clarify that where the duration of a job opportunity is less than one year or less, the prevailing wage determination will be valid for the duration of the job opportunity.

2. Automating the PWD Process

Initially the PWD process will be a manual process. It is the Department's goal to allow the PWD activity eventually to be conducted electronically between the NPC and the employer. The Department sought comment from potential program users on all aspects of its PWD proposal, but in particular regarding the required use of an online prevailing wage system and corresponding form for interaction with the NPC.

The Department received several comments in support of an electronic process. One commenter suggested the centralization of prevailing wage determinations be delayed until the electronic process was available. Another commenter suggested the electronic process should not be mandatory for all employers, since not all employers have access to the Internet. One commenter expressed concern that employers would use an electronic system to "shop" for occupations with the lowest wages to use in describing their job opportunities. The Department disagrees with the suggestion we delay implementation of the prevailing wage function until an electronic version is available. If and when the Department implements an electronic application system, it customarily makes special provisions for those who cannot access the electronic system, and advises the public accordingly. The Department appreciates the input on an electronic system and will take the comments into consideration should a new system be proposed.

3. Extending the PWD Model to PERM, H–1B/H–1B1, E–3, and H–1C Programs

The Department received comments on its proposal to extend the federalized wage determination process to other permanent and temporary worker programs. Some believed that the Department should not include other programs in an H–2B rulemaking. One commenter suggested that the process should not be extended until the new system has proven to be workable. Another commenter was concerned that extending the process to these other programs would result in the total elimination of the States when enforcement capacity is best kept at the State level. One commenter who supported the federalization mentioned that the assignment of occupational codes from the Standard Occupational Classification (SOC) system is also key and should be reviewed. The SOC system is used by many Federal agencies to classify workers into occupational categories.

a. H–1B and PERM Programs

As proposed in the NPRM, for consistency and greater efficiency across non-agricultural programs, this Final Rule extends the new prevailing wage request processing model to the permanent labor certification program, as well as to the H–1B, H–1B1, H–1C and E–3 specialty occupation nonimmigrant programs. As stated in the NPRM, the new process will not alter the substantive requirements of foreign labor certification programs, and we anticipate that, at least in the foreseeable future, the methodology for determining appropriate wage rates will remain much the same as it stands today. Our intent is to modernize, centralize, and make the mechanics and analysis behind wage determination more consistent. Much as the SWAs do now, the NPCs will evaluate the particulars of the employer's job offer, such as the job duties and requirements for the position and the geographic area in which the job is located, to arrive at the correct PWD based on OES data, CBA rates, employer-provided surveys, or other appropriate information. The Department's current prevailing wage guidance for non-agricultural foreign labor certification programs has been in effect since 2005 and is posted in the form of a memorandum on the OFLC Web site. In the near term, the Department will update and formalize its guidance for making prevailing wage determinations to maintain some existing procedures and revise others such as to conform to these regulations. As program experience administering

the PWD process grows, the Department may revise its guidance to explain and assist employers in navigating the process.

To implement and standardize the new process, ETA has developed a new standard Prevailing Wage Determination Request (PWDR) form for employers to use in requesting the applicable wage regardless of program or job classification. As stated in the NPRM, the Department is considering means by which eventually such requests could be submitted, and a prevailing wage provided, electronically.

For purposes of the permanent labor certification (PERM) program, this rule amends the regulations at 20 CFR part 656 to reflect the transfer of prevailing wage determination functions from the SWAs to the NPCs and makes final the technical changes described in the proposed rule.

For purposes of the H–1B program, this rule amends the regulations at 20 CFR part 655 to reflect the transfer of PWD functions from the SWAs to the NPCs and makes final the technical changes described in the proposed rule. Department regulations covering the H–1B program also govern the H–1B1 and E–3 programs, which both require the filing and approval of a "Labor Condition Application," or LCA, rather than a "labor certification application." The Final Rule also amends § 655.1112 governing the H–1C program, to provide for the federalization of prevailing wage determinations.

As described in the NPRM and included in the Final Rule, under the new process, for purposes of H–2B job classifications, NPC staff will follow the requirements outlined under new §§ 655.10 and 655.11 when reviewing each position and determining the appropriate wage rate. These new regulatory sections are consistent with existing provisions at 20 CFR 656.40 and the Department's May 2005 Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, but would supersede current regulations and guidance for the H–2B program to the extent there are any perceived inconsistencies.

These new regulatory sections supersede current regulations and guidelines for all prevailing wage requests in the H–1B, H–1B1, E–3 and PERM programs made on or after January 1, 2010, and for H–1C prevailing wage requests made on or after the effective date of this Final Rule. The Department appreciates that employers will require some time to become accustomed to the new method of securing a prevailing wage determination. The SWAs will also need a time of transition to complete pending prevailing wage determination requests, just as the NPC will require a corresponding time to fully implement the new form and process. The Department believes keeping PWD activities with the SWAs for PERM, H–1B and related programs until January 2010 will facilitate the transition of Federal staff and program users to complete federalization of prevailing wage determinations. Therefore, the Chicago NPC will begin to provide prevailing wage determinations in programs other than H–2B and H–1C on January 1, 2010. Given the limited size of the H–1C program, and the possibility it may sunset in 2009, the Department believes it can begin processing prevailing wage determination requests shortly after this Final Rule takes effect. Prevailing wage requests under the H–1C program made prior to the effective date of this Final Rule will be governed by the Department's current procedures and its 2005 guidance. Any prevailing wage requests for other non-H–2B programs governed by this regulation made prior to January 1, 2010, must be submitted to the SWA having jurisdiction over the area of intended employment and will be valid for the period listed on the determination issued by the SWA. Prevailing wage determinations issued prior to January 1, 2010, by a SWA will be valid after October 1, 2010, if so determined by the SWA issuing them, and fully enforceable as determined by the applicable regulation (H–1B, H–1B1, E–3, H–1C or PERM).

b. H–1C Program

In the same way that the Department is in this Final Rule establishing national processing for the obtaining of prevailing wages through its National Processing Center for both H–1B (and by extension H–1B1 and E–3) and PERM, it will also amend its H–1C regulations to incorporate the same changes. This program, whose prevailing wage processing amendments were inadvertently removed from the NPRM, previously lapsed, but was reauthorized in December 2006, and is scheduled to sunset again in December 2009.[5] The Department has determined that it is administratively prudent to move the prevailing wage determination function to the Chicago NPC in the H–1C program as in the other programs. This affects a very small number of employers (only 14 hospitals are eligible to participate) and is consistent with the reasoning for federalizing prevailing wage determinations that applies to the other programs. As stated in the preamble to the NPRM, the conversion to a federalized prevailing wage system has no effect on the substantive requirements of foreign labor certification programs or on the methodology by which the NPC will determine the prevailing wage for workers to be admitted under any of the applicable visas. This applies equally to H–1C. In fact, the majority of prevailing wage determinations in the H–1C program are based on the wages contained in collective bargaining agreements, making the need to obtain a wage determination by the NPC frequently unnecessary. Facilities may begin submitting H–1C prevailing wage requests to the Chicago NPC on the date this Final Rule takes effect.

4. Section 655.10(h)(3)—Paying the Highest Prevailing Wage Across MSAs

As proposed in the NPRM, this Final Rule requires that, where a job opportunity involves multiple worksites in areas of intended employment and cross multiple Metropolitan Statistical Areas (MSAs) in multiple counties or States with different prevailing wage rates, an employer must pay the highest applicable wage rate of the applicable MSAs throughout the term of employment. The U.S. worker responding to recruitment and the foreign H–2B worker are entitled to know and rely on the wage to be paid for the entire period of temporary employment.

The Department received comments on this requirement, both in support and in opposition. One trade association supported the proposal, concluding it would strengthen protections for U.S. workers while not adding burden to its members, whom it said already paid the highest prevailing wage rate in every MSA. A number of other employer associations opposed the proposal, stating it was arbitrary, unfair, would artificially increase costs for H–2B labor, and would undermine the basic decision-making of many employers, who locate in areas with low labor costs in order to save money.

The Department has decided to retain the requirement that employers advertise and pay the highest of the applicable prevailing wages when the job opportunity involves multiple worksites across multiple MSAs with varying prevailing wage rates for that occupation and at those worksites. This provision is retained because it provides greater consistency and predictability

[5] The Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Public Law 109–423, took effect December 20, 2006. The Act reauthorized the H–1C nonimmigrant nurses program, a program originally created by the Nursing Relief for Disadvantaged Areas Act of 1999.

for both employers and the workers and ensures that U.S. workers who are interested in the job opportunity would not be deterred due to varying wage rates. It also ensures greater protection for workers against possible wage manipulation by unscrupulous employers.

5. General Process or Data Integrity Concerns

Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H–2B workers at or above the wage (presumably the adverse effect wage rate) for H–2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders.

The Department appreciates these suggestions and concerns. However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking. The Department notes that the proposed procedures that were retained in the Final Rule already cover the use of wages specified in a collective bargaining agreement. Similarly, these procedures provide that an employer may use the Davis-Bacon wage and that such use is at the employer's option unless the employer is a Federal construction contractor. There is a similar provision that applies to Service Contract Act wage rates.

Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

F. Section 655.15—Employer Conducted Pre-Filing Recruitment

Under the Final Rule, employers will continue to be required to test the labor market for qualified U.S. workers at prevailing wages no more than 120 days before the date the work must begin ("date of need"). This will ensure the jobs are made available to U.S. workers most likely to qualify for the positions in question. As described in the NPRM and finalized under this rule, U.S. worker recruitment will continue to consist of prescribed steps designed to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market. These steps are similar to those required under the current H–2B program. However, application processing and consistency will be improved by having employers conduct the recruitment before forwarding the recruitment report and application to the Department for review. Additionally, we will continue the Department's current requirement that recruitment take place no more than 120 days before the date of need to ensure jobs are advertised to U.S. workers with adequate notice.

This Final Rule retains the requirement in the proposal that employer recruitment efforts be documented and retained for production to the Department or other Federal agencies. As stated in the NPRM, the recruitment documentation requirements will be satisfied by copies of the pages containing the advertisement from the newspapers in which the job opportunity appeared and, if appropriate, correspondence signed by the employer demonstrating that labor or trade organizations were contacted. Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet showing the beginning and the ending date of the posting or a copy of the job order provided by the SWA with the dates of posting listed, or other proof of publication from the SWA containing the text of the job order. However, in response to public comments, the Final Rule requires record retention for 3 years, which is 2 years less than the Department originally proposed.

As proposed, the Final Rule permits employers to place their own newspaper advertisements. The Department has revised the proposed requirement of three advertisements and will in this Final Rule revert to the current requirement of two advertisements. The Department, however, has maintained in this Final Rule the proposed requirement that one of the two advertisements must be placed in a Sunday edition of a newspaper closest to the area of intended employment. The Department has also added a clarification that the newspaper chosen needs to have a reasonable distribution.

The Department received several comments that supported the shift to a pre-filing recruitment model. One of these commenters recommended that the job order process should also be centralized or that timelines for posting job orders should be established and SWAs should have staff dedicated to working with H–2B job orders. The centralization of the job order process was not envisioned by this regulation, and would require separate rulemaking. Moreover, posting job orders and referring individuals to those jobs is a core function of the SWAs and one that remains at the local level in this rule. Additionally, the Department believes the SWAs must have the flexibility to assign their limited resources based on needs and priorities and declines to establish a timeline for SWAs to post job orders.

The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters who were opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late arrival of H–2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not suitable when serious job seekers are looking for

temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further concerned that the U.S. workers who are hired that far in advance of the date of need are not reliable and will not report for work. In contrast, two commenters suggested a longer recruitment period—one recommended 180 days in advance of the date of need—to provide employers with greater flexibility. The Department declines to extend the period of recruitment to 180 days prior to the date of need because we do not believe recruitment that far in advance would be effective given the concerns expressed by some of the commenters and our own extensive program experience.

One commenter was concerned that the proposed pre-filing recruitment period, when combined with a prevailing wage determination request submission 90 days prior to the recruitment start date, advanced the timeframe for beginning the application to more than 6 months prior to the date of need. This commenter stated this was not characteristic of a user-friendly program. The Department understands that there are trade-offs when designing a new system. In this case, in order to provide the employer more flexibility and eliminate an extra layer of government bureaucracy, the process must begin earlier.

One commenter was concerned about the validity of the pre-filing recruitment when, after completing the recruitment and submitting the application, the employer's needs change and it requires a modification to a term or condition on the application. This commenter questioned whether the recruitment would be considered a valid test of the labor market since, unlike the current process, the underlying application and job order will not have been approved prior to the recruitment effort. The commenter recommended that the Department provide in the regulation that as long as the recruitment was conducted based on the job description and offered wage as determined by the CO and the job order was accepted by the SWA, the recruitment would be considered valid irrespective of any required modifications. It is unclear what kind of modifications would be warranted and, therefore, the Department cannot respond directly to this comment. For example, if a timely-filed application requires a technical modification, but the modification cures the defect and allows the application to resume processing, then the recruitment will continue to be valid for as long as the petition is pending at the NPC and valid for purposes of a final determination. However, if an employer's needs change in a way that requires a substantive correction in one or more key terms and conditions of employment—for example, wages or occupation—the NPC will require that the position be readvertised. Changes in terms of employment contained in the underlying job offer will trigger a requirement for a new labor market test.

The Department's requirement that the employer submit an acceptable job order to the appropriate SWA for posting mandates that the employer complete and submit information regarding all of the job duties and terms and conditions of the job offer. The job duties, the minimum qualifications required for the position (if any), any special requirements, and the rate of pay. This information is normally submitted to the SWA for acceptance prior to the employer's recruitment; as long as the employer's advertisements do not depart from the descriptions contained in the accepted job order, they will be deemed acceptable by the Department. At the same time, the SWA will be the arbiter of the job's acceptability for the job order, and as the job order must be accepted prior to the commencing of recruitment in this Final Rule, all recruitment must reflect the job as accepted by the SWA as well.

The Department has decided to eliminate the document retention requirement in its entirety with respect to applications not certified; therefore, any employer whose application has been denied can discard the records relevant to the denied application immediately upon receiving the denial notice or whenever the decision becomes final if the employer appeals the decision. If the denial is overturned, the application becomes subject to the document retention requirements for approved cases. The Department determined that a document retention requirement in such cases serves no governmental purpose and is unnecessarily burdensome on employers. The Department would, in virtually all such cases, already have copies of the employer's supporting documentation rendering such a retention requirement unnecessary.

1. Section 655.15(g)—Unions as a Source of Labor

As proposed, the rule would have required that if the job opportunity were in an industry, region and occupation in which union recruitment is customary, the appropriate union organization must be contacted. A number of commenters were concerned that the proposed provision placed too great a reliance on the employer's ability to determine what the Department will later decide is "appropriate for the occupation and customary to the industry and area of intended employment." One of these commenters suggested that even if contacting a union may be appropriate in some industries, it would be entirely inappropriate in the construction industry and, at a minimum, the construction industry should be expressly excluded from this requirement under a Final Rule. Another commenter suggested that the requirement was unnecessary, as the required newspaper advertising would reach the same pool of applicants. Another commenter believed the requirement was not authorized by statute and the Department has no basis to impose it. Additionally, the commenter expressed concern that the requirement also has the potential to subject non-unionized employers to "salting" campaigns, during which union organizers retain employment in union shops for the sole purpose of organizing the workforce. According to this commenter, the requirement could unfairly and unnecessarily inject the Department into an area in which it should not be involved.

One specialty bar association opined that the requirement to use unions as a recruitment source would be unworkable in practice, stating that in their experience, unions will not refer workers to non-union shops. The commenter recommended the regulation instead use the approach of the permanent labor certification program, which requires union contact for unionized employers only.

The Department has considered these comments and agrees with the many concerns raised about the proposed requirement, in particular concerns about vagueness and ambiguity, and the dilemma employers would face in trying to interpret and implement the requirement. Accordingly, we have revised the provision to require an employer to contact a labor organization only in cases where the employer is already a party to a collective bargaining agreement that covers the occupation at the worksite that is the subject of the H–2B application. The employer's obligation is only to contact the local affiliate of labor organization that is party to the existing collective bargaining agreement that covers the occupation at the worksite that is the subject of the H–2B application.

2. Section 655.15(i)—Referral of U.S. Workers and SWA Employment Verification

To strengthen the integrity of the Secretary's determination of the availability of U.S. workers, and to help bolster employers' confidence in their local SWAs and the H–2B program, the Department proposed that SWAs verify the employment eligibility of U.S. workers they refer for nonagricultural employment services with the SWA. The Department received a significant number of comments on the practicality of this provision.

Comments on this subject were received from national associations, numerous SWAs, several labor advocacy organizations, and members of Congress. Commenters generally opposed the proposal for a variety of legal, programmatic, resource-related, and policy-based reasons.

Most of the commenters were SWAs that noted the burden this new provision would create. Many saw it as an unfunded Federal mandate in violation of the Unfunded Mandates Reform Act. More than one referred to the Department's recent inclusion of the requirement as a condition for receiving further labor certification grant funding.

As stated in the preamble to the NPRM, the Department is not insensitive to the resource constraints facing state agencies in their administration of the H–2B program. However, as we stated in the NPRM, we do not believe that the requirement will result in a significant increase in workload or administrative burden not covered by Department-provided resources.

In addition, notwithstanding funding limitations, there is a strong, longstanding need for a consistent verification requirement at the State government level. The Department is not leaving States to their own devices. Precisely to ensure that available Federal funding supports verification activities, the Department has added the verification requirement as an allowable cost under the foreign labor certification grant agreement. The Department also funds State employment services under the Wagner-Peyser Act, and for many years States have made Wagner-Peyser grant funding a part of their annual financial plan. To the extent that State functions related to foreign labor certification depend extensively on activities that are already part and parcel of the employment service system, State labor agencies can continue to rely on Wagner-Peyser to support that portion of activity. Ultimately, while cognizant of the challenges posed by funding limitations, we expect States to comply as they do with other regulatory requirements and other terms and conditions of their foreign labor certification grant.

SWAs also expressed concern about possible discrimination suits. The requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. The eligibility requirement is similar to verification requirements to gain access to other similar public benefits.

One SWA said it would be impossible to implement verification of work eligibility because they have a virtual one-stop system that is self-service for both employers and job seekers and the SWA would be unable to certify that applicants referred to those job orders are employment-eligible. While we do not disagree that an in-person verification requirement may impact the decisions of a limited number of otherwise eligible workers, such impact does not outweigh the significant value of verification. Moreover, SWAs can respond to any possible inconvenience to workers by designating or creating additional in-person locations where eligibility can be verified. This is not a problem unique to SWAs—workers may be required to travel great distances to reach a prospective employer, who then (absent a SWA certification) would be required to verify work eligibility. In the end, although employment eligibility verification does require some amount of extra time and effort, the Department has determined that simple convenience must cede to the overarching goal of a legal workforce and has drafted its regulations accordingly.

Several SWAs also pointed out that under the new regulations it will be impossible to identify H–2B job orders, especially now that the SWA will no longer receive a copy of the application or determine prevailing wages and be only responsible for placing the job order. The Final Rule now requires the job order carry a notation identifying it as a job order to be placed in connection with a future application for H–2B workers.

Several other commenters supported the contention made by the SWAs that this requirement will drain SWA resources. A few commenters seem to have interpreted this requirement as mandating the use of the "E-Verify" electronic system. However, although both the NPRM and the Final Rule require the use of the DHS process, which requires the completion of I–9 forms and process, the use of the electronic E-verify system is optional.

The Department's expectation is that SWAs will not expend public resources to refer undocumented workers to H–2B job opportunities. The employment verification provisions included in this regulation are part of a concerted effort—one that includes regulation, written guidance, and ongoing outreach and education—to address longstanding weaknesses and to strengthen the integrity of the program.

3. Section 655.15(h)—Layoff Provisions

Under the NPRM, an employer seeking to employ H–2B workers would have been required to attest that it is not displacing any similarly employed permanent U.S. worker in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H–2B worker(s). The Department received a number of comments from various groups on this provision. We have addressed those below, in conjunction with comments on the layoff provisions at § 655.22(k).

G. Section 655.17—Advertising Requirements

As proposed in the NPRM, the Final Rule requires employers to advertise for available U.S. workers. The advertisement must: (1) Identify the employer with sufficient clarity to notify the potential pool of U.S. workers (by legal and trade name, for example); (2) provide a specific job location or geographic area of employment with enough specificity to apprise applicants of travel or commuting requirements, if any, and where applicants will likely have to reside to perform the services or labor; (3) provide a description of the job with sufficient particularity to apprise U.S. workers of the duties or services to be performed and whether any overtime will be available; (4) list minimum education and experience requirements for the position, if any, or state that no experience is required; (5) list the benefits, if any, and the wage for the position, which must equal or exceed the applicable prevailing wage as provided by the NPC; (6) contain the word "temporary" to clearly identify the temporary nature of the position; (7) list the total number of job openings that are available, which must be no less than the number of openings the employer lists on the application (ETA Form 9141); and (8) provide clear contact information to enable U.S. workers to apply for the job opportunity. The advertisement cannot contain a job description or duties which are in addition to or exceed the duties listed on the Prevailing Wage Determination Request or on the application, and must not contain terms and conditions of

employment which are less favorable than those that would be offered to an H–2B worker.

The Department received multiple comments on the newspaper advertising requirements. Several commenters believed that the requirements, especially the requirement for three ads that was proposed in the NPRM (rather than the two required under the current program), would increase employer costs and time devoted to the application process but not yield additional U.S. workers. The requirement for advertising in a Sunday edition of a newspaper was seen as particularly objectionable due to the higher costs for Sunday ads and the belief that many nonprofessional workers do not read Sunday newspaper editions. Some commenters suggested employers should have the flexibility to use other recruitment methods, such as Web sites that have proved successful in locating seasonal workers. Others were concerned that without SWA guidance, employers would have to guess as to the correctness of their ads, risking that if the CO subsequently determined there were errors in the advertisements, it would be too late to get the workers needed. One commenter was concerned that no process was provided for requiring an employer to revise its ad if the content was determined to be unduly restrictive.

As previously discussed, this Final Rule requires two newspaper advertisements which must include one Sunday edition. Sunday editions have traditionally provided the most comprehensive job advertisements and many U.S. workers potentially seeking employment would normally choose the Sunday paper to review. Employers can, however, always conduct more recruitment than is required, such as posting the opportunity on job search Web sites.

One commenter inquired about the process for employers to follow in selecting an alternate publication in lieu of one of the newspaper ads. Other commenters were concerned about the choice of the specific newspaper in which to advertise and believed that the NPC would not be able to determine the most appropriate newspaper in all cases. One commenter suggested that the SWA should be involved in the process and provide guidance regarding newspaper choices. Another commenter asked whether there would be specific guidance regarding advertisements for live-in jobs, such as those for housekeepers, child monitors, and similar positions. The Department believes that staff at the NPC will be able to handle such issues. The Department declines in the Final Rule to specify the requirements to a high level of detail, as appropriate publication may vary, for example by industry or industry practice, and as the Department normally issues such guidance in the form of Standard Operating Procedures or other policy guidance.

H. Section 655.20—Direct Filing With the NPC and Elimination of SWA Role

Consistent with the proposed rule, the Final Rule eliminates the role of the SWAs in accepting and reviewing H–2B labor certification applications. Once the Final Rule is effective, employers will file H–2B applications directly with the NPC, consistent with the transition provisions of the regulation and with the Department's specialization of its two processing centers effective June 1, 2008. Employers with dates of need prior to October 1, 2009, will submit prevailing wage determination requests SWA, which will process them under the PWD procedures established under § 655.10 of this Final Rule. In the long term, under these regulations, each employer will continue to be required to place a job order with the appropriate SWA as part of pre-filing recruitment, and SWAs will continue to place H–2B-associated job orders in their respective Employment Service systems. This proposal received comments from a broad range of constituencies, including employers, employer associations, advocacy organizations, labor unions, State agencies, and elected officials. Most of the commenters opposed this provision.

Many commenters remarked that the elimination of the SWA portion of the process only shifted activities previously performed by the SWAs to the NPCs without actually improving the process. These commenters believed that eliminating the duplicate SWA review and increasing the Federal role in reviewing applications would result in increased delays, particularly when the Department has acknowledged that its funding has not kept pace with increased workloads in the H–2B program. Others also mentioned possible processing delays and were especially concerned that those industries with later dates of need could be locked out of the program.

Other commenters were concerned the new process would result in the loss of local labor market and prevailing practice expertise in the review process, including checks and balances now in the system, and would increase the potential for fraud. These commenters asserted that the knowledge and expertise of local staff in reviewing and processing applications was essential to the integrity of the H–2B certification process. Some commenters also criticized the NPCs for what they view as "ignoring their own regulations" and "misconstruing the certification process." Several commenters also believed elimination of the duplicate SWA review would result in decreased assistance for employers. One SWA stated that employers would be left without a source for guidance which would drive up the demand for agents, thereby increasing the costs to employers. An employer expressed the opinion that the new process would replace longstanding relationships with SWA employees and reliable determinations with unpredictable determinations and potentially overly stringent penalties.

The Department remains committed to modernizing the application process and continues to believe that the submission of applications directly to the NPC is the most effective way of accomplishing this goal. Processing of H–2B applications by NPC staff will allow for greater consistency for employers, regardless of their industry or location, in both the time required and quality of the application review. The Department believes that by specializing in H–2B application processing, NPC staff will have greater program expertise than SWA staff who are often required to implement a number of diverse programs during the course of their workday, and will generate additional efficiencies in application processing. Therefore, this federalized review of applications will lead to more efficient processing, greater consistency of review, and more effective administration. It will also enable the Department to better identify and implement program improvements.

Eliminating the SWAs' participation in the application review process will provide more efficient review of applications, as well as greater consistency of review. The Department disagrees that NPC staff have insufficient knowledge to undertake this role given that they already perform it. In fact, NPC reviewers who currently review H–2B applications have, in some cases, more experience with such applications than many SWA staff.

Moreover, the SWAs have not been removed from the process—they will continue their traditional role in the recruitment process and working with employers on the specifics of the job order. SWAs will be responsible for clearing and posting job orders, both intrastate and interstate, thus reducing the risk for employers to make mistakes with respect to job descriptions,

minimum requirements, and other application particulars. SWAs will, as part of these duties, review the job offer, its terms and conditions, any special requirements, and the justifications as part of the SWAs' duties to clear and post such orders.

I. Section 655.20—Form Submission and Electronic Filing

The Final Rule requires employers to submit applications on paper, through an information collection (form) modified significantly from the current form to reflect an attestation-based filing process. As stated in the NPRM, the Department will consider in the future an electronic submission system similar to that employed in other programs administered by OFLC, should resources be made available.

The Department received a number of comments from SWAs, a specialty bar association, a large trade association, a small-business coalition, and several industry groups largely supportive of the potential conversion to electronic applications. One commenter encouraged prompt migration to electronic filing, as the commenter felt this would make program data easier to gather, more accurate, and more shareable across federal agencies. A few comments expressed concern that electronic filing would be mandatory for everyone, and recommended that, in the event the Department converted to electronic submission, it maintain paper filing as an option. Two commenters were concerned making electronic submission mandatory could cause undue hardship to employers that do not have Internet access, are not computer literate, or do not have access to a computer. One bar association recommended the Department not require electronic filing until the system was error-free, that any electronic filing system not include system-generated denials as the PERM system does, and that any defects receive an RFI. The Department takes seriously these recommendations. We will determine appropriate timing for the development and implementation of an electronic system based on program need and available resources. We have learned—as have programs users—from our experience with the electronic filing process used in the permanent program, and will apply those lessons to any system we institute for the H–2B program.

J. Section 655.21—Supporting Evidence of Temporary Need

As proposed, this Final Rule provides the employer a variety of options for documenting the basis of its temporary need, to be retained by the employer and submitted in the event of a Request for Further Information (RFI), a post-adjudication audit, a WHD investigation, or another agency investigation. As explained in the NPRM, for most employers participating in the H–2B program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll records for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked. Such records, however, are not the only means by which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application exists and is temporary in nature. Contracts and other documents used to demonstrate temporary need would be required to plainly show the finite nature of that need by clearly indicating an end date to the activity requested.

The Department's new H–2B temporary labor certification application form is designed to require both a short narrative on the nature of the temporary need and responses to questions to determine the time of need and the basis for the need. The narrative will enable the employer to demonstrate in its own words the scope and basis of the need in a way that will enable the Department to confirm the need meets the regulatory standard, with additional questions on the form providing context and clarification. If further clarification is required, the RFI process will be employed. The form also contains an attestation to be signed under penalty of perjury to confirm the employer's temporary H–2B need.

As explained in the NPRM and consistent with current program practice, employers should be wary of using documents demonstrating a "season" in general terms (hotel occupancy rates, weather charts, newspaper accounts); in the Department's experience, such generalized statements fail to link a season to a specific position sought to be filled by the employer, which is required under the program. The Department also recognizes that conventional evidence such as payroll information may not be sufficient to demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer's need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

K. Section 655.22—Obligations of H–2B Employers and Attestation-Based Application

The Department proposed, and this Final Rule institutes, the shift to an attestation-based filing system. The new application form contains a series of attestations to confirm employers' adherence to its obligations under the H–2B program. The information and attestations on the form will provide the necessary assurances for the Department to initially verify program compliance. As described in the NPRM, the Department anticipates the shift to an attestation-based application will have a number of benefits, including a reduction in processing times while maintaining program integrity.

The Department received numerous comments, many of them negative, on the move to an attestation-based application. Some commenters believed that an attestation-based application would reduce the role of the SWA and thus eliminate local expertise; decrease employer compliance; increase erroneous approvals; and increase the likelihood that the Department will simply "rubber stamp" the certifications and weaken U.S. worker protections. The Department disagrees with these assumptions and conclusions. The Department believes that an attestation-based application, backed by audits, is within the Secretary's statutory discretion to implement and is an effective means to ensure that all statutory and regulatory criteria are met and all program requirements are satisfied. Similar approaches have been used successfully by the Department in other contexts, such as in the current permanent labor certification process.

One commenter suggested the Department require that the employer always be the applicant, even if an agent is used, because neither an agent nor the employer would be able to attest to all of the required obligations. This commenter also feared that an employer could shield itself from responsibility by using an agent for such prohibited acts as requiring recruitment fees to be paid by the foreign worker. The Department disagrees with this commenter. In the H–2B program, the agent simply represents the employer in the labor certification process. The employer is ultimately responsible for its obligations under the program and it

is the employer who signs the application form, and attests to the veracity of the information provided and that it will meet all of its obligations.

One commenter appeared to confuse the H–2B and H–2A programs. This commenter referred to the 50 percent rule, an H–2A program feature, and requested that the Department include a grace period for a foreign worker to find another employer if dismissed under the 50 percent rule. In the current H–2A temporary agricultural program, employers must hire a qualified U.S. worker who applies for a position certified under a temporary labor certification, if that worker applies during the first half of the certified period of employment. The H–2B program has no such provision and the Department declines to impose one, especially as this was not proposed in the NPRM.

The Department received a number of comments on the specific obligations of H–2B employers outlined in the proposed rule. One commenter pointed out a semantic error in proposed § 655.22(a), which stated the employer must attest that "no U.S. workers" are available. The commenter correctly pointed out that an employer cannot possibly have such broad knowledge and that the statute does not require such knowledge. The Department has deleted that provision. There were other comments about word choice and semantics and, where appropriate, the Department has changed the wording to make the attestations easier to understand.

The Department has also added language to the provision, in § 655.22(a), that requires that H–2B job opportunities offer terms and working conditions that are "normal to U.S. workers similarly employed" to clarify that normal is synonymous with not unusual. This is within the range of generally accepted meanings of the term. See, e.g., Black's Law Dictionary 1086 (8th ed. 2004) ("The term describes not just forces that are constantly and habitually operating but also forces that operate periodically or with some degree of frequency. In this sense, its common antonyms are *unusual* and *extraordinary*."); Webster's Unabridged Dictionary 1321 (2d ed. 2001) (supplying "not abnormal" as one of several definitions). Thus, "normal" does not require that a majority of employers in the area use the same terms or working conditions. If there are no other workers in the area of intended employment who are performing the same work activity, the Department will look to workers outside the area of intended employment to assess the normality of an employer's proposed productivity standard.

Unless otherwise noted, no substantive change is intended. Below, we respond to comments on specific obligations and describe substantive changes made to those subsections. In cases where the Final Rule deletes or adds provisions, the numbering has changed accordingly from that published in the NPRM.

1. Section 655.22(a)—U.S. Worker Unavailability

The Department proposed that employers seeking to hire H–2B workers attest there were no U.S. workers in the area of intended employment capable of performing the temporary services or labor in the job opportunity. Comments on this provision reflected strong concern that employers cannot attest to the actual unavailability of U.S. workers, but simply that the employer has tested the labor market appropriately and in good faith to demonstrate that capable U.S. workers did not respond to its recruitment efforts or ultimately were not available (either due to lawful rejection by the employer, failure on the worker's part to follow through or remain on the job, etc.) to perform the labor or services. The Department agrees and has deleted this provision from the Final Rule.

2. Section 655.22(f)—Worker Abandonment and Employer Notification to the Department and DHS

The Department's NPRM would have required employers to notify the Department and DHS within 48 hours if an H–2B worker separated from employment prior to the end date of employment in the labor certification. This notification requirement would have also applied if the H–2B worker absconded from or abandoned employment prior to the end date of employment. This requirement was included to ensure that if the basis for the worker's status ended before the end date on the application, both DHS and the Department could take appropriate action to monitor the program.

The Department received a number of comments in opposition to this requirement, primarily from employers and employer and trade associations. Several employer associations shared the concern that, in their view, the requirement represented a new and unfair liability for employers, opening them up to potential legal action from H–2B employees if the employee left to pursue other legal employment before the end of the contract period. One association found it problematic, given the perception that this worker population is more transient than the workforce at large. It also was concerned about the administrative burden on employers to comply with the requirement. It asserted that employers were unlikely to know the real circumstances of the worker's departure, if it was a legal extension or change of status or something else. Consistent with a number of other comments either seeking or recommending clarification to the notice requirement, this association stated that such status determinations are complex legal issues and employers should not be required to make them. It also believed that the reporting requirement was unlikely to accomplish anything without imposing additional significant burdens on employers and that it was unlikely that DHS would pursue individuals who are the subject of these reports. A small business association agreed about the unreasonableness of the potential burden on employers and was concerned that the requirement would ask small businesses to become unpaid Immigration Service agents responsible for enforcing immigration laws.

A trade association found the required 48 hours for notification to be an extremely limited period of time for notification, and a burden on employers. It recommended that, if the requirement were continued, it should be extended to 30 days. Further, this trade association recommended that DHS create a simple reporting method to allow employers to provide the information directly through the Internet or by telephone. The requirement was described as too vague and not providing enough specifics as to when the employer would be required to do such notification.

An individual employer found insufficient safeguards in the proposal, as there was no indication of actions that the bureaucracy at the Department or DHS would take based on the information. The employer wanted the two departments to be more specific as to how the information was to be used.

An employer agent believed the requirement was inappropriate in these regulations, as it was tangential to the Department's role regarding the availability of U.S. workers or preventing adverse affect on U.S. workers, and believed that it created additional confusion and potential liability for employers. Similarly, an employer association thought the requirement inappropriate and did not clearly outline the process by which employers would make such notifications. Additionally, the employer association asked for

additional guidance as to what information would be required for employers to document separation or job abandonment and was concerned that violations of this provision could lead to debarment from future participation in the program.

The Department reviewed the comments received on this specific reporting requirement and the concerns raised by the employers and associations on its implementation. The Department acknowledges that many of these concerns have merit, and has therefore sought to provide clarifications and limitations in the Final Rule to address these concerns. The Department did not, however, discern sufficient justification from these comments to eliminate the requirement in its entirety. The notification is necessary in all circumstances because the early separation of a worker impacts not only the rights and responsibilities of the employer and worker but also implicates DOL's and DHS's enforcement responsibilities. Although any abscondment is a loss to the employer, the Government requires notification to be able to better track workers who are in the country on a temporary basis with limited work authorization.

The Department acknowledges the need for clarification in the provision to ensure that the 48-hour requirement begins to run only when the abandonment is actually discovered. The Department has therefore added language to the provision clarifying that the employer must notify DOL no later than 2 work days after such abandonment or termination is discovered by the employer. The Department has added further clarification to ensure that employers must meet the identical standards for notification to DOL as to DHS, so that an abscondment occurs when the worker has not reported for work for a period of 5 consecutive work days without the consent of the employer to that non-reporting. This is intended to clarify for the employer that the same standard of reporting applies across both agencies, making it easier on the employer to make the report. There is no requirement that the notification be made by certified mail, however. A file copy of a letter sent by normal U.S. mail, with notation of the posting date, will suffice. However, in addition, the Department revised the notification requirement to reflect a time period of no later than 2 work days after the employer discovers the employee has absconded, which, consistent with DHS, has been defined as 5 consecutive work days of not reporting for work. To make the standard further consistent across agencies, for purposes of this provision the Department will defer to DHS on the definition of the term "working day."

3. Section 655.22(g)—Deductions and Prohibition on Transfer of Costs

The NPRM prohibited deductions by the employer or any third party, including a recruiter, for any expenses including recruitment fees and any other deductions not expressly permitted by law. Both worker advocacy organizations and an employer of H–2B workers commented that the provision was confusing and ambiguous. Worker advocates objected that it was unclear whether employees could be required to pay recruiting costs directly, while an employer objected to the payment of recruiting costs that were not clearly defined in the proposal. We agree that the rule as proposed was confusing. The confusion resulted in part from the fact that employer cost shifting is addressed elsewhere in the regulations, in § 655.22(j). Further, cost shifting by third parties presents an identical problem under the H–2A program but was dealt with in a different manner in the NPRM. Accordingly we are revising the language concerning cost shifting by third parties to mirror § 655.105(p) of the H–2A Final Rule to read as follows: "The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2A workers to seek or receive payments from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A)."

The Final Rule makes clear that recruiters may not pass on expenses to H–2B workers. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported. The Department is concerned that workers who heavily indebt themselves to secure a place in the H–2B program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic. We believe that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country. Employers may easily band together for purposes of recruitment to defray costs. The fact that a recruiter is essential to the securing of such worker does not dissuade the Department from requiring the employer to bear the expense; rather, it underscores the classification of that payment as a cost allocable to the employer.

The Department recognizes that its power to enforce regulations across international borders is constrained. However, it can and should do as much as possible in the U.S. to protect workers from unscrupulous recruiters. Consequently, the Department is requiring that the employer make, as a condition of applying for labor certification, the commitment that the employer is contractually forbidding any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2B workers to seek or receive payments from prospective employees.

The Department has also revised this section in the Final Rule to omit restrictions on deductions that are already covered in § 655.22(j), and we are incorporating the following language which is identical to the language in 20 CFR 655.104(p) of the H–2A Final Rule: "The employer must make all deductions from the worker's paychecks that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA."

4. Section 655.22(h) [(g) in Final Rule]—Basis for Offered Wage

This provision requires that the offered wage not be based on commission, bonuses, or other incentives unless the employer guarantees that the wage paid will equal or exceed the prevailing wage. The second sentence of the proposed provision further stated that "the offered wage shall be held to exclude any deductions for reimbursement of the employer or any third party by the employee for expenses in connection with obtaining or maintaining the H–2B employment including but not limited to international recruitment, legal fees not otherwise prohibited by this section, visa fees, items such as tools of the trade, and other items not expressly permitted by law." This sentence received several comments. A worker's rights advocacy group claimed the Department will not achieve its objective of protecting foreign workers from paying fees that should be paid by the employer. This commenter provided an example of a practice by one employer who required workers to pay for tests to determine their welding and fitting skills in preparation for employment in the United States. This

commenter further recommended that this section should clarify that costs paid directly by workers are de facto deductions for the purpose of calculating compliance with the offered wage, even if employers do not directly deduct them and also that DOL should clarify its position on which costs are considered to benefit employers and thus require reimbursement and include specific examples of such costs. This commenter also believed that similar language in the FLSA was confusing. The Department appreciates the detailed analysis provided by this commenter, but we believe the statutory requirements, which are based on decades of administration of the Federal wage and hour laws, are clear and that it is not necessary to make the recommended changes.

5. Section 655.22(i) [(h) in Final Rule]—Position Is Temporary and Full-Time

The Department proposed that an employer seeking to employ H–2B workers be required to attest that the job opportunity is for a full-time, temporary position. One commenter suggested the proposed regulation could harm U.S. workers by guaranteeing full-time work for the period to foreign workers, while there is no such guarantee provided to U.S. workers in any seasonal position. The commenter also stated that while employers can state their intention to hire temporary workers full-time, if the weather does not cooperate, the employer may have no choice but to reduce hours in a particular week and that under this provision, the employer would not be able to do this, causing significant harm to the business and the U.S. workers whose hours would need to be reduced even further in order to ensure that foreign workers were paid a full-time wage. The commenter recommended a revised attestation stating: "The job opportunity is a bona fide, temporary position and hours worked will be comparable to the full time hours worked by associates in the same position at the employment site." As stated in the preamble to the NPRM, the H–2B program has always required that the positions being offered be temporary and full-time in nature, and the Department recognizes that some industries, occupations and States have differing definitions of what constitutes full-time employment. For example, certain landscaping positions are often classified as full-time for a 35-hour work week. To provide additional clarity, the Department, in § 655.4 has provided a definition of full-time employment that reflects our experience in the administration of this program. We will continue to make determinations of whether work is full-time for foreign labor certification purposes based on the facts, program experience, customary practice in the industry, and any investigation of the attestation. The Department has therefore decided to retain the proposed language.

6. Section 655.22(k) [(i) in Final Rule]—Layoff Provisions

Under the NPRM, an employer seeking to employ H–2B workers would have been required to attest that it is not displacing any similarly employed U.S. worker(s) in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H–2B worker. The Department received a number of comments from various groups on this provision.

A number of commenters favored the requirement, noting that it assisted efforts to ensure that employers cannot lay off U.S. workers after seeking to hire H–2B workers to perform the same services. Other commenters, however, had concerns regarding the implementation of the prohibition and the potential liability.

Several commenters were concerned that the requirement to contact former employees who had been laid off would be onerous, given the difficulties in reaching what is purportedly a transient population, making such contact unduly burdensome. The Department finds this argument unpersuasive. The commenter did not support the summary statements that all temporary or seasonal help is transient and rootless in the communities in which the work is performed. Even assuming that such workers do not have lasting ties to the employer, employers generally maintain continuing contact with former employees for many purposes—including, but not limited to, the provision of payroll tax information the following year and the transfer or disposition of benefits (including unemployment benefits). Moreover, by limiting the requirement for such contact to the 120 days or less before the employer's date of need for the H–2B workers, the employer's last contact information would likely be current, making such contact, generally speaking, relatively simple.

One commenter asserted that the layoff provision conflicts with the definition of seasonality, noting that by definition a seasonal employee will always be laid off within the period set forth in an annual cycle. An employer association also objected to the provision on the ground that requiring the consideration of U.S. workers would force employers who laid off U.S. workers at the end of one season to hire them again at the commencement of the next season because the timing would put the next season within the 120-day window.

In response to these comments, the Department has limited the applicability of the layoff provision to 120 days on either side of the date of need. This broad period of time, covering two thirds of the year, will protect U.S. workers near the time of recruiting for and hiring H–2B workers, which is when U.S. workers are most vulnerable, but avoids the complications of overlapping seasons noted by some commenters.

The Department notes that much of the concern of those commenters regarding the re-hiring of U.S. workers stems from a belief that such workers will not show up or be interested in being re-hired. But, by limiting the applicability of the provision to within 120 days of the date of need (as well as the actual occupation and the area of intended employment of the sought-after H–2B certification), this provision affords laid off workers a reasonable opportunity to apply for vacancies for which they qualify, striking an appropriate balance between worker protection and employer needs.

Some commenters noted the need for a strengthening of the layoff provision, calling for additional safeguards against massive layoffs of U.S. workers by strengthening requirements for how employers will demonstrate they have made efforts to contact former employees. The Department declines to do so at this time. Employers will be allowed to document their contact of former employees using any objective means at their disposal in a manner guaranteed to ensure a good faith contact effort has been made. The Department does not have evidence at this time that employers will engage in fraudulent behavior with respect to this requirement. The Department will monitor this attestation, and all other employer attestations, through post-certification audits and will note the need for program modifications through that process.

7. Section 655.22(l) [(j) in Final Rule]—Prohibition Against Payments

As in the proposal, the Final Rule requires that an employer attest that it has not and will not shift the costs of preparing or filing the H–2B temporary labor certification application to the temporary worker, including the costs of domestic recruitment or attorneys' and agent fees. The domestic recruitment, legal, and other costs associated with

obtaining the labor certification are business expenses necessary for or, in the case of legal fees, desired by, the employer to complete the labor certification application and labor market test. The employer's responsibility to pay these costs exists separate and apart from any benefit that may accrue to the foreign worker. Prohibiting the employer from passing these costs on to foreign workers allows the Department to protect the integrity of the process and protect the wages of the foreign worker from deterioration by unwarranted deduction. The Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make deductions from a worker's pay for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees (see fuller discussion below concerning transportation costs under the FLSA).

This section, pertaining to the receipt of payments by the employer from the employee or a third party, received many comments. Some of the commenters opposed the provision in its entirety, arguing it will make the program prohibitively expensive for employers. Other commenters were concerned the requirement would eliminate the current practice of having the employee pay for part of the recruiting and visa costs as an incentive for the workers not to leave the employer. Others supported this provision in its entirety, while still others agreed with the intent of the provision but found the language ambiguous. One specialty bar association not only supported the prohibition on cost-shifting for recruitment, but asked the Department to strengthen the prohibition language. However, this commenter was adamantly opposed to the prohibition against foreign workers paying the attorney's fees. The Department disagrees with the comments opposing this provision. We believe that these expenses are the costs of doing business and should be borne by the employer. The Department took all comments into consideration and modified the provision to clarify and strengthen the prohibition. The Final Rule applies the prohibition to attorneys and agents, not simply to employers. As rewritten, the provision eliminates reference to payments from "any other party;" it applies only to payments from the employees.

This section in the NPRM also would have prohibited the employer from receiving payments "of any kind for any activity related to the labor certification" process. The Department received a comment arguing that the phrase "received payment * * * as an incentive or inducement to file" is ambiguous. The Department took this comment into consideration and removed reference to incentive or inducement.

In addition, and based upon the comments received, the Department has revised the provision on cost-shifting for greater clarity. As mentioned above, the Department has eliminated the qualifying language regarding the incentive and inducement to filing, again to simplify for all employers engaging in recruitment activities what is prohibited. By simplifying the provision to prohibit employers who submit applications from seeking or receiving payment for any activity related to the recruitment of H–2B workers, the Department hopes to achieve consistent and enforceable compliance.

With regard to the application of the FLSA to H–2B workers' inbound subsistence and transportation costs, we note that a number of district courts have issued decisions on this question. See *De Leon-Granados* v. *Eller & Sons Trees Inc.*, 2008 WL 4531813 (N.D. Ga., Oct. 7, 2008); *Rosales* v. *Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. Feb. 11, 2008); *Rivera* v. *Brickman Group*, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); *Castellanos-Contreras* v. *Decatur Hotels, LLC*, 488 F. Supp. 2d 565 (E.D. La. 2007); *Recinos-Recinos* v. *Express Forestry Inc.*, 2006 WL 197030 (E.D. La. Jan. 24, 2006). These district courts have referenced the appellate court's decision in *Arriaga* v. *Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), which held that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses (and visa and immigration fees) paid by the workers employed by the growers under the H–2A program. Under the FLSA, pre-employment expenses incurred by workers that are properly business expenses of the employer and primarily for the benefit of the employer are considered "kick-backs" of wages to the employer and are treated as deductions from the employees' wages during the first workweek. 29 CFR 531.35. Such deductions must be reimbursed by the employer during the first workweek to the extent that they effectively result in workers' weekly wages being below the minimum wage. 29 CFR 531.36. Although the employer in the *Arriaga* case did not itself make direct deductions from the workers' wages, the Court held that the costs incurred by the workers amounted to "de facto deductions" that the workers absorbed, thereby driving the workers' wages below the statutory minimum. The Eleventh Circuit reasoned that the transportation and visa costs incurred by the workers were primarily for the benefit of the employer and necessary and incidental to the employment of the workers and stated that "[t]ransportation charges are an inevitable and inescapable consequence of having H–2A foreign workers employed in the United States; these are costs which arise out of the employment of H–2A workers." Finally, the court held that the growers' practices violated the FLSA minimum wage provisions, even though the H–2A regulations provide that the transportation costs need not be repaid until the workers complete 50 percent of the contract work period. The Eleventh Circuit noted that the H–2A regulations require employers to comply with applicable federal laws, and in accepting the contract orders in this case, the ETA Regional Administrator informed the growers in writing that their obligation to pay the full FLSA minimum wage is not overridden by the H–2A regulations.

The Department believes that the better reading of the FLSA and the Department's own regulations is that relocation costs under the H–2A program are not primarily for the benefit of the employer, that relocation costs paid for by H–2A workers do not constitute kickbacks within the meaning of 29 CFR 531.35, and that reimbursement of workers for such costs in the first paycheck is not required by the FLSA.

The FLSA requires employers to pay their employees set minimum hourly wages. 29 U.S.C. 206(a). The FLSA allows employers to count as wages (and thus count toward the satisfaction of the minimum wage obligation) the reasonable cost of "furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. 203(m). The FLSA regulations provide that "[t]he cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable [costs within the meaning of the statute] and may not therefore be included in computing wages." 29 CFR 531.3(d)(1). The FLSA regulations further provide examples of various items that the Department has deemed generally to be qualifying facilities within the meaning of 29 U.S.C. 203(m) (see also 29 CFR 531.32(a)), as well as examples of

various items that the Department has deemed generally not to be qualifying facilities (see 29 CFR 531.3(d)(2), 29 CFR 531.32(c)).

Separate from the question whether items or expenses furnished or paid for by the employer can be counted as wages paid to the employee, the FLSA regulations contain provisions governing the treatment under the FLSA of costs and expenses incurred by employees. The regulations specify that wages, whether paid in cash or in facilities, cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally, or "free and clear." 29 CFR 531.35. Thus, "[t]he wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash. For example, if the employer requires that the employee must provide tools of the trade that will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act." *Id.* The regulations treat employer deductions from an employee's wages for costs incurred by the employer as though the deductions were a payment from the employee to the employer for the items furnished or services rendered by the employer, and applies the standards set forth in the "kick-back" provisions at 29 CFR 531.35 to those payments. Thus, "[d]eductions for articles such as tools, miners' lamps, dynamite caps, and other items which do not constitute 'board, lodging, or other facilities' " are illegal "to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the Act." 29 CFR 531.36(b).

In sum, where an employer has paid for a particular item or service, under certain circumstances it may, pursuant to 29 U.S.C. 203(m), count that payment as wages paid to the employee. On the other hand, when an employee has paid for such an item or service, an analysis under 29 CFR 531.35 is required to determine whether the payment constitutes a "kick-back" of wages to the employer that should be treated as a deduction from the employee's wages.

The *Arriaga* court seems to have assumed that all expenses necessarily fall into one of these two categories—that either they qualify as wages under 29 U.S.C. 203(m) or they constitute a "kick-back" under 29 CFR 531.35. See *Arriaga*, 305 F.3d at 1241–42 (stating that if a payment "may not be counted as wages" under 29 U.S.C. 203(m), then "the employer therefore would be required to reimburse the expense up to the point the FLSA minimum wage provisions have been met" under 29 CFR 531.35 and 29 CFR 531.36). That is incorrect. For example, if an employer were to give an employee a valuable item that was not "customarily furnished" to his or her employees, the employer would not be able to count the value of that item as wages under 29 U.S.C. 203(m) unless the employer "customarily furnished" the item to his or her employees. Nevertheless, since the employee paid nothing for that item, it clearly would not constitute a "kick-back" of wages to the employer that would have to be deducted from the employee's wages for purposes of determining whether the employer met its minimum wage obligations under 29 U.S.C. 206(a). Similarly, if a grocery employee bought a loaf of bread off the shelf at the grocery store where he or she worked as part of an arms-length commercial transaction, the payment made by the employee to the employer would not constitute a "kick-back" of wages to the employer, nor would the loaf of bread sold by the employer to the employee be able to be counted toward the employee's wages under 29 U.S.C. 203(m). Both parties would presumably benefit equally from such a transaction—it would neither be primarily for the benefit of the employer, nor would it be primarily for the benefit of the employee.

Expenses paid by an employer that are primarily for the employer's benefit cannot be counted toward wages under 29 U.S.C. 203(m). See 29 CFR 531.3(d). Similarly, expenses paid by an employee cannot constitute a "kick-back" unless they are for the employer's benefit. See 29 CFR 531.35. An analysis conducted under 29 U.S.C. 203(m) determining that a particular kind of expense is primarily for the benefit of the employer will thus generally carry through to establish that the same kind of expense is primarily for the benefit of the employer under 29 CFR 531.35. Each expense, however, must be analyzed separately in its proper context.

The question at issue here is whether payments made by H–2B employees for the cost of relocating to the United States, whether paid to a third party transportation provider or paid directly to the employer, constitutes a "kick-back" of wages within the meaning of 29 CFR 531.35. If the payment does constitute a "kick-back," then the payment must, as the *Arriaga* court decided, be counted as a deduction from the employee's first week of wages under the FLSA for purposes of determining whether the employer's minimum wage obligations have been met.

The Department does not believe that an H–2B worker's payment of his or her own relocation expenses constitutes a "kick-back" to the H–2B employer within the meaning of 29 CFR 531.35. It is a necessary condition to be considered a "kick-back" that an employee-paid expense be primarily for the benefit of the employer. The Department need not decide for present purposes whether an employee-paid expense's status as primarily for the benefit of the employer is a sufficient condition for it to qualify as a "kick-back," because the Department does not consider an H–2B employee's payment of his or her own relocation expenses to be primarily for the benefit of the H–2B employer.

Both as a general matter and in the specific context of guest worker programs, employee relocation costs are not typically considered to be "primarily for the benefit" of the employer. Rather, in the Department's view, an H–2B worker's inbound transportation costs either primarily benefit the employee, or equally benefit the employee and the employer. In either case, the FLSA and its implementing regulations do not require H–2B employers to pay the relocation costs of H–2B employees. *Arriaga* and the district courts that followed its reasoning in the H–2B context misconstrued the Department's regulations and are wrongly decided.

As an initial matter, any weighing of the relative balance of benefits derived by H–2B employers and employees from inbound transportation costs must take into account the fact that H–2B workers derive very substantial benefits from their relocation. Foreign workers seeking employment under the H–2B nonimmigrant visa program often travel great distances, far from family, friends, and home, to accept the offer of employment. Their travel not only allows them to earn money—typically far more money than they could have in their home country over a similar period of time—but also allows them to live and engage in non-work activities in the U.S. These twin benefits are so valuable to foreign workers that these workers have proven willing in many instances to pay recruiters thousands of dollars (a practice that the Department is now taking measures to curtail) just to gain access to the job opportunities, at times

going to great lengths to raise the necessary funds. The fact that H–2B workers travel such great distances and make such substantial sacrifices to obtain work in the United States indicates that the travel greatly benefits those employees.

Most significantly, however, the Department's regulations explicitly state that "transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment" are qualifying "facilities" under 29 U.S.C. 203(m). 29 CFR 531.32(a). As qualifying facilities, such expenses cannot by definition be primarily for the benefit of the employer. 29 CFR 531.32(c). The wording of the regulation does not distinguish between commuting and relocation costs, and in the context of the H–2B program, inbound relocation costs fit well within the definition as they are between the employee's home country and the place of work.

The *Arriaga* court ruled that H–2A relocation expenses are primarily for the benefit of the employer in part because it believed that under 29 CFR 531.32, "a consistent line" is drawn "between those costs arising from the employment itself and those that would arise in the ordinary course of life." 305 F.3d at 1242. The court held that relocation costs do not arise in the ordinary course of life, but rather arise from employment. *Id.* Commuting costs and relocation costs cannot be distinguished on those grounds, however. Both kinds of expenses are incurred by employees for the purpose of getting to a work site to work. Moreover, an employee would not rationally incur either kind of expense but for the existence of the job. Both the employer and the employee derive benefits from the employment relationship, and, absent unusual circumstances, an employee's relocation costs to start a new job cannot be said to be primarily for the benefit of the employer.

That is not to say that travel and relocation costs are never properly considered to be primarily for the benefit of an employer. The regulations state that travel costs will be considered to be primarily for the benefit of the employer when they are "an incident of and necessary to the employment." 29 CFR 531.32(c). This might include, for example, a business trip, or an employer-imposed requirement that an employee relocate in order to retain his or her job. Relocation costs to start a new job will rarely satisfy this test, however.

In a literal sense it may be necessary to travel to a new job opportunity in order to perform the work, but that fact, without more, does not render the travel an "incident" of the employment. Inbound relocation costs are not, absent unusual circumstances, any more an "incident of * * * employment" than is commuting to a job each day. Indeed, inbound relocation costs are quite similar to commuting costs in many respects, which generally are not considered compensable. Cf. DOL Opinion Letter WH–538 (Aug. 5, 1994) (stating that travel time from home to work is "ordinary home-to-work travel and is not compensable" under the FLSA); *Vega ex rel. Trevino* v. *Gosper*, 36 F.3d 417 (5th Cir. 1994) (finding travel to and from work and home not compensable activity under Portal-to-Portal Act). In fact, there is no reason to believe that the drafters of 29 U.S.C. 203(m) and 206(a) ever intended for those provisions to indirectly require employers to pay for their employees' relocation and commuting expenses. To qualify as an "incident of * * * employment" under the Department's regulations, transportation costs must have a more direct and palpable connection to the job in question than merely serving to bring the employee to the work site.

Taking the *Arriaga* court's logic to its ultimate conclusion would potentially subject employers across the U.S. to a requirement to pay relocation expenses for all newly hired employees—or at least to pay relocation expenses for all newly hired foreign employees, since international relocation is perhaps less "ordinary" than intranational relocation. That simply cannot be correct. The language of 29 U.S.C. 203(m) and 206(a) and their implementing regulations provide a very thin reed on which to hang such a seismic shift in hiring practices, particularly so many years after those provisions have gone into effect. Nor does the fact that H–2B workers are temporary guest workers change the equation. Even assuming that H–2B workers derive somewhat less benefit from their jobs because they are only temporary, that fact alone would not render the worker's relocation expenses an "incident" of the temporary job. If it did, ski resorts, camp grounds, shore businesses, and hotels would all be legally required to pay relocation costs for their employees at the beginning of each season—again, a result that is very difficult to square with the language and purpose of 29 U.S.C. 203(m) and 29 CFR 531.35.

A stronger argument could be made, perhaps, that employers derive a greater-than-usual benefit from relocation costs when they hire foreign guest workers such as H–2B workers, because employers generally are not allowed to hire guest workers unless they have first attempted but failed to recruit U.S. workers. Thus, such employers have specifically stated a need to hire non-local workers. Given the substantially greater benefit that foreign guest workers generally derive from work opportunities in the United States than they do from employment opportunities in their home countries, however, the Department believes that this at most brings the balance of benefits between the employer and the worker into equipoise. Moreover, the employer's need for non-local workers does nothing to transform the relocation costs into an "incident" of the job opportunity in a way that would render the employee's payment of the relocation expenses a "kick-back" to the employer. If it did, courts would soon be called upon every time an employer hired an out-of-state worker to assess just how great the employer's need for the out-of-state employee was in light of local labor market conditions. Conversely, the courts would also have to inquire into the employee's circumstances, and whether the employee had reasonably comparable job prospects in the area from which the employee relocated. Again, the Department does not believe such a result is consistent with the text or the intent of the FLSA or the Department's implementing regulations.

It is true, of course, that H–2B employers derive some benefit from an H–2B worker's inbound travel. To be compensable under the FLSA, however, the question is not whether an employer receives some benefit from an item or paid-for cost, but rather whether they receive the primary benefit. Significantly, despite the fact that employers nearly always derive some benefit from the hiring of state-side workers as well, such workers' relocation costs generally have not been considered to be "primarily for the benefit of the employer." That is so because the worker benefits from the travel either more than or just as much as the employer.

In sum, the Department believes that the costs of relocation to the site of the job opportunity generally is not an "incident" of an H–2B worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H–2B employer. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.

8. Section 655.22(m) [(k) in Final Rule]—Bona Fide Inquiry

As proposed in the NPRM, the Final Rule at § 655.22(k) requires an employer that is a job contractor to attest that if it places its employees at the job sites of other employers, it has made a written bona fide inquiry into whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the 120 days of the date of need. To comply with this attestation, the Department is requiring the employer to inquire in writing to and receive a written response from the employer where the relevant H–2B worker will be placed. This can be done by exchange of correspondence or attested to by the secondary employer in the contract for labor services with the employer petitioning to bring in H–2B workers. This proposed attestation at § 655.22(k) also requires the employer to attest that all worksites where the H–2B employee will work are listed on the *Application for Temporary Employment Certification*.

The Department received several comments on this secondary placement attestation provision. While some were in favor of the requirement, some employer associations expressed concern that making such an inquiry of their clients was unfair and unduly burdensome. The Department acknowledges that this attestation imposes an additional level of inquiry between job contractors and their clients where the contractor will be providing H–2B workers at a client site. The INA's mandate of the unavailability of persons capable of performing the job duties for which the H–2B workers are sought is at the heart of this requirement.

It is the H–2B worker's job activity, rather than the identity of the H–2B worker's employer, which is required to be measured against the availability of U.S. workers; the H–2B worker can be admitted only upon assurances of the unavailability of unemployed persons able to take the H–2B job opportunity. As a result, an H–2B worker performing duties at company X, for which company Y has hired him and pays him, may have an adverse effect not only on employees at the petitioning job contractor company employing him but also the company benefiting from his or her services. The limitations imposed by the Department—area of intended employment, occupation, and timing—provide parameters to reassure employers while at the same time enabling them to ensure full compliance with the mandates of the H–2B program.

One commenter agreed with this provision but did not believe a labor contractor should be held liable for the statements provided by those entities. The Department believes this commenter misinterpreted this section. The job contractor should make a bona fide inquiry and document the inquiry and response. If it later turns out that the employer who received the H–2B worker from the job contractor displaced a U.S. worker during the stated timeframe, proof of the employer's negative response to the job contractor's bona fide inquiry will relieve the job contractor of liability for that violation.

Another commenter requested that we strike this provision in its entirety because it does not allow for change in circumstances that would warrant displacing U.S. workers. The Department sees no reason why the U.S. worker would have to be displaced over the foreign worker and therefore, declines to eliminate this provision.

Finally, an industry association commented that H–2B workers employed by carnivals and circuses are constantly being placed on job sites of other employers as they travel the circuit and that this requirement is too difficult to comply with. It is difficult for the Department to discern, from the manner in which this comment was written, whether the H–2B workers are being paid by one petitioning employer throughout the itinerary or whether these H–2B workers are placed on the payroll of the fixed-site employer at each location. The Department has not made any changes to this section, as no compliance challenge was clearly communicated.

9. Section 655.22(o) [(m) in Final Rule]—Notice to Worker of Required Departure

Under the Final Rule, employers have a responsibility to inform foreign workers of their duty to leave the United States at the end of the authorized period of stay, and to pay for the return transportation of the H–2B worker if that worker is dismissed early. As stated in the NPRM, DHS will establish a new land-border exit pilot program for certain H–2B and other foreign workers to help ensure that departure follows the end of work authorization, regardless of whether it flows from a premature end or from the end of the authorized labor certification.

The Department received one comment on the duty to inform the worker of the obligation to depart from the country. This commenter opined that it is not the responsibility of employers to become unpaid immigration officers. The Department is not suggesting that it is placing any burden on employers to act as immigration officers. The Department has retained the requirement, while clarifying it to be consistent with DHS's regulations on this issue.

10. Section 655.22(p) [(n) in Final Rule]—Representation of Need

The Final Rule requires the employer to attest that it truly and accurately stated the number of workers needed, the dates of need, and the reasons underlying the temporary need in its labor certification request. The Department received two comments on this provision. One requested that we change the words "truly and accurately" to "reasonable and good faith" based on estimates from information available at the time of filing the certification. The Department has considered this change but declines to amend the regulatory language. The concern of the commenter of the need for flexibility is found in the provision in both the NPRM and this Final Rule regarding amendments (§ 655.34(c)(2)] of the start date of the certification. Any need for additional flexibility on the part of the Department must be balanced against the Department's need to ensure integrity in an attestation-based program; giving freedom to change its dates of need allows unscrupulous employers to submit applications not based on an actual need, thus circumventing the entire process in an attempt to obtain limited visas.

The second commenter expressed concern with the date of need requirement and requested the Department change several sections on which this attestation is predicated. One of the major concerns of this commenter was the potential need to amend start dates after certification if an employer must wait for visa numbers to become available. The Department has, however, retained the underlying provision for this attestation. While the Department permits amendment of the start date of the certification by the employer both prior to certification (§ 655.34(c)(2)] and after certification to certify a late adjudication (§ 655.34(c)(4)), the reconciliation of the start date becomes an issue for DHS adjudication. The Department notes that a regulatory provision allowing movement of the date of need after certification would be inconsistent with the DHS proposed rule, which would not permit the filing of a petition whose start date was inconsistent with the start date of the labor certification.

This commenter also proposed, in the alternative, that employers be allowed

to submit their I–129 labor certification applications to DHS with a note that they have submitted their request for an amendment to the Department and that the Department be required to adjudicate the request for amendment within five days. The Department considered the comment and has decided not to establish a deadline for the processing of amendment requests. We defer to DHS to determine what is appropriate for its adjudication of I–129 petitions which falls exclusively under its jurisdiction.

L. Retention of Supporting Documentation

The Final Rule contains a modified requirement that employers retain specified documentation outlined in the proposed regulations to demonstrate compliance with program requirements. The proposed retention period was for 5 years. This documentation must be provided in the event of an RFI, post-adjudication audit, WHD investigation or other similar activity. The Department received a few comments in response to this proposed requirement. One small business coalition expressed its support, while another organization expressed concern that a 5-year document retention requirement was too long, especially for small employers, or employers like circuses and carnivals that are mobile or have a mobile component. Another commenter requested the Department prepare and provide a list to H–2B employers in one place, in plain language—perhaps as part of broad stakeholder compliance assistance—the documentation that should be retained. In response to concerns about the length of time for records retention, the Department has reduced the requirement from 5 years to 3 years. The documentation required will support specific attestations by the employer under the program. We will provide additional guidance in the course of individual and broad-based technical assistance and educational outreach to the employer community, including on the OFLC Web site. We will consider the issuance of additional written guidance, as appropriate.

M. Section 655.23(c)—Request for Further Information

The Department proposed to issue a Request for Further Information (RFI) within 14 days of receiving the application, if needed, for the purpose of adjudicating the application for labor certification. All of those who commented on this provision requested that the timeframes be changed, but most also recommended an additional provision that would obligate the Department to process and respond to the information received through the RFI within a certain period of time. The Department agrees and shortened both the issuance and response time to 7 days. The Department also has added a provision that obligates the CO to issue a Final Determination within 7 business days of receiving the employer's response, or by 60 days before the date of need, whichever is greater.

N. Section 655.24—Post-Adjudication Audits

The Department proposed to use various selection criteria for identifying applications for audit review after the application has been adjudicated in an effort to maintain and enhance program integrity. The audits are meant to permit the Department to ensure compliance with the terms and conditions by an employer and to fulfill the Secretary's statutory mandate to certify applications only where unemployed U.S. workers capable of performing such services cannot be found. Failure by an employer to respond to the audit could lead to debarment from the program as could a finding by the Department that the employer has not been complying with the terms and conditions attested to in the application. The Department received many comments on this provision. They were equally divided between those that opposed post-adjudication audits and those that believed audits are an effective tool to enhance integrity. Those who opposed the post-adjudication audits did not make any alternative suggestions on how the Department could determine compliance with the program. Therefore, with no other alternatives available, the Department believes its initial analysis is correct and, therefore, has not made any substantive changes to this section, save for including the option for the CO to refer any findings that an employer violated the terms and conditions of the program with respect to eligible U.S. workers to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices, as suggested by one commenter.

O. Section 655.30—Supervised Recruitment

The Department proposed to require certain employers to engage in supervised pre-filing recruitment to ensure compliance with recruitment requirements. One comment was received on this provision. The commenter believes that the NPC will be unable to handle such a responsibility as effectively and as efficiently as did the local SWAs and that it will affect the integrity of the program. The Department respectfully disagrees with this commenter and has retained the provision as proposed. We believe that centralizing the process will provide uniformity and expertise that will enhance program integrity. Further, in the permanent labor certification program, supervised recruitment is conducted under Federal guidance and not SWA supervision.

P. Section 655.31—Debarment

The Department's NPRM proposed a mechanism allowing the Department to debar an employer/attorney/agent from the H–2B program for a period of up to 3 calendar years. Debarment from the program is a necessary and reasonable mechanism to enforce H–2B labor certification requirements and ensure compliance with the program's statutory requirements. Further, debarment and other enforcement mechanisms, *e.g.*, audits, are necessary and reasonable program compliance checks to balance the transition to an attestation-based filing system. The proposed rule would permit the Department to debar an employer, attorney, and/or agent for a period of up to 3 calendar years for misreprosenting a material fact or for making a fraudulent statement on an H–2B application, for a material or substantial failure to comply with the terms of the attestations, for failure to cooperate with the audit process or ordered supervised recruitment, or if the employer/attorney/agent has been found by a court of law, WHD, DHS, or the DOS to have committed fraud or willful misrepresentation involving any OFLC employment-based immigration program.

Upon further consideration, based in part upon the Department's recent efforts to modernize its H–2A labor certification regulations, the Department has decided to modify the debarment provision so that it more closely parallels the debarment provision for the H–2A regulation at 20 CFR 655.118, given the similarity of the H–2A and H–2B labor certification programs. While many of the grounds for debarment are substantially similar in the Final Rule as in the NPRM, the Final Rule contains additional safeguards for both workers and employers, which are explained in greater detail below.

1. Debarment Authority

An advocacy organization questioned the Department's authority to debar attorneys, agents, or employers from the H–2B program and asserted that a determination of a violation should only be made after notice of violation and an

opportunity for a hearing. The debarment of entities from participating in a government program is an inherent part of an agency's responsibility to maintain the integrity of that program. As the Second Circuit found in *Janik Paving & Construction, Inc.* v. *Brock*, 828 F.2d 84 (2d Cir. 1987), the Department possesses an inherent authority to refuse to provide a benefit or lift a restriction for an employer that has acted contrary to the welfare of U.S. workers. In assessing the Department's authority to debar violators, the court found that "[t]he Secretary may * * * make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions * * * as [s]he may find necessary and proper in the public interest to prevent injustice of undue hardship or to avoid serious impairment of the conduct of Government business." *Id.* at 89.

In addition, although the Administrative Procedure Act provides that parties are entitled to appear before the agency with legal counsel, see 5 U.S.C. 555(b), this provision "leaves intact the agencies' control over both lawyers and non-lawyers who practice before them," Attorney General's Manual on the APA (1947) at 65. The Department's debarment of attorneys and agents under the H–2B program is also consistent with the Department's longstanding practice of regulating attorneys and representatives who appear before the agency. See, *e.g.*, *In re judicial inquiry re Miroslaw Kusmirek*, 2000–INA–116 (Sept. 18, 2002) (sanctioning a representative for providing forged documents to the Department of Labor).

In order to encourage compliance, the regulatory scheme for the H–2B program relies on attestations, audits, investigations and the remedial measure of debarment. Use of debarment as a mechanism to encourage compliance has been endorsed in the INA for a number of foreign labor certification and attestation programs. Ensuring the integrity of a statutory program enacted to protect U.S. workers is an important part of the Department's mission.

As part of the Department's inherent debarment authority, the Department may determine the particular procedures that may apply to the process. Accordingly, it is within the Department's authority to require the OFLC Administrator to issue a Notice of Intent to Debar no later than 2 years after the occurrence of the violation; offer the employer an opportunity to submit evidence in rebuttal; and if the rebuttal evidence is not timely filed or if the Administrator determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment, issue a *Notice of Debarment* which may be subject to administrative appeal through the Department's Board of Alien Labor Certification Appeals (BALCA). Like the NPRM, the Final Rule provides that the *Notice of Debarment* shall be in writing, state the reason for the debarment finding and duration of debarment, and identify the appeal rights. Additionally, the Final Rule provides that the debarment will take effect on the start date identified in the *Notice of Debarment* unless the administrative appeal is properly filed within 30 days of the date of the Notice, thereby, staying the debarment pending the outcome of the appeal.

2. Grounds for Debarment

While a union and a state agency expressed their support for the debarment provisions, a law firm asserted that the debarment was an unduly strict sanction for minor violations of new procedures, the details of which are still not clear. We disagree with the commenter's characterization of violations warranting debarment as "minor." The Department will not debar for "minor" violations. Rather most of the violations that will be the basis of potential debarment actions require a pattern or practice of acts that: (1) Are significantly injurious to the wages or benefits offered under the H–2B program or working conditions of a significant number of the employer's U.S. or H–2B workers; (2) reflect a significant failure to offer employment to each qualified domestic worker who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons; (3) reflect a significant failure to comply with the employer's obligations to recruit U.S. workers; (4) reflect a significant failure to comply with the RFI or audit process; (5) reflect the employment of an H–2B worker outside the area of intended employment, or in an activity/activities not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension; or (6) reflect a significant failure to comply with supervised recruitment. However, the Department recognizes that there are some acts which the Department would have no other available remedy to enforce would warrant debarment even without a pattern or practice. These acts are set forth separately under § 655.31(d)(2) through (5). These acts are: Fraud; the failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection or law enforcement function; the failure to comply with one or more sanctions or remedies imposed by the ESA, or with one or more decisions of the Secretary or court; and a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

As to the details of the violation not being clear, we believe that the regulations are quite clear in setting forth the various grounds under which an employer, attorney or agent may be debarred. The Department understands the seriousness of debarment as a penalty and, in considering the comments received in response to the NPRM, believes that the resulting debarment provision upholds the integrity of the H–2B labor certification program and puts employers on notice of what violations are sufficiently serious that could result in potential debarment.

Additionally, the law firm requested a provision for training prior to being subject to sanctions such as debarment. While we do not think that it is necessary to address such training directly in the regulation, OFLC will issue further guidance, as appropriate, to orient stakeholders and staff to these new provisions.

3. Debarment of Attorneys and Agents

An international recruiting company requested that the Department apply a different standard for the debarment of attorneys and agents from the debarment of employers. In particular, the commenter asserted that the evidence to debar the agent or attorney would need to be legally significant since they do not share in the task of employment and stated that many agents accept information from the employer at face value and accept information as true. While attorneys and agents are not strictly liable for all actions of the employers they represent they do have responsibilities attendant to their participation in the program. Employers, agents, and attorneys each must remain aware of their particular responsibilities under the labor certification process and of the consequences of submitting false or misleading information to a Federal agency. Accordingly, the regulation provides that the Administrator may debar agents and attorneys not only for participating in, but also having knowledge of, or having reason to know of, the employer's substantial violation.

An advocacy organization objected to the omission of appeal rights for

attorneys and agents with respect to a *Notice of Debarment*. The commenter stressed that since attorneys and agents may themselves be subject to a *Notice of Debarment*, they ought to have recourse to correct a conceivably incurred or unfair decision. The commenter also noted that there may be certain instances where the interests of an employer and attorney or agent may diverge with respect to pursuing an appeal and the latter would be harmed due to the lack of appeal rights. The commenter also noted that the Department's permanent labor certification regulations provide not only the employer but any debarred person or entity the right to appeal the debarment decision. We agree with commenter's concern and have included references to attorneys' and agents' rebuttal and appeal rights, in additional to that of employers.

4. Use of Labor Contractors

An advocacy organization expressed a concern that employers would manipulate their legal identities resulting in abuses that would not be cured by debarment. In particular, the commenter set forth a scenario in which a company would retain a labor contractor or temporary agency to serve as the "employer" for a group of foreign workers at the company's work site. The commenter was concerned that the company would take advantage of a labor contractor's false claim that no domestic workers could be found, yet only the labor contractor would be debarred as the "employer," thus allowing the company to hire another labor contractor to repeat the same abuses.

The commenter seems to presume all labor contractors would commit violations of the program, which is a generalization that unfairly portrays law abiding labor contractors in a negative light. Nonetheless, this is a situation that would be of concern to the Department and, if appropriate, we would pursue administrative means to ascertain the veracity of applications and information submitted to the Department.

5. Review of Debarment Determinations

The Department did not receive comments about the procedures for the review of the Administrator, OFLC's debarment determinations. However, to ensure consistency across programs, the Department has included in the Final Rule procedures, identical to those set forth in the Department's H–2A Final Rule, for hearings before an administrative law judge and review of the administrative law judge's decision by the Administrative Review Board. Under the Final Rule, a debarred party may request a hearing which would be governed by the procedures in 29 CFR part 18, and administrative law judge decisions would not be required to be issued within a set period of time. We believe that this process provides a period of time that is both sufficient for thorough consideration of the grounds for debarment and expedient enough so as to allow the Department to debar bad actors before they can cause any additional harm while also minimizing the period of uncertainty for employers in the case of a successful appeal.

Q. Section 655.32—Labor Certification Determinations

The proposed language delineated the criteria by which the Administrator of OFLC will certify or deny applications. The commenters, though citing this particular section of the NPRM, actually commented on the attestation-based process in general. Their comments were incorporated into that discussion above.

R. Section 655.33—Appeals to the BALCA

The Department's and DHS's NPRMs proposed a new model for the adjudication of H–2B applications. Under current procedures, the Department does not provide for any administrative review of decisions either denying H–2B labor certification applications or rendering a non-determination. Currently, the Department's decisions are advisory to DHS and employers whose applications are denied or issued a non-determination by the Department may submit countervailing evidence to DHS and have access to administrative review under DHS procedures. Under the DHS NPRM, the countervailing evidence process is eliminated and employers seeking to file H–2B visa petitions will be required to present an approved labor certification from DOL. Since DOL decisions denying H–2B labor certification will no longer be subject to additional review outside of the Department, we concluded that it would be appropriate to provide an employer whose labor certification application is denied an opportunity to seek review in the Department. The Department's NPRM included such a procedure providing for administrative review before the BALCA.

The Department received a number of comments on this portion of the NPRM, the majority of which expressed dissatisfaction with the proposal. We have carefully reviewed these comments and made several changes in response. Several commenters expressed satisfaction with the current appeal process and requested that it not be changed. To the extent these comments related to concerns about the length of that process, that question is discussed below. To the extent the commenters expressed a preference for the retention of the current practice in which countervailing evidence can be submitted to DHS when an H–2B labor certification application is denied, similar comments were submitted to DHS in response to its NPRM and DHS made no change in its Final Rule. We defer to and adopt DHS's response on this issue. Likewise, the concern expressed by one commenter that the time spent utilizing the Department's appeals procedures will delay employers getting into the queue at DHS for the limited number of available H–2B visas, is a matter that is addressed by DHS in their Final Rule.

With regard to matters directly related to the Department's proposal, a number of commenters objected to the provision that precluded the submission of new evidence to the BALCA. We believe these commenters do not recognize the totality of the proposal. The NPRM provides that before a CO can deny an H–2B application, the CO must issue an RFI that apprises the employer of the grounds for the proposed denial and provides an opportunity to submit additional information. The Department does not see any reason to provide another opportunity to submit necessary information. In addition, providing such an opportunity would inevitably delay issuance of final decisions from the BALCA. Concerns about delays at the BALCA were expressed by a number of commenters even in the absence of any authorization for the submission of new evidence.

Several commenters expressed concern that the appeal process before the BALCA would take too long. One noted specifically that no time limit was contained for the BALCA to issue its docketing statement and a briefing schedule. It was also pointed out that the NPRM provided merely that the BALCA "should" notify the employer of its decision within 20 days of the filing of the CO's brief. In response to comments reflecting concerns about the timeliness of the appeal process, the Final Rule reflects significantly shorter time frames, with the BALCA decision due no later than 15 business days after the request for review is filed.

One commenter suggested the possibility of allowing worker representatives to participate in the administrative appeal process. We have rejected that suggestion. Generally, the

Department's labor certification procedures do not involve participation by third parties and we do not believe that their involvement would enhance the process given the nature of the labor certification determination.

S. Section 655.34(c)—Amendments

The Department received several comments on the provision requiring the amendment of labor certifications if the start dates change and/or the number of workers change. All commenters opposed this change. One commenter admitted that employers set their start date based on the availability of visa numbers. Other commenters claimed that this provision makes it impracticable to adjust to market fluctuations during the season. The Department appreciates the candid comments about the difficulties this new requirement will create. However, the Department's experience is that many times dates of need or number of workers needed are changed to such a degree that the recruitment previously done is stale by the time USCIS receives the application. Changes to start dates, especially as the practice has become more common, also raise a concern that U.S. workers who might indeed be available for work on the new start date were not given the chance to apply originally. Therefore, this requirement represents a reasonable and logical solution. The only changes made to the section were for clarification purposes.

T. Section 655.35—Required Departure

In consultation with DHS, the Department proposed to include, as part of the employer's obligations, the requirement that employers provide notice to the H–2B workers of their required departure at the end of their authorized stay or separation from employment, whichever occurs first. This section was designed in anticipation of DHS establishing a registration of departure program. The provision requires employers to inform their H–2B workers of their obligation to register their departure at the port of exit. The Department received one comment suggesting that we eliminate this provision because it is unworkable due to the requirement for specific entry and exit points, which is inevitably a guarantee for violations occurring. This commenter also suggested we work with DHS instead. The Department respectfully declines to eliminate this language. The entry-exit ports and requirements continue to be matters of immigration under DHS's jurisdiction; this language simply makes it an employer's obligation to inform foreign workers of the workers' responsibility. The Department did consult with DHS on this language to establish this employer obligation and lay the appropriate groundwork as DHS continues to build their next-generation entry-exit system.

U. Delegation of Enforcement Authority

As previously discussed, the INA provides the Department no direct authority to enforce any conditions concerning the employment of H–2B workers, including the prevailing wage attestation. DHS possesses that authority pursuant to secs. 103 and 214(a) and (c) of the INA. 8 U.S.C. 1103 and 8 U.S.C. 1184(c)(14)(A). DHS may also delegate its authority to the Department under secs. 103(a)(6) and 214(c)(14)(B) of the INA. 8 U.S.C. 1103(a)(6) and 8 U.S.C. 1184(c)(14)(B). DHS has chosen to delegate its enforcement authority to DOL, which provides the basis for the new enforcement provisions of this subpart. The delegation will not take effect until this rule becomes effective.

V. Section 655.50(c)—Availability of Records in the Enforcement Process

Language has been added to § 655.50(c) to describe the employer's responsibility to make records available when those records are maintained in a central office.

W. Section 655.60—Compliance With Application Attestations

The NPRM proposed a WHD enforcement program addressing H–2B employers' compliance with attestations made as a condition of securing authorization to employ H–2B workers. The proposed enforcement program also covered statements made to DHS as part of the petition for an H–2B worker on the DHS Form I–129, Petition for a Nonimmigrant Worker. Compliance with attestations and the DHS petition are designed to protect U.S. workers and would be reviewed in WHD enforcement actions. This Final Rule adopts this proposal.

A trade union and U.S. Senator commented that the proposal did not include a mechanism for accepting complaints of potential violations. The Department intends to accept complaints, as it does under other statutes it administers such as the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, which does not have a specific regulatory mechanism for the acceptance of complaints. Thus, the Department has not added a specific regulatory procedure here.

Another trade union commented that the Department should adopt the definition of "employ" found in the FLSA, which defines the term to include "suffer or permit to work." In fact, the proposed regulations included such a definition. However, the terms "employer" and "employee" were defined in terms of the common law test of employment which does not include "suffer or permit to work." Since the two concepts are different and the use of the "suffer or permit" test is precluded by the U.S. Supreme Court opinion in *Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 322–323 (1992), the reference to "suffer or permit to work" has been removed.

X. Section 655.65—Remedies for Violations of H–2B Attestations

1. Section 655.65(a) and (b)—Assessment of Civil Money Penalties

Under the proposed rule, the WHD would assess civil monetary penalties in an amount not to exceed $10,000 per violation for a substantial failure to meet conditions of the H–2B labor condition application or of the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker; or for a willful misrepresentation of a material fact on the DOL application or DHS petition; or a failure to cooperate with a Department of Labor audit or investigation. No comment addressed this provision and it is adopted in the Final Rule, with one change—in accordance with the statutory provisions, the Final Rule clearly reflects that the WHD Administrator may access civil money penalties when appropriate.

2. Section 655.65(i)—Reinstatement of Illegally Displaced U.S. Workers

Under the NPRM the WHD would seek reinstatement of similarly employed U.S. workers who were illegally laid off by the employer in the area of intended employment. Such unlawful terminations are prohibited if they occur less than 120 days before the date of requested need for the H–2B workers or during the entire period of employment of the H–2B workers. No comments addressed this proposal and it is adopted in the Final Rule.

3. Section 655.65(i)—Other Appropriate Remedies

WHD may seek remedies under other laws that may be applicable to the work situation including, but not limited to, remedies available under the FLSA (29 U.S.C. 201 *et seq.*), the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 *et seq.*), and the McNamara-O'Hara Service Contract Act (41 U.S.C. 351 *et seq.*). WHD also may seek other administrative remedies for violations as it determines to be appropriate.

The Department sought public comments on whether back wages can be assessed under the H–2B program when an employer fails to pay the prevailing wage rate. The most extensive comments received were from a U.S. Senator asserting that the lack of back pay as a remedy is a "weakness of the Department's enforcement proposal" and that back pay is "an essential make-whole remedy for both H–2B program participants and American workers * * * [and] would provide a key incentive for otherwise vulnerable workers to come forward and protect their rights." The Senator also stated that "[t]here is ample authority establishing that similarly broad grants of remedial authority are sufficient to authorize an award of back [pay], even when this remedy is not specifically enumerated."

The Department has carefully considered whether Congress has provided authority to assess back wages under the H–2B provisions. The Department concludes that the H–2B statutory provisions provide the Secretary with the authority to seek back wages for failure to pay the required wage even though the statute does not specifically list this remedy. The INA broadly authorizes DHS to, "in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties * * *) as the Secretary of Homeland Security determines to be appropriate[.]" 8 U.S.C. 1184(c)(14)(i). As noted above, that authority has been delegated to the Department of Labor. Awarding back pay is unquestionably the most appropriate remedy for failure to pay the required wage. It is also consistent with the statutory grant of authority and will further the purposes of the H–2B program because it will reduce employers' incentives to bypass U.S. workers in order to hire and exploit H–2B foreign workers, and guard against depressing U.S. workers' wage rates.

A number of courts have concluded that, under similarly broad grants of remedial authority, the Secretary may establish back pay as an appropriate sanction even in the absence of explicit statutory authority. See, *e.g., Commonwealth of Kentucky Dept. of Human Resources* v. *Donovan*, 704 F.2d 288, 294–96 (6th Cir. 1983) (ruling that the Secretary of Labor had authority to award back pay under Comprehensive Employment and Training Act (CETA) both prior to the 1978 statutory and regulatory amendments and pursuant to the 1978 amendments); *City of Philadelphia* v. *U.S. Dept. of Labor*, 723 F.2d 330, 332 (3d Cir. 1983); *United States* v. *Duquesne Light Co.*, 423 F. Supp. 507, 509 (W.D. Pa. 1976) (in government contracting case, back pay appropriate under E.O. 11246).

The preamble to the NPRM, 73 FR 29946, noted that the H–1B provisions of the INA, unlike the H–2B provisions, contain a separate provision requiring that the Secretary assess back wages in cases where an employer has failed to pay the LCA-specified wages. 8 U.S.C. 1182(n)(2)(D) ("If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the [LCA] * * * the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the [H–1B] requirements * * * whether or not [other penalties have] been imposed."). The H–1B back pay provision is, however, different from either programs' general, broad grant of remedial authority by being mandatory and by imposing no standard for the severity of wage violations (*e.g.*, willfulness or "substantial violation") for the collection of back wages. Therefore, the failure to include the mandate in H–2B simply means that the Secretary is not required to seek back pay in cases where the employer has failed to pay the LCA-specified wages; it does not bear on the Secretary's discretion to seek back pay in such cases. The Department concludes that the statutory language of the H–2B program provides the Secretary with the discretionary authority to seek back pay, provided there is a finding of a "substantial violation" or willfulness, in cases where the employer has failed to pay the LCA-specified wages. See 8 U.S.C. 1184(c)(14)(A)(i). The Department has modified the Final Rule accordingly.

Y. Comments Beyond the Scope

In addition to those discussed above, the Department received numerous comments that were beyond the scope of or not directly relevant to the proposed regulation. We did not respond to these comments, but find it appropriate to note them. They included: Calls for the Department to work with Congress to extend the Save Our Small and Seasonal Business Act returning workers provision; calls for the Congress to raise the H–2B 66,000 annual visa cap, or to allocate visa numbers more equitably across States; calls for the government to "recapture" H–2B visa numbers that expire the same year they are issued so they can be used for different workers; calls for the Congress to increase funding for all Federal agencies administering the H–2B visa program, and the SWAs, either through appropriations, or applications or fraud preventions fees; requests that DHS establish a special fraud investigative unit for certain visa related crimes and offenses; concerns about the requirement that workers use DHS's designated entry-exit system, and about the burdens and policies behind such a system; a request that foreign workers be given a two-month grace period between employers when the worker needs an extension but the workers' visas terminate before the beginning of their next employment; a request that employers have the authority to activate or deactivate the H–2B visa like a credit card to allow immediate action and loss of status if the worker fails to comply with the terms of the H–2B contract; calls for the government to require that H–2B workers (over whom the Department has no jurisdiction save for the areas covered in this Final Rule) purchase travel insurance or prohibit H–2B workers from identifying themselves as "self-employed" on their federal tax forms, or to eliminate the requirement that H–2B workers pay Social Security or Medicare; opinions that the United States has sufficient foreign workers to meet the needs of U.S. employers, especially at a time when the economy is slowing down and many U.S. workers are unemployed; calls for U.S. employers to provide higher wages and better working conditions; and a call for H–2B workers to be permitted representation by Federally-funded legal services corporations, and that resources for such counsel be increased.

III. Administrative Information

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is "significant" and therefore, subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues

arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department determined that this regulation is a "significant regulatory action" under sec. 3(f)(4). This Final Rule implements a significant policy related to the President's policies on immigration. However, the Department determined that this rule is not an "economically significant" rule under E.O. 12866 because it will not have an annual effect on the economy of $100 million or more.

Analysis Considerations

The direct incremental costs employers will incur because of this Final Rule, above and beyond the current costs required by the program as it is currently implemented, are not economically significant. The total annual cost associated with this Final Rule is approximately $1,872,769 per year or $166 per employer. The only additional costs on employers resulting from this Final Rule are those involved in (1) the placement of a Sunday advertisement, which replaces one of the former daily advertisement and the additional paperwork costs; (2) the new paperwork and retention requirements; and (3) contacting laid-off workers to notify them of a job opportunity.[6]

Cost of the Sunday Advertisement

The cost range for advertising and recruitment is taken from a recent (October 2008) sample of newspapers in various urban and rural U.S. cities, and reflects approximate costs for placing one 10-line advertisement in those newspapers. The cost of advertising in a Sunday paper instead of during the week is approximately $234, which represents an increase of approximately $31.16 over the weekday advertisement.[7] The additional total cost for the 11,267 employers utilizing the H–2B program of one Sunday ad would average approximately $351,080 assuming that such ads would not have been placed by the business as part of its normal practices to recruit U.S. workers.[8]

Cost of Paperwork and Record Retention Requirements

The paperwork and record retention costs are minimal, as records will require a burden of approximately 1.35 hours per year per application. Based on the median hourly wage rate for a Human Resources Manager ($40.47), as published by the Department's Occupational Information Network, O*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation, a total cumulative burden of 15,210 hours will result in a total cost of $874,118, or $77.58 per employer.

Cost To Notify Laid-Off Workers of Job Opportunity

A final cost to employers for implementing the requirements of this Final Rule is the cost associated with notifying laid-off workers of a job opportunity. The Department estimates that the total cost to meet this requirement is $647,571 or $57.48 per employer. To make this cost determination, the Department estimated it would take an employer's Human Resources Manager approximately 3 minutes to notify each laid-off worker. The Department does not have data to determine how many laid-off workers an employer would be required to notify. Therefore, the Department projected this number based on the total number of employees requested on the applications. Based on FY 2006 data, employers requested visas for 247,287 foreign workers, for an average of 22 employees per employer. We then multiplied this number by 3 minutes (the time estimate to notify each laid-off worker) to determine that it will take each employer approximately one hour to meet this requirement. Thus, the cost per employer is the hourly salary for the Human Resource Manager to make the calls or $57.47.

Benefits

We also project that employers will experience significant time-savings as a result of the reengineered process. The Department estimates the average time-savings to employers will be at least 28 days from the cnrrent process, based on the current average H–2B application processing time of 73 days in the fiscal year (FY) 2007 (October 1, 2006–September 30, 2007). Although the Department cannot estimate the cost savings as a result of this time saved, it believes that employers will experience a variety of economic benefits, including benefits from predictability of workforce size and availability regardless of geographic area, as a result of reengineering the application process.

The Department received seven comments related to the cost of this rulemaking. One comment was directed at the cost to small businesses and has been addressed in Section B of this section of the preamble below. The remaining six comments were related to the costs to the SWAs, which is not a cost calculated in the total cost of this Final Rule because they are considered transfer costs under OMB Circular A–4. Therefore, the Department has addressed those comments in Section C of this section of the preamble. The Department notes, however, that based on the comments, it reduced the number of required advertisements from three in the preamble to two in this Final Rule, which is reflected in the cost analysis above.

B. Regulatory Flexibility Analysis/ SBREFA

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. A significant economic impact is defined as eliminating more than 10 percent of the businesses' profits; exceeding 1 percent of the gross revenue of the entities in a particular sector; or exceeding 5 percent of the labor costs of the entities in the sector. Further under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. Although the RFA and the SBREFA analyses were included as separate preamble sections in the proposed rule, the Department has included them in one preamble section in this Final Rule to avoid unnecessary duplication. The Department has certified that this Final Rule does not have a significant economic impact on a substantial number of small entities.

1. Definition of a Small Entity

A small entity is one that is "independently owned and operated and which is not dominant in its field of operation." The definition of small business varies from industry to

[6] The Department notes that this cost is not new to the H–2B program because it has been required in program guidance. However, because it is new to the regulation, we have included it in this analysis.

[7] The Department based this average on 10 locations with the highest number of H–2B applications, including the following: Houston, Texas; Orlando, Florida; Vail, Colorado; Orange County, California; Cape Cod, Massachusetts; Detroit, Michigan; Baton Rouge, Louisiana; Houma, Louisiana; Columbus, Ohio; and Washington, DC.

[8] The Department notes that this cost is based on the highest costs in each location. Fees are likely to be lower given that many newspapers offer lower rates for consecutive ads, for placing two ads in the same week, or for purchasing a Sunday and weekday ad.

industry to the extent necessary to properly reflect industry size differences. An agency must either use the SBA definition for a small entity, or, establish an alternative definition. Given that this rulemaking crosses industry sectors, the Department has adopted the SBA size standards defined in 13 CFR 121.201. The SBA utilizes annual revenue in some industries, while utilizing number of employees in others to determine whether or not a business is considered a small business. Historically however, the Department has not collected information about an employer's industry classification, annual revenues, or number of employees currently on payroll in the H–2B program. Therefore, the Department cannot accurately and comprehensively categorize each applicant-employer for the purpose of conducting the RFA analysis by industry and size standard. In lieu of the industry and size standard analysis, the Department based the estimated costs of the reformed H–2B process assuming all employers-applicants were small entities.

2. Factual Basis for Certification

The factual basis for such a certification is that this Final Rule does not affect a substantial number of small entities and there will not be a significant economic impact on them. The Department receives more than 10,000 applications a year under this program. In FY 2006 (October 1, 2005–September 30, 2006), ETA received from SWAs 11,267 applications from employers seeking temporary labor certification under the H–2B program. As mentioned earlier, the Department does not collect information regarding the numbers of small entities participating in the H–2B program. The Department believes that this rule may potentially affect as many as 11,267 employers participating in this program, assuming that each employer only has one application.

Although there may be a substantial number of small entities impacted by this Final Rule, the Department has determined that this rule will not have a significant economic impact on those small businesses that utilize the program. The RFA and the SBREFA, which amended the RFA, require that an agency promulgating regulations segment and analyze industrial sectors into several appropriate size categories for the industry being regulated. Even though the foreign labor certification programs are open to all industries, the Department does not have sufficient data to analyze the universe of H–2B applicants by industry sector. However, the Department was able to analyze the PY 2006 data to determine that landscape occupations [9] accounted for approximately 31 percent of all the applications filed. According to SBA guidelines for the landscape industry, all employers with annual receipts at or below $6.5 million are considered small businesses. The cost of this rule for those employers at this threshold would be approximately .003 percent of their annual revenues; even for employers with annual receipts of only $500,000, the cost would represent only .036 percent of revenues.[10] The Department also recognizes that there are potentially very small business that might be affected. Therefore, for purposes of comparing costs, this rule would cost small entities that had gross annual receipts of $120,000 and profits of $12,000 approximately .15 percent of their revenues, which would not be significant.

The Department believes that the costs incurred by employers under this Final Rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H–2B program must continue to establish to the Secretary's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers. Similar to the current process, employers under this H–2B process will file a standardized application but will retain recruitment documentation, a recruitment report, and any supporting evidence or documentation justifying the temporary need for the services or labor to be performed. To estimate the cost of this reformed H–2B process on employers, the Department calculated each employer will pay an additional $31.16 to meet the advertising requirements for a job opportunity, and will spend an additional 1.35 hours staff time preparing the standardized application, narrative statement of temporary need, final recruitment report, and retaining all other required documentation (*e.g.*, newspaper ads, business necessity) for audit purposes or $81.57 per employer. The Department also estimated that it will take an employer approximately one hour to notify laid-off workers of a job opportunity, or $66.46.

Using the RFA standard to determine whether a rule will have a substantial impact on a significant number of small businesses, the Department determined that this Final Rule will not eliminate more than 10 percent of the businesses' profits; exceed 1 percent of the gross revenue of the entities in a particular sector; or exceed 5 percent of the labor costs of the entities in the sector. The total cost per employer is approximately $179, which represents .15 percent of the gross receipts and profits of a small entity with $120,000 in revenues and $12,000 profits. Therefore, this rule will not have a significant impact on a substantial number of small businesses.

The Department received one comment on this section, which generally stated that the rule would increase the cost to employers, especially given the changes to advertising. Although this statement is partly true given that the cost of the rule increased by approximately $179, in light of the other non-quantifiable benefits, the Final Rule will likely represent a cost-savings to the employer. Therefore, for the reasons stated, the Department believes that total costs for any small entities affected by this program will be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H–2B labor certification applications qualify as small businesses, there will be no net negative economic effect.

C. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 *et seq.*) directs agencies to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector to determine whether the regulatory action imposes a Federal mandate. A Federal mandate is defined in the Act at 2 U.S.C. 658(5)–(7) to include any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H–2B worker is purely voluntary and is, therefore,

[9] The Department notes that this was the only occupation that could be paralleled with the industry classifications required by the SBA and described in 13 CFR 121.201. The landscape industry includes grounds keeping, lawn services, landscaping, tree planting, tree trimming, and tree surgeons. However, the Department does not require employers to list a North American Industry Classification System (NAICS) code for each employment position under the H–2B program, and therefore, the data calculated for this example is not as accurate as it would be with NAICS coding. For instance, some landscaping duties require bricklaying, which we note has been used as a separate employment category on some of the applications. Without the coding it is not possible to categorize occupations accurately. Therefore, the Department notes that we used this industry merely to provide an example of how this rule could affect a category of employers.

[10] The cost of the rule ($166) divided by the projected annual receipts of the business.

excluded from any reporting requirement under the Act.

The Department received six comments on this section from SWAs related to the increase in cost and workload and/or the lack of funding to support the new H–2B processing requirements. One commenter generally noted that its jurisdiction was neither financially nor functionally prepared to take on this added workload. Three States specifically stated that the funds provided under the Wagner-Peyser Act were insufficient to carry out their H–2B responsibilities prior to the changes in this rule, and the new eligibility verification requirements increased their funding challenges. Three States specifically related the lack of resources to the additional cost of storing and processing the I–9 documents related to the eligibility verification requirements.

The Department disagrees that this Final Rule imposes an unfunded mandate. As noted in the proposed rule, the Department is not insensitive to the resource and time constraints facing SWAs in their administration of H–2B activities and the difficulties inherent in making informed referrals on a population of workers that may be itinerant and difficult to contact. 73 FR 29950, May 28, 2008. However, we do not believe that this requirement will result in a significant workload increase or administrative burden. The Department points out that although there may be some new requirements for SWAs, there are also many requirements for SWAs that have been eliminated in this Final Rule given the reengineered approach. The Department believes reduced burden from the old requirements more than offsets any additional burden finalized here. The SWAs will experience a direct impact on their foreign labor certification activities in the elimination of certain H–2B activities under this Final Rule. These eliminated activities are currently funded by the Department under grants provided under the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.* In addition, other tools will be available to the SWAs to make this requirement relatively easy to implement, such as the E-Verify system. As a result, the net effect of this Final Rule will likely be to ensure the amounts of such grants available to each State correspond or even increase relative to its workload under the H–2B program in the receipt, processing and monitoring of each application.

One State commented that the new eligibility verification requirements could lead to discriminatory practices subject to legal challenge, which in this commenter's opinion, the legal costs associated with any defense also represented an unfunded mandate. The Department believes it is premature to presume that the States will have to bear a significant cost to defend against any potential litigation associated with the implementation of this Final Rule, and which is typically considered part of a grantee's programmatic responsibility, should it occur.

Therefore, for the reasons stated above, the Department finds that this Final Rule does not impose an unfunded mandate.

D. Executive Order 13132—Federalism

Executive Order 13132 addresses the Federalism impact of an agency's regulations on the States' authority. Under E.O. 13132, Federal agencies are required to consult with States prior to and during the implementation of national policies that have a direct effect on the States, the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Further, an agency is permitted to limit a State's discretion when it has statutory authority and the regulation is a national activity that addresses a problem of national significance.

The Department received one comment on this section. This commenter stated that the Department's reversal of a long-standing position on U.S. worker self-attestation creates a Federalism impact. According to this commenter, TEGL 11–07, Change 1, mandates that SWAs perform pre-employment eligibility verifications on every U.S. worker that requests a referral to an H–2A job order. This commenter requests that the Department prepare a summary impact statement and acknowledge that many States currently have attestation-based systems for U.S. worker access to public labor exchange services.

The Department disagrees with this commenter's assessment of a Federalism impact and therefore, the need for a summary impact statement. In this case there is no direct effect on the States because the States are not in the best position to address the needs to re-engineer a Federal program to relieve the backlog that has occurred due to inadequate staffing, funding, or other issues of concern. The issues addressed by the regulations are of national concern to ensure an effective program that regulates temporary alien workers and protects U.S. workers.

As noted elsewhere in this preamble, the Department attempted to reform this program in 2005. To meet the demands of the considerable workload increases for both the Department and the SWAs and limited appropriations, the Department determined that regulatory changes were still necessary. These changes are consistent with the Department's review, program experience, and years of stakeholder feedback on longstanding concerns about the integrity of the prior program. Therefore, as a program of national scope, the Department is implementing requirements that apply uniformly to all States.

Even if there were an argument that the Department should defer to the States on the eligibility verification requirements, the Department is authorized by the INA to implement Federal regulations to ensure consistency across States on immigration matters. Therefore, rather than having separate eligibility verification processes that vary from State to State, the Department is exercising its right under the INA to impose consistent requirements for all participants across the H–2B program. In addition, given that the H–2B program is an immigration-related program, it also is a program of national security and therefore, of national significance with Federal oversight and uniformity. The verification requirement is designed to strengthen the integrity of the temporary labor certification process, afford employers a legal pool of applicants, protect U.S. workers, and improve confidence in and use of the H–2B program.

Further, the relationship the States have with this program and the Federal Government is through grants from the Department to the States for the sole purpose of maintaining consistency across States. As a voluntary Federal program, the Department may change the direction from time to time as dictated by the changes to immigration-related concerns, but at the same time are consistent with the underlying legislation.

Therefore, for the reasons stated, the Department has determined that this rule does not have sufficient Federalism implications to warrant the preparation of a summary impact statement.

E. Executive Order 13175—Indian Tribal Governments

Executive Order 13175 requires Federal agencies to develop policies in consultation with tribal officials when those policies have tribal implications. This Final Rule regulates the H–2B visa program and does not have trihal implications. Therefore, the Department has determined that this E.O. does not apply to this rulemaking. The Department did not receive any comments related to this section.

F. Assessment of Federal Regulations and Policies on Families

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

The Final Rule does not have an impact on the autonomy or integrity of the family as an institution, as it is described under this provision. The Department did not receive any comments related to this section.

G. Executive Order 12630—Protected Property Rights

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

The Department did not receive any comments on this section. The Department certifies that this Final Rule does not infringe on protected property rights.

H. Executive Order 12988—Civil Justice Reform

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

The rule has been drafted in clear language and with detailed provisions that aim to minimize litigation. The purpose of this Final Rule is to reengineer the H–2B program and simplify the application process. Therefore, the Department has determined that the regulation meets the applicable standards set forth in sec. 3 of E.O. 12988. The Department received no comments regarding this section.

I. Plain Language

Every Federal agency is required to draft regulations that are written in plain language to better inform the public about policies. The Department has assessed this Final Rule under the plain language requirements and determined that it follows the Government's standards requiring documents to be accessible and understandable to the public. The Department did not receive any comments related to this section.

J. Executive Order 13211—Energy Supply

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

K. Paperwork Reduction Act

1. Summary

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501), information collection requirements, which must be implemented as a result of this regulation, a clearance package containing proposed forms was submitted to OMB on February 14, 2008, along with its proposed rule to reform the H–2A agricultural foreign labor certification program, and then again on May 22, 2008, in conjunction with the H–2B proposed rulemaking preceding this Final Rule. Therefore, the public was given 60 days to comment on this information collection with both submissions, for a total of 120 days. All comments received were taken into consideration and a final package was submitted to OMB. The collection of information for the current H–2B program under the regulations in effect prior to the effective date of this rule were approved under OMB control number 1205–0015 (Form ETA 750).

This Final Rule implements the use of the new information collection, which OMB approved on November 21, 2008 under OMB control number 1205–0466. The Expiration Date is November 30, 2011. The new forms, ETA 9141 and ETA 9142, have a public reporting burden estimated to average 55 minutes for Form ETA 9141 and 2.75 hours for Form ETA 9142 per response or application filed.

This paperwork package applies—as does this Final Rule—to the H–2B, H–1B, H–1B1, H–1C, E–3, and PERM programs. The burden hours associated with the additional programs are a result of the wage determination and retention of document requirements. Under this Final Rule, and the implementation schedule it establishes, employers applying to any of these programs must use the ETA Form 9141, a single, Federal form that replaces the State-specific forms previously used to obtain prevailing wage determinations. There are no additional costs to the employer associated with the implementation of this new form, as costs are defined by the Paperwork Reduction Act. As the Department notes elsewhere in this preamble, the H–1C program was inadvertently removed. Consistent with the proposed rule at 73 FR 29947, May 28, 2008, it was the Department's intention to standardize all forms for better program effectiveness and efficiency in its non-agricultural programs, which necessarily extends also to the H–1C program.

For an additional explanation of how the Department calculated the burden hours and related costs, the Paperwork Reduction Act package for this information collection may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting the Department at: Office of Policy Development and Research, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov*.

The Department received six comments on this section, all related to the H–2B program. One commenter stated that the form ETA 9141 was unnecessarily long and complex and should be simplified. The Department has attempted to shorten the form and make it easier to use. It has been reduced from seven pages to four pages.

Three of the comments related to the burden associated with the paperwork requirements. Two final commenters stated that they did not have the funding or staff time to manage the record retention requirements or to process and store the paperwork. None of the commenters specifically addressed the issue of our methodology or assumptions, or the other programs to which the ETA 9141 now applies.

The paperwork burden estimate for the form used for the H–2B program under the regulations in effect prior to the effective date of this Final Rule, (form ETA 750—OMB control number 1205–0015) was approximately 1.4 hours. Under this new collection of information, the Department estimates that the burden will be approximately 2.75 hours for Form ETA 9142. We based this calculation on a burden estimate of 1.4 hours for those program requirements that remained the same and allocated approximately 1.35 hours for the additional information requirements.

Although the Department did not receive any comments related to the remaining programs (H–1B, H–1B1, E–3, H–1C, and PERM), it notes that only the Form ETA 9141 applies to these programs. This Form will be used in lieu of the State form for submitting a prevailing wage request. Although the burden hours for each State application vary, the Department estimates the burden hours to complete the State forms to be approximately 1.0 hour. As a result, and for the reasons discussed elsewhere in this preamble, the Department does not expect the paperwork burden hours to increase for these programs.

In sum, without more persuasive analysis rebutting the analysis used by the Department, we assume our calculations are representative of the actual hourly burden for the new collection, which represents no increase for most programs and a minimal increase for the H–2B program.

L. Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at Number 17–273, "Temporary Labor Certification for Foreign Workers."

List of Subjects

20 CFR Part 655

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

20 CFR Part 656

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

■ For the reasons stated in the preamble, the Department of Labor amends 20 CFR parts 655 and 656 as follows:

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

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

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

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

Subpart A issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c); and 8 CFR 214.2(h).

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

Subpart C issued under 8 CFR 214.2(h).

Subparts D and E authority repealed.

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

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

Subparts J and K authority repealed.

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

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

■ 3. Revise subpart A to read as follows:

Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)

Sec.

655.1 Purpose and scope of subpart A.
655.2 Territory of Guam.
655.3 Special procedures.
655.4 Definitions of terms used in this subpart.
655.5 Application Filing Transition.
655.6 Temporary need.
655.7 [Reserved]
655.8 [Reserved]
655.9 [Reserved]
655.10 Determination of prevailing wage for temporary labor certification purposes.
655.11 Certifying officer review of prevailing wage determinations.
655.12 [Reserved]
655.13 [Reserved]
655.14 [Reserved]
655.15 Required pre-filing recruitment.
655.17 Advertising requirements.
655.18 [Reserved]
655.19 [Reserved]
655.20 Applications for temporary employment certification.
655.21 Supporting evidence for temporary need.
655.22 Obligations of H–2B employers.
655.23 Receipt and processing of applications.
655.24 Audits.
655.25 [Reserved]
655.26 [Reserved]
655.27 [Reserved]
655.28 [Reserved]
655.29 [Reserved]
655.30 Supervised recruitment.
655.31 Debarment.
655.32 Labor certification determinations.
655.33 Administrative review.
655.34 Validity of temporary labor certifications.
655.35 Required departure.
655.50 Enforcement process.
655.55 Complaints.
655.60 Violations.
655.65 Remedies for violations.
655.70 WHD Administrator's determination.
655.71 Request for hearing.
655.72 Hearing rules of practice.
655.73 Service of pleadings.
655.74 Conduct of proceedings.
655.75 Decision and order of administrative law judge.
655.76 Appeal of administrative law judge decision.
655.80 Notice to OFLC and DHS.

Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)

§ 655.1 Purpose and scope of subpart A.

(a) Before granting the petition of an employer to admit nonimmigrant workers on H–2B visas for temporary

nonagricultural employment in the United States (U.S.), the Secretary of Homeland Security is required to consult with appropriate agencies regarding the availability of U.S. workers. Immigration and Nationality Act of 1952 (INA), as amended, secs. 101(a)(15)(H)(ii)(b) and 214(c)(1), 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c)(1).

(b) Regulations of the Department of Homeland Security (DHS) for the U.S. Citizenship and Immigration Services (USCIS) at 8 CFR 214.2(h)(6)(iv) require that, except for Guam, the petitioning H–2B employer attach to its petition a determination from the Secretary of Labor (Secretary) that:

(1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing of the petition for H–2B classification and at the place where the foreign worker is to perform the work; and

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

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

(1) This subpart sets forth the procedures through which employers may apply for H–2B labor certifications, as well as the procedures by which such applications are considered and how they are granted or denied.

(2) This subpart sets forth the procedures governing the Department's investigatory, inspection, and law enforcement functions to assure compliance with the terms and conditions of employment under the H–2B program. The authority for such functions has been delegated by the Secretary of Homeland Security to the Secretary of Labor and re-delegated within the Department to the Employment Standards Administration (ESA) Wage and Hour Division (WHD). This subpart sets forth the WHD's investigation and enforcement actions.

§ 655.2 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor (Department or DOL) does not certify to the USCIS of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas, or enforce compliance with the provisions of the H–2B visa program provisions in the Territory of Guam. Pursuant to DHS regulations, 8 CFR 214.2(h)(6)(v) administration of the H–2B temporary labor certification program is performed by the Governor of Guam, or the Governor's designated representative.

§ 655.3 Special procedures.

(a) *Systematic process.* This subpart provides procedures for the processing of H–2B applications from employers for the certification of employment of nonimmigrant positions in nonagricultural employment.

(b) *Establishment of special procedures.* The Office of Foreign Labor Certification (OFLC) Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for the processing of certain H–2B applications when employers can demonstrate, upon written application to the OFLC Administrator, that special procedures are necessary. These include special procedures currently in effect for the handling of applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers. Prior to making determinations under this paragraph (b), the OFLC Administrator may consult with employer and worker representatives.

§ 655.4 Definitions of terms used in this subpart.

For the purposes of this subpart:

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

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

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

Administrator, Wage and Hour Division (WHD), Employment Standards Administration means the primary official of the WHD, or the Administrator's designee.

Agent means a legal entity or person authorized to act on behalf of the employer for temporary non-agricultural labor certification purposes that is not itself an employer as defined in this subpart. The term "agent'" specifically excludes associations or other organizations of employers.

Applicant means a lawful U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (Form ETA 9142).

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary nonagricultural labor certification determination from DOL. A complete submission of the *Application for Temporary Employment Certification* includes the form, all valid wage determinations as required by § 655.101(a)(1) and the U.S. worker recruitment report.

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

Attorney means any person who is currently 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, and who is not under suspension, debarment or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3, 1003.101. Such a person is permitted to act as an agent or attorney for 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, and consisting of Administrative Law Judges assigned to the Department and designated by the Chief Administrative Law Judge to be members of BALCA.

The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

Center Director means the OFLC official to whom the OFLC Administrator has delegated his authority for purposes of National Processing Center (NPC) operations and functions.

Certifying Officer (CO) means the OFLC official designated by the Administrator, OFLC with making programmatic determinations on employer-filed applications under the H–2B program.

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

Date of need means the first date the employer requires services of the H–2B workers as listed on the application.

Department of Homeland Security (DHS) means the Federal agency having jurisdiction over certain immigration-related functions, acting through its agencies, including the U.S. Citizenship and Immigration Services.

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

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

Employer means:

(1) A person, firm, corporation or other association or organization:

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

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

(iii) Possesses, for purposes of the filing of an application, a valid Federal Employer Identification Number (FEIN).

(2) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers may be considered to jointly employ that employee.

Employment and Training Administration or ETA means the agency within the Department, which includes the OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the Act.

ETA National Processing Center (NPC) means a National Processing Center established by the OFLC for the processing of applications submitted in connection with the Department's mandate pursuant to the INA.

Full-time, for purposes of temporary labor certification employment, means 30 or more hours per week, except that where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition shall have precedence.

H–2B Petition means the form and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2B nonimmigrant workers.

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

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

Job opportunity means one or more job openings with the petitioning employer for temporary employment at a place in the U.S. to which U.S. workers can be referred. Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories, possessions, or commonwealths cannot be the subject of an *Application for Temporary Employment Certification.*

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

Layoff means any involuntary separation of one or more U.S. employees without cause or prejudice.

Metropolitan Statistical Area (MSA) means those geographic entities defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

Offered Wage means the highest of the prevailing wage, Federal minimum wage, the State minimum wage, or local minimum wage.

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

Occupational Employment Statistics Survey (OES) means that program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual wage estimates for occupations at the State and MSA levels.

Prevailing Wage Determination (PWD) means the prevailing wage for the position, as described in § 655.10(b), that is the subject of the *Application for Temporary Employment Certification.*

Professional Athlete shall have the meaning ascribed to it in INA sec. 212(a)(5)(A)(iii)(II), which defines "professional athlete" as an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

Representative means an individual employed by or authorized to act on behalf of the employer with respect to the recruitment activities entered into for and attestations made with respect to the *Application for Temporary Employment Certification.* A representative who interviews and/or considers U.S. workers for the job that is subject of the Application must be the person who normally interviews or

considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

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

Secretary of Homeland Security means the chief official of the Department of Homeland Security 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.

State Workforce Agency (SWA), formerly known as State Employment Security Agency, means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer public labor exchange delivered through the State's one-stop delivery system in accordance with the Wagner-Peyser Act. (29 U.S.C. 49 *et seq.*).

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

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

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

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

(7) Similarity of products and services; and

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

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

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

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

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

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

Within [number and type] days will, for purposes of determining an employer's compliance with timing requirements with respect to appeals and requests for review, begin to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the employer sends whatever communication is required by these rules back to the Department, as evidenced by a postal mark or other similar receipt.

§ 655.5 Application Filing Transition.

(a) *Compliance with these regulations.* Except as provided in paragraphs (b) and (c) of this section, employers filing applications for H–2B workers on or after the effective date of these regulations where the date of need for the services or labor to be performed is on or after October 1, 2009, must comply with all of the obligations and assurances in this subpart. SWAs will no longer accept for processing applications filed by employers for H–2B workers for temporary or seasonal nonagricultural services on or after January 18, 2009.

(b) *Applications filed under former regulations.* (1) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations, the SWAs shall continue to process all active applications under the former regulations and transmit all completed applications to the appropriate NPC for review and issuance of a labor certification determination.

(2) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations that were completed and transmitted to the NPC, the NPC shall continue to process all active applications under the former regulations and issue a labor certification determination.

(c) *Applications filed with the NPC under these regulations.* Employers filing applications on or after the effective date of these regulations where their date of need for H–2B workers is prior to October 1, 2009, must receive a prevailing wage determination from the SWA serving the area of intended employment. The SWA shall process such requests in accordance with the provisions of § 655.10. Once the employer receives its prevailing wage determination from the SWA, it must conduct all of the pre-filing recruitment steps set forth under this subpart prior to filing an *Application for Temporary Employment Certification* with the NPC.

§ 655.6 Temporary need.

(a) To use the H–2B program, the employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii).

(b) The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

(c) Except where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an *Application for Temporary Employment Certification* where the employer has a recurring, seasonal or peakload need lasting more than 10 months.

(d) The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed in addition to the needs of each individual employer with

whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

(e) The employer filing the application must maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the labor certification.

§§ 655.7–655.9 [Reserved]

§ 655.10 Determination of prevailing wage for temporary labor certification purposes.

(a) *Application process.* (1) The employer must request a prevailing wage determination from the NPC in accordance with the procedures established by this regulation.

(2) The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete *Application for Temporary Employment Certification* with the Department.

(3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.

(b) *Determinations.* Prevailing wages shall be determined as follows:

(1) Except as provided in paragraph (e) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section.

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the same opportunity and staff level within the area of intended employment, the prevailing wage shall be based on the highest applicable wage among all relevant worksites.

(4) If the employer provides a survey acceptable under paragraph (f) of this section that provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of U.S. workers similarly employed in the area of intended employment.

(5) The employer may use a current wage determination in the area determined under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*

(6) The NPC will enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer within 30 days of receipt of the request for a prevailing wage determination. The employer must offer this wage (or higher) to both its H–2B workers and any similarly employed U.S. worker hired in response to the recruitment required as part of the application.

(c) *Similarly Employed.* For purposes of this section, "similarly employed" means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of comparable skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(d) *Validity period.* The NPC must specify the validity period of the prevailing wage, which in no event may be more than 1 year or less than 3 months from the determination date. For employment that is less than one year in duration, the prevailing wage determination shall apply and shall be paid the prevailing wage by the employer, at a minimum, for the duration of the employment.

(e) *Professional athletes.* In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see sec. 212(p)(2) of the INA).

(f) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPC will consider wage information provided by the employer in making a Prevailing Wage Determination. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide 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 in accordance with guidance issued by the OFLC national office.

(3) The survey must be based upon recently collected data:

(i) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more than 24 months before the publication date.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(4) If the employer-provided survey is found not to be acceptable, the NPC shall inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for consideration is not acceptable, may file supplemental information as provided in paragraph (g) of this section, file a new request for a PWD, appeal under § 655.11, or, if the initial PWD was requested prior to submission of the employer survey, acquiesce to the initial PWD.

(g) *Submission of supplemental information by employer.* (1) If the employer disagrees with the wage level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there is another legitimate basis for such a review, the employer may submit supplemental information to the NPC.

(2) The NPC must consider one supplemental submission relating to the employer's survey, the skill level assigned to the job opportunity, or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, the NPC must

inform the employer, in writing, of the reasons for its decision.

(3) The employer may then apply for a new wage determination, appeal under § 655.11, or acquiesce to the initial PWD.

(h) *The prevailing wage cannot be lower than required by any other law.* No PWD for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

(i) *Retention of Documentation.* The employer must retain the PWD for 3 years and submitted to a CO in the event it is requested in an RFI or an audit or to a Wage and Hour representative in the event of a Wage and Hour investigation.

§ 655.11 Certifying officer review of prevailing wage determinations.

(a) *Request for review of prevailing wage determinations.* Any employer desiring review of a PWD must make a written request for such review within 10 days of the date from when the final PWD was issued. The request for review must be sent to the NPC postmarked no later than 10 days after the determination; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all materials submitted to the NPC for purposes of securing the PWD.

(b) *NPC Review.* Upon the receipt of a written request for review, the NPC shall review the employer's request and accompanying documentation, including any supplementary material submitted by the employer.

(c) *Designations.* The Director of the NPC will determine which CO will review the employer's request for review.

(d) *Review on the record.* The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:

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

(2) Modify the PWD.

(e) *Request for review by BALCA.* Any employer desiring review of a CO's decision on a PWD must make a written request for review of the determination by BALCA within 30 calendar days of the date of the decision of the CO. The CO must receive the written request for BALCA review no later than the 30th day after the date of its final determination including the date of the final determination.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the decision on the PWD by the NPC was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002.

(4) The BALCA shall handle appeals in accordance with § 655.33.

§§ 655.12–655.14 [Reserved]

§ 655.15 Required pre-filing recruitment.

(a) *Time of Filing of Application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied, except where specifically exempted from some or all of those requirements by these regulations or special procedures. Applications submitted not meeting this requirement shall not be accepted for processing.

(b) *General Attestation Obligation.* An employer must attest on the *Application for Temporary Employment Certification* to having performed all required steps of the recruitment process as specified in this section.

(c) *Retention of documentation.* The employer filing the *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts, including prevailing wage determinations, as required in this subpart and be prepared, upon written request, to submit this documentation in response to an RFI from the CO prior to the CO rendering a Final Determination or in the event of a CO-directed audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the certification.

(d) *Recruitment Steps.* An employer filing an application must:

(1) Obtain a prevailing wage determination from the NPC in accordance with procedures in § 655.10;

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

(3) Publish two print advertisements (one of which must be on a Sunday, except as provided in paragraph (f)(4) of this section); and

(4) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H–2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.

(e) *Job Order.* (1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H–2B workers, identifying it as a job order to be placed in connection with a future application for H–2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.

(2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17.

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

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the

employer must, in place of a Sunday edition advertisement, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements contained in § 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

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

(g) *Labor Organizations.* During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, an employer that is already a party to a collective bargaining agreement governing the job classification that is the subject of the H–2B labor certification application must formally contact by U.S. Mail or other effective means the local union that is party to the collective bargaining agreement. An employer governed by this paragraph must maintain dated logs demonstrating that such organizations were contacted and notified of the position openings and whether they referred qualified U.S. worker(s), including number of referrals, or were non-responsive to the employer's request.

(h) *Layoff.* If there has been a layoff of U.S. workers by the applicant employer in the occupation in the area of intended employment within 120 days of the first date on which an H–2B worker is needed as indicated on the submitted *Application for Temporary Employment Certification*, the employer must document it has notified or will notify each laid-off worker of the job opportunity involved in the application and has considered or will consider each laid-off worker who expresses interest in the opportunity, and the result of the notification and consideration.

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

(j) *Recruitment Report.* (1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H–2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.

(2) The recruitment report must:

(i) Identify each recruitment source by name;

(ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;

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

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

§ 655.17 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under § 655.15 before filing the *Application for Temporary Employment Certification* must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those to be offered to the H–2B workers. All advertising must contain the following information:

(a) The employer's name and appropriate contact information for applicants to send résumés directly to the employer;

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

(c) If transportation to the worksite(s) will be provided by the employer, the advertising must say so;

(d) A description of the job opportunity (including the job duties) for which labor certification is sought with sufficient detail to apprise applicants of services or labor to be performed and the duration of the job opportunity;

(e) The job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available;

(f) The work hours and days, expected start and end dates of employment, and whether or not overtime will be available;

(g) The wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which must not be less than the highest of the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H–2B employment; and

(h) That the position is temporary and the total number of job openings the employer intends to fill.

§§ 655.18–655.19 [Reserved]

§ 655.20 Applications for temporary employment certification.

(a) *Application Filing Requirements.* An employer who desires to apply for labor certification of temporary employment for one or more nonimmigrant foreign positions must file a completed *Application for Temporary Employment Certification* form, and a copy of the recruitment report completed in accordance with § 655.15(j).

(b) *Filing.* An employer must complete the *Application for Temporary Employment Certification* and send it by U.S. Mail or private mail courier to the NPC. Employers are strongly encouraged to keep receipts of any mailings. The Department will publish a Notice in the **Federal Register** identifying the address or addresses to which applications must be mailed, and will also post these addresses on the Department's Internet Web site at *http://www.foreignlaborcert.doleta.gov/*. The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). The Department

may, at a future date, require applications to be filed electronically in addition to or instead of by U.S. Mail or private mail courier.

(c) Except where otherwise permitted under § 655.3, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H–2B program.

(d) Certification of more than one position may be requested on the application as long as all H–2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(e) Except where otherwise permitted under § 655.3, only one *Application for Temporary Employment Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.

(f) Where a one-time occurrence lasts longer than one year, but less than 18 months, the employer will be issued a labor certification for the entire period of need. Where a one-time occurrence lasts 18 months or longer, the employer will be required to conduct another labor market for the portion of time beyond 12 months.

§ 655.21 Supporting evidence for temporary need.

(a) *Statement of Temporary Need.* Each *Application for Temporary Employment Certification* must include attestations regarding temporary need in the appropriate sections. The employer must include a detailed statement of temporary need containing the following:

(1) A description of the employer's business history and activities (*i.e.*, primary products or services) and schedule of operations throughout the year;

(2) An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need;

(3) An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need under § 655.6(b) as defined by DHS under 8 CFR 214.2(h)(6)(ii)(B); and

(4) If applicable, a statement justifying any increase or decrease in the number of H–2B positions being requested for certification from the previous year.

(b) *Request for Supporting Evidence.* In circumstances where the CO requests evidence or documentation substantiating the employer's temporary need through a RFI under § 655.23(c) to support a Final Determination, or notifies the employer that its application is being audited under § 655.24, the employer must timely furnish the requested supplemental information or evidence or documentation. Failure to provide the information requested or late submissions may be grounds for the denial of the application. All such documentation or evidence becomes part of the record of the application.

(c) *Retention of documentation.* The documentation required in this section and any other supporting evidence justifying the temporary need by the employer filing the *Application for Temporary Employment Certification* must be retained for a period of no less than 3 years from the date of the certification.

§ 655.22 Obligations of H–2B employers.

An employer seeking H–2B labor certification must attest as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions of this subpart:

(a) The employer is offering terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that they may not be unusual for workers performing the same activity in the area of intended employment, and which are not less favorable than those offered to the H–2B worker(s) and are not less than the minimum terms and conditions required by this subpart.

(b) The specific job opportunity for which the employer is requesting H–2B certification is not vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage.

(c) The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted the required recruitment, in accordance with the regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which labor certification is sought. Any U.S. worker applicants were rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.

(d) During the period of employment that is the subject of the labor certification application, the employer will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;

(e) The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage, and the employer will pay the offered wage during the entire period of the approved H–2B labor certification.

(f) Upon the separation from employment of H–2B worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of the separation from employment not later than 2 work days after such separation is discovered by the employer. An abandonment or abscondment shall be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. Employees may be terminated for cause.

(g)(1) The offered wage is not based on commissions, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage, or the legal Federal, State, or local minimum wage, whichever is highest. The employer must make all deductions from the worker's paychecks that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2B workers to seek or receive payments from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A). This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees.

(h) The job opportunity is a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H–2B employers in the same or comparable occupations.

(i) The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for*

Temporary Employment Certification in the area of intended employment within the period beginning 120 calendar days before the date of need through 120 calendar days after the date of need, except where the employer also attests that it offered the job opportunity that is the subject of the application to those laid off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity only for lawful, job-related reasons.

(j) The employer and its attorney or agents have not sought or received payment of any kind from the employee for any activity related to obtaining the labor certification, including payment of the employer's attorneys' or agent fees, *Application for Temporary Employment Certification*, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

(k) If the employer is a job contractor, it will not place any H–2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless:

(1) The employer applicant first makes a written bona fide inquiry as to whether the other employer has displaced or intends to displace any similarly employed U.S. workers within the area of intended employment within the period beginning 120 days before through 120 calendar days after the date of need, and the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers, and

(2) All worksites are listed on the certified *Application for Temporary Employment Certification*, including amendments or modifications.

(l) The employer will not place any H–2B workers employed pursuant to this application outside the area of intended employment listed on the *Application for Temporary Employment Certification* unless the employer has obtained a new temporary labor certification from the Department.

(m) Unless the H–2B worker will be sponsored by another subsequent employer, the employer will inform H–2B workers of the requirement that they leave the U.S. at the end of the authorized period of stay provided by DHS or separation from the employer, whichever is earlier, as required in § 655.35 of this part (absent any extension or change of such worker's status or grace period pursuant to DHS regulations), and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.

(n) The dates of temporary need, reason for temporary need, and number of positions being requested for labor certification have been truly and accurately stated on the application.

§ 655.23 Receipt and processing of applications.

(a) *Filing Date.* Applications received by U.S. Mail or private courier shall be considered filed when determined by the NPC to be complete. Incomplete applications shall not be accepted for processing or assigned a receipt date, but shall be returned by U.S. Mail to the employer or the employer's representative as incomplete.

(b) *Processing.* The CO will review complete applications for an absence of errors that would prevent certification and for compliance with the criteria for certification. The CO will make a determination to certify, deny, or issue a Request for Further Information prior to making a Final Determination on the application. Criteria for certification, as used in this subpart, are whether the employer has: established the need for the nonagricultural services or labor to be performed is temporary in nature; established that the number of worker positions being requested for certification is justified and represent bona fide job opportunities; made all the assurances and met all the obligations required by § 655.22; and complied with all requirements of the program.

(c) *Request for Further Information.* (1) If the CO determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification in paragraph (b) of this section, the CO must issue a RFI to the employer. The CO will issue the written RFI within 7 calendar days of the receipt of the application, and send it by means normally assuring next-day delivery.

(2) The RFI must:

(i) Specify the reason(s) why the application is not sufficient to grant temporary labor certification, citing the relevant regulatory standard(s) and/or special procedure(s);

(ii) Specify a date, no later than 7 calendar days from the date of the written RFI, by which the supplemental information and documentation must be received by the CO to be considered; and

(iii) State that, upon receipt of a response to the written RFI, or expiration of the stated deadline for receipt of the response, the CO will review the existing application as well as any supplemental materials submitted by the employer and issue a Final Determination. If unusual circumstances warrant, the CO may issue one or more additional RFIs prior to issuing a Final Determination.

(3) The CO will issue the Final Determination or the additional RFI within 7 business days of receipt of the employer's response, or within 60 days of the employer's date of need, whichever is later.

(4) Compliance with an RFI does not guarantee that the employer's application will be certified after submitting the information. The employer's documentation must justify its chosen standard of temporary need or otherwise overcome the stated deficiency in the application.

(d) Failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application. Such failure to comply with an RFI may also result in a finding by the CO requiring supervised recruitment under § 655.30 in future filings of H–2B temporary labor certification applications.

§ 655.24 Audits.

(a) *Discretion.* OFLC will conduct audits of H–2B temporary labor certification applications. The applications selected for audit will be chosen within the sole discretion of OFLC.

(b) *Audit Letter.* When an application is selected for audit, the CO shall issue an audit letter to the employer. The audit letter will:

(1) State the application has been selected for audit and note documentation that must be submitted by the employer;

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

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

(i) Require the employer to conduct supervised recruitment under § 655.30 in future filings of H–2B temporary labor certification applications for a period of up to 2 years, or

(ii) Debar the employer from future filings of H–2B temporary labor certification applications as provided in § 655.31.

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

(d) *Audit violations.* If, as a result of the audit, the CO determines the employer failed to produce all required documentation, or determines that the employer made a material misrepresentation with respect to the application, the employer may be required to conduct supervised recruitment under § 655.30 in future filings of H–2B temporary labor certification applications for up to 2 years, or may be subject to debarment pursuant to § 655.31 or other sanctions. The CO may provide the audit findings and underlying documentation to DHS, WHD, or another appropriate enforcement agency. The CO may refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§§ 655.25–655.29 [Reserved]

§ 655.30 Supervised recruitment.

(a) *Supervised recruitment.* Where an employer is found to have violated program requirements, to have made a material misrepresentation to the Department, or to have failed to adequately conduct recruitment activities or failed in any obligation of this part, the CO may require pre-filing supervised recruitment.

(b) *Requirements.* Supervised recruitment shall consist of advertising for the job opportunity or opportunities in accordance with the required recruitment steps outlined under § 655.15, except as otherwise provided below.

(1) The CO will direct where the advertisements are to be placed.

(2) The employer must supply a draft advertisement and job order to the CO for review and approval no fewer than 150 days before the date on which the foreign worker(s) will commence work unless notified by the CO of the need for Supervised Recruitment less than 150 days before the date of need, in which case the employer must supply the drafts within 30 days of receipt of such notification.

(3) Each advertisement must comply with the requirements of § 655.17(a).

(4) The advertisement shall be placed in accordance with guidance provided by the CO.

(5) The employer will notify the CO when the advertisements are placed.

(c) *Recruitment report.* No fewer than 2 days after the last day of the posting of the job order and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare a detailed written report of the employer's supervised recruitment, signed by the employer as outlined in § 655.15(i). The employer must submit the recruitment report to the CO within 30 days of the date of the first advertisement and must retain a copy for a period of no less than 3 years. The recruitment report must contain a copy of all advertisements and a copy of the SWA job order, including the dates so placed.

(d) The CO may refer any findings that an employer or its representative discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.31 Debarment.

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Reflect a significant failure to comply with the RFI or audit process pursuant to §§ 655.23 or 655.24;

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

(vi) Reflect a significant failure to comply with the supervised recruitment process pursuant to § 655.30.

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

(3) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under this subpart;

(4) A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations under this subpart found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order secured by the Secretary; or

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

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

(1) The Administrator, OFLC will send to the employer, attorney, or agent a *Notice of Intent to Debar* by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed debarment. The employer, attorney, or agent may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The Administrator, OFLC must consider all relevant evidence presented in deciding whether to debar the employer, attorney, or agent.

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

(3) If, after reviewing the employer's timely filed rebuttal evidence, the Administrator, OFLC determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment under § 655.31(d), the Administrator, OFLC will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination of debarment and of the employer, attorney, or agent's right to appeal.

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

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

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

(iii) Review by the ARB.

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

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

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

(*1*) The issue or issues raised;

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

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

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

(f) *Inter-Agency Reporting.* After completion of the appeal process, DOL will inform DHS and other appropriate enforcement agencies of the findings and provide a copy of the *Notice of Debarment.*

§ 655.32 Labor certification determinations.

(a) *COs.* The Administrator, OFLC, is the Department's National CO. The Administrator, and the CO(s) in the NPC (by virtue of delegation from the Administrator), have the authority to certify or deny applications for temporary employment certification under the H–2B nonimmigrant classification. If the Administrator directs that certain types of temporary labor certification applications or specific applications under the H–2B nonimmigrant classification be handled by the National OFLC, the Director of the Chicago NPC will refer such applications to the Administrator.

(b) *Determination.* The CO will make a determination either to grant or deny the *Application for Temporary Employment Certification.* The CO will grant the application if and only if the employer has met all the requirements of this subpart, including the criteria for certification defined in § 655.23(b), thus demonstrating that an insufficient number of qualified U.S. workers are available for the job opportunity for which certification is sought and the employment of the H–2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

(c) *Notice.* The CO will notify the employer in writing (either electronically or by U.S. Mail) of the labor certification determination.

(d) *Approved certification.* If temporary labor certification is granted, the CO must send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney with a copy to the employer. The Final Determination letter will notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office.

(e) *Denied certification.* If temporary labor certification is denied, the Final Determination letter will:

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

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

(3) Offer the employer an opportunity to request administrative review of the denial available under § 655.33, or to file a new application in accordance with specific instructions provided by the CO; and

(4) State that if the employer does not request administrative review in accordance with § 655.33, the denial is final and the Department will not further consider that application for temporary alien nonagricultural labor certification.

(f) *Partial Certification.* The CO may, in his/her discretion, and to ensure compliance with all statutory and regulatory requirements, issue a partial certification, reducing either the period of need, the number of H–2B positions being requested, or both, based upon information the CO receives in the course of processing the temporary labor certification application, an RFI, or otherwise. If a partial labor certification

is issued, the Final Determination letter will:

(1) State the reason(s) for which either the period of need and/or the number of H–2B positions requested has been reduced, citing the relevant regulatory standards and/or special procedures;

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

(3) Offer the employer an opportunity to request administrative review of the partial labor certification available under § 655.33; and

(4) State that if the employer does not request administrative review in accordance with § 655.33, the partial labor certification is final and the Department will not further consider that application for temporary nonagricultural labor certification.

§ 655.33 Administrative review.

(a) Request for review. If a temporary labor certification is denied, in whole or in part, under § 655.32, the employer may request review of the denial by the BALCA. The request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 calendar days of the date of determination;

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

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the Final Determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO in support of the application.

(b) Upon the receipt of a request for review, the CO shall, within 5 business days assemble and submit the Appeal File using means to ensure same day or overnight delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) Within 5 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or overnight delivery, a brief in support of the CO's decision.

(d) The Chief Administrative Law Judge may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) The BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the denial of the temporary labor certification; or

(2) Direct the CO to grant the certification; or

(3) Remand to the CO for further action.

(f) The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 5 business days of the submission of the CO's brief or 10 days after receipt of the Appeal File, whichever is earlier, using means to ensure same day or overnight delivery.

§ 655.34 Validity of temporary labor certifications.

(a) *Validity Period.* A temporary labor certification is valid only for the period of time between the beginning and ending dates of employment, as certified by the OFLC Administrator on the *Application for Temporary Employment Certification*. The certification expires on the last day of authorized employment.

(b) *Scope of Validity.* A temporary labor certification is valid only for the number of H–2B positions, the area of intended employment, the specific services or labor to be performed, and the employer specified on the certified *Application for Temporary Employment Certification* and may not be transferred from one employer to another.

(c) *Amendments to Applications.* (1) Applications may be amended at any time, before the CO's certification determination, to increase the number of positions requested in the initial application by not more than 20 percent (50 percent for employers requesting less than 10 positions) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been reasonably foreseen, and the employer's services or products will be in jeopardy prior to the time that new H–2B workers could be secured.

(2) Applications may be amended to make minor changes in the period of employment, only when a written request is submitted to the CO and written approval obtained in advance. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity.

(3) Other amendments to the application, including elements of the job offer and the place of work, may be requested, in writing, and will be granted if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under § 655.32.

(4) The CO may change the date of need to reflect an amended date when delays occur in the adjudication of the *Application for Temporary Employment Certification*, through no fault of the employer, and the certification would otherwise become valid after the initial date of need.

§ 655.35 Required departure.

(a) *Limit to worker's stay.* As defined further in DHS regulations, a temporary labor certification shall limit the authorized period of stay for any H–2B worker whose admission is based upon it. 8 CFR 214.2(h)(13). A foreign worker may not remain in the U.S. beyond the validity period of admission by DHS in H–2B status nor beyond separation from employment, whichever occurs first, absent any extension or change of such worker's status or grace period pursuant to DHS regulations.

(b) *Notice to worker.* Upon establishment of a pilot program by DHS for registration of departure, the employer must notify any H–2B worker starting work at a job opportunity for which the employer has obtained labor certification that the H–2B worker, when departing the U.S. by land at the conclusion of employment as described in paragraph (a) of this section, must register such departure at the place and in the manner prescribed by DHS. This requirement will apply only to H–2B foreign workers entering from ports of entry participating in the DHS pilot program.

§ 655.50 Enforcement process.

(a) *Authority of the WHD Administrator.* The WHD Administrator shall perform all the Secretary's investigative and enforcement functions under secs. 1101(a)(15)(H)(ii)(b), 103(a)(6), and 214(c) of the INA, pursuant to the delegation of authority from the Secretary of Homeland Security to the Secretary of Labor.

(b) *Conduct of investigations.* The Administrator, WHD, shall, either pursuant to a complaint or otherwise, conduct such investigations as may, in the judgment of the Administrator, be appropriate, and in connection therewith, may enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons, and gather such information as deemed necessary by the Administrator to determine compliance

regarding the matters which are the subject of investigation.

(c) *Employer cooperation/availability of records.* An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the WHD Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative. No employer or representative or agent of an employer subject to the provisions of secs. 1101(a)(15)(H)(ii)(b) and 214(c) of the INA and/or of this subpart shall interfere with any official of the Department who is performing an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(b) or 1184(c). Any such interference shall be a violation of the labor certification application and of this subpart, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality.* The WHD Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart.

§ 655.60 Violations.

The WHD Administrator, through investigation, shall determine whether an employer has—

(a) Filed a petition with ETA that willfully misrepresents a material fact.

(b) Substantially failed to meet any of the conditions of the labor certification application attested to, as listed in § 655.22, or any of the conditions of the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker in 8 CFR 214.2(h).

(c) Misrepresented a material fact to the State Department during the visa application process.

§ 655.65 Remedies for violations.

(a) Upon determining that an employer has willfully failed to pay wages, in violation of the attestation required by § 655.22(e) or willfully required employees to pay for fees or expenses prohibited by § 655.22(j), or willfully made impermissible deductions from pay as provided in § 655.22(g), the WHD Administrator may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s), not to exceed $10,000.

(b) Upon determining that an employer has terminated by layoff or otherwise any employee described in § 622.55(k) of this part, within the period described in that section, the Administrator may assess civil money penalties that are equal to the wages that would have been earned but for the layoff at the H–2B rate for that period, not to exceed $10,000. No civil money penalty shall be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(c) The Administrator may assess civil money penalties in an amount not to exceed $10,000 per violation for any substantial failure to meet the conditions provided in the H–2B *Application for Temporary Employment Certification* or the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or successor form, or any willful misrepresentation in the application or petition, or a failure to cooperate with a Department audit or investigation.

(d) Substantial failure in paragraph (h) of this section shall mean a willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or successor form.

(e) For purposes of this subpart, "willful failure" means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart. See *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985).

(f) The provisions of this subpart become applicable upon the date that the employer's labor condition application is certified and/or upon the date employment commences, whichever is earlier. The employer's submission and signature on the labor certification application and DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or successor form constitutes the employer's representation that the statements on the application are accurate and its acknowledgment and acceptance of the obligations of the program. The employer's acceptance of these obligations is re-affirmed by the employer's submission of the petition (Form I–129), supported by the labor certification.

(g) In determining the amount of the civil money penalty to be assessed pursuant to paragraphs (b) and (c) of this section, the WHD Administrator shall consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;

(2) The number of U.S. or H–2B workers employed by the employer and affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

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

(h) *Disqualification from approval of petitions.* Where the WHD Administrator finds a substantial failure to meet any conditions of the application or in a DHS Form I–129, or a willful misrepresentation of a material fact in an application or in a DHS Form I–129, as those terms are defined in § 655.31, the Administrator may recommend that ETA debar the employer for a period of no less than 1 year, and no more than 3 years.

(i) If the WHD Administrator finds a violation of the provisions specified in this subpart, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including reinstatement of displaced U.S. workers, or other appropriate legal or equitable remedies. If the WHD Administrator finds that an employer has not paid wages at the wage level specified under the application and required by § 655.22(e), the Administrator may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of § 655.22(e).

(j) The civil money penalties determined by the WHD Administrator to be appropriate are due for payment within 30 days of the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator.

(k) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every 4 years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI–U) for the U.S. City Average for All Items. The adjusted amounts will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

§ 655.70 WHD Administrator's determination.

(a) The WHD Administrator's determination shall be served on the employer by personal service or by certified mail at the employer's last known address. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The WHD Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the Administrator's determination.

(c) The WHD Administrator's written determination shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefore, and in the case of a finding of violation(s) by an employer, prescribe the amount of any back wages and civil money penalties assessed and the reason therefor.

(2) Inform the employer that a hearing may be requested pursuant to § 655.71.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served).

(5) Where appropriate, inform the employer that the Administrator will notify ETA and DHS of the occurrence of a violation by the employer.

§ 655.71 Request for hearing.

(a) An employer desiring review of a determination issued under § 655.70, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. In such a proceeding, the Administrator shall be the prosecuting party, and the employer shall be the respondent. If such a request for an administrative hearing is timely filed, the WHD Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

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

(1) Be dated;

(2) Be typewritten or legibly written;

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

(4) State the specific reason or reasons why the employer believes such determination is in error;

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

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

(c) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the WHD Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An employer which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting employer's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within 10 days.

(e) Copies of the request for a hearing shall be sent by the employer or authorized representative to the WHD official who issued the WHD Administrator's notice of determination, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

§ 655.72 Hearing rules of practice.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 655.73 Service of pleadings.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the WHD Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following service and includes the last day of the period

unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

§ 655.74 Conduct of proceedings.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.71, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The administrative law judge shall notify all parties of the date, time and place of the hearing. All parties shall be given at least 14 calendar days notice of such hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party.

§ 655.75 Decision and order of administrative law judge.

(a) The administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Administrative Review Board (Board) review thereof shall be filed as provided in § 655.76. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order affirming the decision, or unless and until 30 calendar days have passed after the Board's receipt of the petition for review and the Board has not issued notice to the parties that the Board will review the administrative law judge's decision.

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

(c) In the event that the WHD Administrator assesses back wages for wage violation(s) of § 655.22(e), (g), or (j) based upon a PWD obtained by the Administrator from OFLC during the investigation and the administrative law judge determines that the Administrator's request was not warranted, the administrative law judge shall remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from OFLC or, in the event the employer filed a timely appeal under § 655.11, the final wage determination resulting from that process. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

§ 655.76 Appeal of administrative law judge decision.

(a) The WHD Administrator or an employer desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (e.g., briefs); and

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–5220, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding.

(h) The Board's final decision shall be served upon all parties and the administrative law judge.

§ 655.80 Notice to OFLC and DHS.

(a) The WHD Administrator shall, as appropriate, notify DHS and OFLC of the final determination of a violation and recommend that DHS not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions.

(b) The Administrator shall notify DHS and OFLC upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made; or

(2) Where, after a hearing, the administrative law judge issues a

decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, or reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision holding that a violation was committed by an employer.

■ 4. Amend § 655.715 by adding a definition for the "Center Director" to read as follows:

§ 655.715 Definitions.

* * * * *

Center Director means the Department official to whom the Administrator has delegated his authority for purposes of NPC operations and functions.

* * * * *

■ 5. Amend § 655.731 by revising paragraphs (a)(2) introductory text, (a)(2)(ii), (b)(3)(iii)(A), and (d)(2) and (3) to read as follows:

§ 655.731 What is the first LCA requirement regarding wages?

* * * * *

(a) * * *

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an OFLC NPC (OES), an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

* * * * *

(ii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(2), and (b)(3)(iii)(C)(2) of this section. The prevailing wage rate shall be based on the best information available. The following prevailing wage sources may be used:

(A) *OFLC National Processing Center (NPC) determination.* Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests, but shall do so in accordance with these regulatory provisions and Department guidance. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. Upon receipt of a written request for a PWD on or after January 1, 2010, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with secs. 212(n) and 212(t) of the INA. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the Chicago NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The Chicago NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(*1*) An employer who chooses to utilize an NPC PWD shall file the labor condition application within the validity period of the prevailing wage as specified in the PWD. Any employer desiring review of an NPC PWD, including judicial review, shall follow the appeal procedures at 20 CFR 656.41. Employers which challenge an NPC PWD under 20 CFR 656.41 must obtain a ruling prior to filing an LCA. In any challenge, the Department and the NPC shall not divulge any employer wage data collected under the promise of confidentiality. Once an employer obtains a PWD from the NPC and files an LCA supported by that PWD, the employer is deemed to have accepted the PWD (as to the amount of the wage) and thereafter may not contest the legitimacy of the PWD by filing an appeal with the CO (see 20 CFR 656.41) or in an investigation or enforcement action.

(*2*) If the employer is unable to wait for the NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the NPC, that the information relied upon produced a wage below the final PWD and the employer was paying the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H–2B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

(*3*) In all situations where the employer obtains the PWD from the NPC, the Department will deem that PWD as correct as to the amount of the wage. Nevertheless, the employer must maintain a copy of the NPC PWD. A complaint alleging inaccuracy of an NPC PWD, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of an NPC PWD. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(A) A copy of the prevailing wage finding from the NPC for the occupation within the area of intended employment.

* * * * *

* * * * *

(d) * * *

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under § 656.41 of this chapter within 30 days of the employer's receipt of the PWD from the Administrator. If the request is timely filed, the decision of OFLC is suspended until the Center Director issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the NPC Center Director, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this chapter within 30 days of the receipt of the decision of

the Center Director. If a request for review is timely filed with the BALCA, the determination by the Center Director is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the NPC shall divulge any employer wage data collected under the promise of confidentiality.

(i) Where an employer timely challenges an OFLC PWD obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling. Upon such a final ruling, the investigation and any subsequent enforcement proceeding shall continue, with the PWD as determined by the BALCA serving as the conclusive determination for all purposes.

(ii) [Reserved]

(3) For purposes of this paragraph (d), OFLC may consult with the NPC to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

■ 6. Amend § 655.1102 to add the definition of "Office of Foreign Labor Certification (OFLC)" to read as follows:

§ 655.1102 What are the definitions of terms that are used in these regulations?

* * * * *

Office of Foreign Labor Certification (OFLC) means the organizational component within the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning foreign workers seeking admission to the United States.

* * * * *

■ 7. Amend § 655.1112 by revising paragraph (c)(2) to read as follows:

§ 655.1112 Element II—What does "no adverse effect on wages and working conditions" mean?

* * * * *

(c) * * *

(2) Determination of prevailing wage for H–1C purposes. In the absence of collectively bargained wage rates, the National Processing Center (NPC) having jurisdiction as determined by OFLC shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines issued by ETA for prevailing wage determination requests submitted on or after the effective date of these regulations.

(i) Prior to the effective date of these regulations, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after the effective date of these regulations, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. A facility seeking to determine the prevailing wage must request a prevailing wage determination from the NPC having jurisdiction for providing the prevailing wage over the proposed area of intended employment not more than 90 days prior to the date the attestation is submitted to the Department. The NPC must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Once a facility obtains a prevailing wage determination from the NPC and files an attestation supported by that prevailing wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (as to both the occupational classification and the wage rate) and thereafter shall not contest the legitimacy of that prevailing wage determination in an investigation or enforcement action pursuant to subpart M of this part.

(ii) A facility may challenge the prevailing wage determination with the NPC having provided such determination according to administrative guidelines issued by ETA, but must obtain a final ruling prior to filing an attestation.

* * * * *

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 8. The authority citation for part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p)(1); sec.122, Public Law 101–649, 109 Stat. 4978; and Title IV, Public Law 105–277, 112 Stat. 2681.

■ 9. Amend § 656.3 by revising the definitions of "Prevailing wage determination (PWD)" and "State Workforce Agency (SWA)" to read as follows:

§ 656.3 Definitions, for purposes of this part, of terms used in this part.

* * * * *

Prevailing wage determination (PWD) means the prevailing wage provided or approved by an OFLC National Processing Center (NPC), in accordance with OFLC guidance governing foreign labor certification programs. This includes PWD requests processed for purposes of employer petitions filed with DHS under Schedule A or for sheepherders.

* * * * *

State Workforce Agency (SWA), formerly known as State Employment Security Agency (SESA), means the state agency that receives funds under the Wagner-Peyser Act to provide employment-related services to U.S. workers and employers and/or administers the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act.

* * * * *

§ 656.15 [Amended]

■ 10. Amend § 656.15:

■ a. By removing the words "in duplicate;" from paragraph (a); and

■ b. By removing paragraph (f) and redesignating paragraph (g) as paragraph (f).

■ 11. Amend § 656.40 by revising paragraphs (a), (b) introductory text, (c), (g), (h) and (i) to read as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) *Determinations.* The National Processing Center will determine the appropriate prevailing wage as follows:

* * *

(c) *Validity Period.* The National Processing Center must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the

determination date. To use a prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 of this part within the validity period specified by the NPC.

* * * * *

(g) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new PWD request.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.

(3) The survey submitted to the NPC must be based upon recently collected data.

(i) A published survey must have been published within 24 months of the date of submission to the NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the NPC.

(4) If the employer-provided survey is found not to be acceptable, the NPC will inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for NPC consideration is not acceptable, may file supplemental information as provided by paragraph (h) of this section, file a new request for a PWD, or appeal under § 656.41.

(h) *Submittal of supplemental information by employer.* (1) If the employer disagrees with the skill level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the NPC.

(2) The NPC will consider one supplemental submission about the employer's survey or the skill level the NPC assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it will inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination or appeal under § 656.41 of this part.

(i) Frequent users. The Secretary will issue guidance regarding the process by which employers may obtain a wage determination to apply to a subsequent application, when the wage is for the same occupation, skill level, and area of intended employment. In no case may the wage rate the employer provides the NPC be lower than the highest wage required by any applicable Federal, State, or local law.

(ii) [Reserved]

* * * * *

■ 12. Revise § 656.41 to read as follows:

§ 656.41 Review of prevailing wage determinations.

(a) *Review of NPC PWD.* Any employer desiring review of a PWD made by a CO must make a request for such review within 30 days of the date from when the PWD was issued. The request for review must be sent to the director of the NPC that issued the PWD within 30 days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the NPC up to the date of the PWD received from the NPC.

(b) *Processing of request by NPC.* Upon the receipt of a request for review, the NPC will review the employer's request and accompanying documentation, and add any material that may have been omitted by the employer, including any material the NPC sent the employer up to the date of the PWD.

(c) *Review on the record.* The director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

(d) *Request for review by BALCA.* Any employer desiring review of the director's determination must make a request for review by the BALCA within 30 days of the date of the Director's decision.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD.

(2) The request for review must be in writing and addressed to the director of the NPC making the determination. Upon receipt of a request for a review, the director will assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The director will send the Appeal File to the Office of Administrative Law Judges, BALCA. The BALCA handles the appeals in accordance with §§ 656.26 and 656.27.

Signed in Washington, DC, this 12th day of December, 2008.

Brent R. Orrell,

Deputy Assistant Secretary, Employment and Training Administration.

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division, Employment Standards Administration.

[FR Doc. E8–29995 Filed 12–18–08; 8:45 am]

BILLING CODE 4510–FP–P

LOUISIANA WORKFORCE

MARCH 10, 2015:
**7 MEN
**WORKED 1PM - 6PM
**CLEANED INSIDE OF PLANT (APPROX. 2 HOURS)
**PEELED CRAWFISH (APPROX. 3 HOURS)
**19.8 LBS PEELED = .94 LBS EACH PER HOUR
**CRAWFISH PEELED WERE LARGE IN SIZE

**APPEARS TO BE DIFFICULT FOR WORKER'S TO PEEL CRAWFISH EFFICIENTLY DUE TO THE SIZE OF THEIR HANDS
**LOTS OF SHELLS FOUND IN CRAWFISH MEAT

MARCH 11, 2015:
**7 MEN
**WORKED 3PM - 7PM
**PEELED CRAWFISH (APPROX 4 HOURS)
**42.7 LBS PEELED = 1.52 LBS EACH PER HOUR
**CRAWFISH PEELED WERE LARGE IN SIZE

**WORKER'S ARE A LITTLE FASTER THAN YESTERDAY, BUT STILL NOT REACHING 3 LBS PER HOUR, WHICH IS NEED ED
**ONE WORKER STATED, " I WOULD RATHER BE IN JAIL THAN PEEL CRAWFISH."
NOTIFIED WARDEN, BRADY STOUTES, AND WORKER WAS ELIMINATED FROM WORK DETAIL

MARCH 12, 2015:
**6 MEN (1 WORKER WHO STATED HE WOULD RATHER BE IN JAIL WAS ELIMINATED FROM WORK DETAIL)
**WORKED 3PM-6PM
**CONTINUED TRAINING

MARCH 17, 2015:
**5 MEN (1 WORKER REMOVED FROM DETAIL BY PRISON)
**WORKED 3PM-6PM
**GRADED CRAWFISH

MARCH 18, 2015:
**5 MEN
**WORKED 3PM-6PM
**PEELED CRAWFISH
**CRAWFISH WERE SMALL SIZE PEELING CRAWFISH
**14.8 LBS PEELED= 1.18 LBS EACH PER HOUR

MARCH 19, 2015:
**5 MEN
**WORKED 3PM-6PM
**PEELED CRAWFISH
**CRAWFISH WERE SMALL SIZE PEELING CRAWFISH
**14.2 LBS PEELED= 1.13 LBS EACH PER HOUR

DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Silver Spring, MD 20993

JUL 30 2015

The Honorable David Vitter
Chairman
Committee on Small Business and Entrepreneurship
United States Senate
Washington, D.C. 20510-6350

Dear Mr. Chairman:

Thank you for providing the opportunity for the Food and Drug Administration (FDA or the Agency) to testify at the May 6, 2015, hearing before the Committee on Small Business and Entrepreneurship, entitled "Impact of Federal Labor and Safety Laws on the U.S. Seafood Industry." This letter provides responses for the record to questions posed by Committee Members, which we received on May 21, 2015.

If you have further questions, please let us know.

Sincerely,

for Thomas A. Kraus
Associate Commissioner
for Legislation

cc: The Honorable Jeanne Shaheen
Ranking Member
Committee on Small Business and Entrepreneurship

The Honorable David Vitter

In Dr. Strain's testimony, he mentioned that some chemicals on imported seafood are banned in the United States. During the hearing the concept of parity between domestic requirements and foreign quality standards was discussed at length.

Dr. Strain brought up several examples of imported crawfish that contain chemicals that would not be allowed in the US. When we know that countries, who have different chemical safety laws and standards for food, are exporting seafood to our shores, why is there no grounds for a presumptive denial of entry based on this knowledge?

As we explain in further detail below, FDA does have the authority to prevent the importation of products that are not in compliance with U.S. standards and requirements. With regard to all imported food, it is the importer's responsibility to offer for entry into the United States product that is fully compliant with all applicable U.S. laws. Under the seafood Hazard Analysis Critical Control Point (HACCP) regulation, HACCP controls are required for both domestic and foreign processors of fish and fishery products. Additionally, the regulation requires that U.S. importers take certain steps to verify that their foreign suppliers meet the requirements of the regulation. In recent years, the Agency has significantly increased the number of inspections of foreign food manufacturers.

In addition, the Agency has conducted foreign country assessments to evaluate the country's laws for, and implementation of, good aquaculture practices. Specifically, FDA evaluates the country's controls, including licensing and permitting, inspections, and training programs for aquaculture products. FDA uses the information from country assessments to better target surveillance sampling of imported aquaculture products, inform its planning of foreign seafood HACCP inspections, provide additional evidence for potential regulatory actions, and improve collaboration with foreign government and industry contacts to achieve better compliance with FDA's regulatory requirements. For example, the country assessments for China in 2006, Chile in 2009,[1] and India in 2010 resulted in increased sampling and testing for aquaculture products from these countries (e.g., eel from China, salmon from Chile, and shrimp from India).

FDA screens 100 percent of import entries electronically, and a subset of those are physically inspected at varying rates, depending on the potential risk associated with them. If the product appears to be adulterated or misbranded, based on examination or other information, such as prior history of the product, manufacturer, or country, FDA will give notice advising the owner or consignee of the appearance of a violation under the Federal Food, Drug, and Cosmetic Act and the right to provide testimony or evidence to rebut the appearance of the violation. For example, if an import entry of seafood is detained due to a detection of a chemical residue such as chloramphenicol, the importer can send a sample of the imported lot to a private laboratory to determine if that residue is present. An FDA scientist then reviews the private laboratory finding to confirm that the analysis is valid. If the product is ultimately refused admission, it must be destroyed, unless it is exported by the owner or consignee within 90 days of the date of

[1] Dr. Solomon's written testimony from May 6, 2015, incorrectly stated that the country assessment for Chile was in 2008.

the notice of refusal.

When FDA has sufficient evidence to indicate that future entries of a particular product offered for import into the United States may appear violative, FDA may place the foreign processor or the specific product on an import alert. Import alerts inform FDA field staff that the Agency has sufficient evidence to detain, without physical examination, future shipments of an imported product, and such shipments may be refused admission into United States commerce. To obtain release of such product, the responsible party, the importer, would need to submit or provide sufficient evidence to FDA that the product is in compliance with U.S. requirements. When FDA has evidence of a systemic pattern of violations within a country, FDA may use a country-wide import alert to address the violations. For example, FDA imposed a country-wide import alert on all farm-raised catfish, basa, shrimp, dace, and eel from China in June 2007, due to the presence of unapproved animal drugs and/or unsafe food additives, such as malachite green. Shipments of products covered by the import alert may be detained, without physical examination, at the time they are offered for import into U.S. commerce. The shipments can be released by FDA after evidence is provided to overcome the appearance that the products are violative. As another example, the Agency has two import alerts related to chloramphenicol in aquaculture products: Import Alert 16-127 relates to crustaceans containing chloramphenicol, and Import Alert 16-124 relates to the use of unapproved new animal drugs in aquaculture seafood products.

The Honorable Jeanne Shaheen

As I mentioned, I am very concerned about the new USDA program being set up to inspect catfish separately from all other seafood.

Once USDA's catfish inspection program is finalized, that agency estimates it will cost around $14 million a year to operate. Is that comparable to the typical annual cost to the taxpayer of the inspection of catfish under FDA jurisdiction?

In Fiscal Year 2014, FDA estimates that we expended $1.97 million on the catfish inspection program. This cost includes the following operational activities: domestic inspections, investigations, sample collections, and sample analyses, as well as import investigations, field exams, sample collections, sample analyses, and label reviews. This estimate is not a full Agency cost, as it does not include costs for the Center for Food Safety and Applied Nutrition to conduct various activities such as foreign country assessments, compliance reviews, or participation in international meetings, which are not limited to catfish.

We are aware that the 2011 GAO Report, "Seafood Safety: Responsibility for Inspecting Catfish Should Not Be Assigned to USDA," cites an estimate of "less than $700,000 annually" spent by FDA. It should be noted that this estimate reflected only the inspection of catfish processing facilities and did not include the other operational costs identified in the current calculation.

We are not aware of the specifics of the proposed USDA program cost estimates, which may include activities outside the scope of FDA inspection/sampling activities and our associated

costs.

The Honorable Mazie Hirono

Regarding data collection for seafood safety guidelines and regulations—As you probably know, seafood is important in Hawaii. It is estimated that in Hawaii, we consume more than two times the national average of seafood per person, which includes the consumption of raw fish. Seafood is deeply ingrained in the way of life and culture of our island state, from fishermen to consumers, we have a supply chain with checks and balances for fresh, safe and quality seafood landed in Hawaii.

I appreciate that seafood regulation is no easy undertaking for the FDA. Can you explain how FDA gathers and collects data as part of promulgating guidelines and regulations on seafood safety? Does FDA work with the domestic fishing industry and state health departments in promulgating seafood safety guidance/regulations particularly as it relates to the consumption of raw domestic seafood?

By way of background, federal regulations are governed by the Administrative Procedure Act. Once an agency decides that a regulatory action is necessary or appropriate, it develops and typically publishes a proposed rule in the *Federal Register*, soliciting comments from the public (including academia, industry, and state counterparts) on the regulatory proposal. After the agency considers this public feedback and makes changes where appropriate, it then publishes a final rule in the *Federal Register* with a specific date upon which the rule becomes effective and enforceable. In issuing a final rule, the agency must describe and respond to the public comments it received.

In developing the seafood HACCP regulation, FDA relied on data compiled by the Centers for Disease Control and Prevention (CDC) in its Foodborne Disease Surveillance System as reported from state and local health authorities as well as on research conducted by FDA, the National Oceanic and Atmospheric Administration (NOAA), the Environmental Protection Agency (EPA), and others. That data was used both to produce information that would provide a better understanding of the toxins, bacteria, chemical contaminants, and other phenomena, and to provide a basis for developing more advanced types of controls for them. FDA also relied on its own risk assessment and on the conclusions of the 1991 National Academy of Sciences' Institute of Medicine report entitled "Seafood Safety."

FDA guidance documents are developed and issued in accordance with FDA's good guidance practices (GGPs). The way the Agency gathers information and collects data depends on the level of the guidance document. With regard to seafood, FDA maintains the Fish and Fishery Products Hazards and Controls Guidance (the Hazard Guide), which is intended to assist processors of fish and fishery products in the development of their HACCP plans, which are required by FDA's seafood HACCP regulation. The Hazard Guide was designed to address both species (type of fish) and processing (raw, cooked, time/temperature)-related hazards using the most up-to-date scientific data and information regarding industry practices. Supporting documentation is referenced at the end of each chapter within the Hazard Guide. Processors of fish and fishery products will find information in the guidance that will help them identify

hazards that are associated with their products and help them formulate control strategies. The guidance is also intended to serve as a tool to be used by federal and state regulatory officials in the evaluation of HACCP plans for fish and fishery products.

In developing the fourth edition of the Hazard Guide, the Agency reviewed comments received on the third edition of the guide and revised it as appropriate, in accordance with GGPs. FDA also reviewed illness and outbreak data from CDC, inspection data from FDA's Office of Regulatory Affairs, and any new scientific literature before modifying the guide. As described above, FDA also works with seafood industry members to better understand common practices in order to assist with scientific data reviews that help ensure that the most up-to-date and scientifically sound controls are used to mitigate hazards reasonably likely to occur.

FDA works closely with state and local officials as well as with industry to ensure the safety of seafood. As one example, the National Shellfish Sanitation Program (NSSP) is a federal/state cooperative program recognized by FDA and the Interstate Shellfish Sanitation Conference for the sanitary control of shellfish produced and sold for human consumption. The purpose of the NSSP is to promote and improve the sanitation of shellfish moving in interstate commerce through federal/state cooperation and uniformity of state shellfish programs. Participants in the NSSP include agencies from shellfish producing and non-producing states, FDA, EPA, NOAA, and the shellfish industry.

Senate Small Business Committee

May 6, 2015 Hearing

Questions for the Record for Assistant Secretary of Employment and Training, Portia Wu

Questions and Answers

Questions from:

Senator David Vitter

During the hearing we discussed in detail the requirements placed on utilizers of the H-2B visa program. Mr. Randol addressed several concerns about the program, including the requirement to pay workers when a work season is cut short by natural occurrences (hurricanes, droughts, etc.) and the requirement that workers be paid the same, regardless of work output or productivity. These rules do not seem to be workable in the real world:

1. **Please elaborate on the statutory basis that the Department of Labor has based these requirements on.**

Response: The Immigration and Nationality Act (INA) permits the importation of foreign workers for the H-2B program only "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). Under Department of Homeland Security (DHS) regulations, a petition for temporary employment filed with DHS must be accompanied by an approved temporary labor certification from the Department of Labor (DOL), which serves as DOL's advice to DHS regarding whether a qualified U.S. worker is available to fill the employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See, e.g.*, 8 CFR 214.2(h)(6)(iii)(A).

2. **Further, please elaborate on the statutory basis utilized by the Department of Labor for all changes to the H-2B program, and private wage survey use, with account taken for the recent court decision.**

Response: The new joint DHS-DOL H-2B regulations provide interpretations of the statutory requirement in 8 U.S.C. 1101(a)(15)(H)(ii)(b), consistent with the DHS regulations at 8 CFR 214.2(h)(6)(iii)(A) & (D).

Senator Jeanne Shaheen

I recognize that there is a need for comprehensive reform of our temporary work visa programs, to better suit businesses' needs and protect both American and foreign workers. I was

disappointed that the House of Representatives failed to take up the Senate-passed immigration reform legislation last Congress, which would have implemented many much-needed reforms. Without such a comprehensive strategy, I appreciate the difficult position the Department is in with regards to the specific regulations governing the H-2B program.

1. **Can you explain how the H-2B Wage Final Rule issued on April 29th by the Department weighs the legitimate need for temporary foreign workers with the need to protect wages of U.S. workers?**

Response: The H-2B Wage Final Rule is intended to ensure both that employers' legitimate needs for temporary foreign workers are met, and that the requirement to protect the wages of U.S. workers is fulfilled. The Wage Final Rule continues the use of the Occupational Employment Statistics (OES) survey mean wage as the indicator of the prevailing wage, which protects the wages of American and foreign workers. At the same time, the Rule also includes flexibility for employers by permitting narrow use of employer-provided surveys in limited circumstances, including the use of state-conducted surveys, consistent with court rulings on these issues.

2. **What measures has the Department taken to ensure that these regulations will survive potential legal challenges to the rules, given the history of legal challenges that H-2B regulations have faced, and ensure that businesses utilizing the H2B program have certainty in the program?**

Response:

We have considered and taken into account past decisions in promulgating the rule. Specifically, issuing the rule jointly with DHS addresses legal challenges to DOL's authority to independently issue regulations. However, as revealed by cases that have already been filed against the 2015 H-2B regulations, the Departments cannot guarantee that challengers will not attempt to have the two regulations struck down.

3. **How will the interim rule protect temporary workers in the H-2B program from labor exploitation, including forced labor and human trafficking?**

Response: In the 2015 Interim Final Rule (IFR), the Departments implemented some crucial reforms to prevent worker exploitation, unfair treatment and human trafficking, many of which track recommendations by the GAO as well as bi-partisan measures that have been adopted by Congress in other contexts. Specifically, the 2015 IFR includes the following worker protections:

- Strengthened provisions banning the passing of prohibited fees (i.e., those related to obtaining an H-2B labor certification, and related recruitment or other costs) to employees and requires an employer to demonstrate it prohibited third parties engaged in the recruitment of H-2B workers from charging workers prohibited fees by submitting to DOL a copy of any contract with a recruiter or agent engaged in the recruitment of H-2B workers.

- Mandatory disclosure of employer contracts with any labor recruiter or agent engaged in recruiting H-2B workers and the identities and locations of all persons and entities hired by or working for the recruiters.
- Prohibition of retaliation against workers, including intimidating, threatening, restraining, coercing, blacklisting, or discharging workers or causing another to do so if the worker exercised his/her rights under the regulations, complained against the employer, or instituted or participated in a legal proceeding against the employer, or if the worker consulted with others (such as a workers' center, community organization, labor union, legal assistance program, or an attorney).
- Expanded authority to revoke an existing labor certification based on a finding of violations(s), and/or debarment of employers who engage in willful or substantial violations from filing a labor certification application or labor condition application with DOL for an expanded period of up to 5 years.

Senator Mazie Hirono

Questions 1-3: *Regarding H-2B Visas Program*

1. Tell us how the new 2015 Interim Final Rule helps U.S. workers looking for work.

Response: The 2015 H-2B Interim Final Rule (IFR) strives to improve U.S. worker access to jobs through enhanced U.S. worker recruitment efforts closer to the employer's start date of need. The IFR enhances the mandatory recruitment of U.S. workers by extending the recruitment period until 21 days before the employer's start date of work. Under the prior 2008 rule, an employer had no obligation to hire U.S. workers after concluding the 10-day recruitment period and submitting the recruitment report – a period that could be completed nearly four months before the start date of work. U.S. job applicants typically seek jobs that start sooner and may not have the ability to wait for a job that begins several months in the future.

Unlike the 2008 rule, the IFR also requires the rehiring of interested former U.S. employees who worked for the employer within the last year, unless an employee was terminated for cause or abandoned the worksite. The IFR also requires that notice be given to workers in the area and occupation either through the bargaining representative or through a posting of the job at the work location. Finally, the IFR also gives the Department of Labor discretion to order additional recruitment, particularly where a job is located in an area of substantial unemployment, thereby providing that U.S. workers are afforded access to the job opportunities for which the employer intends to hire H-2B workers.

In addition to enhancing employers' efforts to recruit U.S. workers, the IFR also provides for the broader circulation of the job order by State Workforce Agencies. The Department will also expand its existing national electronic job registry to include H-2B job orders. The posting of the job orders will not require additional effort on the part of the employer but will substantially improve the visibility of temporary nonagricultural job opportunities to U.S. workers during the extended recruitment period. Job applicants will be able to browse and search job opportunities across multiple data points, such as by location, period of employment, occupation, etc.

2. Tell us about some of the problems with employers exploiting H-2B workers, and how the new 2015 Interim Final Rule helps prevent H-2B workers from being treated unfairly.

Response: The U.S. Government Accountability Office (GAO) reported in March 2015 that 44 percent of employers who use the H-2A and H-2B temporary worker programs are not getting their workers directly, and instead use labor recruiters. GAO found that labor recruiters frequently charge workers fees that reduce their real wages, misrepresent the wages workers will be paid as well as the jobs they will perform, and in some cases subject workers to human trafficking. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, at 6, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS (2015) (U.S. Government Accountability Office Report to Congressional Committees).

The 2015 Interim Final Rule (IFR) implemented some crucial reforms to prevent worker exploitation, unfair treatment, and human trafficking, many of which track recommendations by the GAO, as well as bi-partisan measures that have been adopted by Congress in other contexts. For example, the 2015 IFR includes strengthened provisions banning the passing of prohibited fees (i.e., those related to obtaining an H-2B labor certification, and related recruitment or other costs) to employees, and requires an employer to prove it prohibited third parties engaged in the recruitment of H-2B workers from charging workers prohibited fees by submitting a copy of such a contract. In addition, in order to provide that workers are not given misinformation about a job opportunity, employers must provide the worker with a copy of the approved job order no later than when the worker is applying for a visa. The IFR also requires the posting of a workers' rights poster at each worksite, which includes contact information for the Department for reporting violations.

In order to provide greater transparency in the use of foreign labor recruiters, the 2015 IFR requires the disclosure of employer contracts with any labor recruiter or agent engaged in recruiting H-2B workers and the identities and locations of all persons and entities hired by or working for the recruiters. In the future, DOL will begin posting a list of these agents and recruiters on a publicly available website after updating the routine uses in DOL's Privacy Act System of Records Notice.

For the first time, the 2015 IFR explicitly prohibits retaliation against workers, including intimidating, threatening, restraining, coercing, blacklisting, or discharging workers or causing another to do so if the worker exercised his/her rights under the regulations, complained against the employer or instituted or participated in a legal proceeding against the employer or if the worker consulted with others (such as a workers' center, community organization, labor union, legal assistance program, or an attorney).

The new regulation also gives the Department expanded authority to revoke an existing labor certification based on a finding of violations(s) or to debar an employer from filing a labor certification application or labor condition application with DOL for an expanded period of up to 5 years.

3. Tell us how the 2015 Wage Final Rule is fairer to workers.

Response: The 2015 Wage Final Rule sets the threshold wage an employer seeking H-2B workers must offer and pay to both the U.S. and H-2B workers it hires for its temporary positions. A fair prevailing wage requirement is key to preventing adverse effect in the wages and working conditions of U.S. workers when employers seek to hire foreign workers.

Questions 4-5: *Regarding the Workforce Innovation and Opportunity Act (WIOA)*

Last year, the Senate passed the Workforce Innovation and Opportunity Act (WIQA) by a vote of 95-3. Every member of this Committee who was here last year voted for it.

4. Tell us how DOL is implementing this law, and how it helps the seafood industry train workers.

Response: The Workforce Innovation and Opportunity Act (WIOA), signed into law on July 22, 2014, presents an extraordinary opportunity to improve job and career options for America's job seekers and workers through an integrated, job-driven public workforce system that links diverse talent to businesses. WIOA retains the nationwide system of one-stop centers, currently branded as American Job Centers, which directly provide an array of employment and connect customers to work-related training and education. The new law places greater emphasis on one-stop centers achieving results for jobseekers, workers and businesses, including employers in the seafood industry. WIOA supports the development of strong regional economies through robust public/private partnerships that align investments in workforce, education, and economic development. In addition to providing individuals access to the services they need to get good jobs and stay employed, one-stop centers help business find skilled workers and access other supports, including education and training, for their current workforces. We expect that the seafood industry could benefit from active participation in regional and local workforce bodies that establish priorities and align workforce programs and strategies to meet worker and employer needs, including the use of industry sector partnerships and career pathways to build a pipeline of skilled workers for in-demand industries.

On April 16, 2015, the Departments of Labor and Education published five Notices of Proposed Rule Makings (NPRMs) in the Federal Register to implement WIOA. Before issuing these proposed rules, the Departments of Labor and Education solicited broad input from the public workforce system and its partners and stakeholders through a variety of mechanisms, ranging from in-person town halls, to outreach calls, and to webinars. The public had until June 15, 2015 to submit comments. Individuals were able to review the proposed rules and submit comments on line at www.regulations.gov. The Departments will now analyze the comments and reconcile them through revisions or explanations as needed. We expect to publish Final Rules in early 2016.

At the same time, states are required under WIOA to implement many of its requirements beginning on July 1, 2015. As such, the Department is issuing operating guidance and providing

assistance to states to support this process. Individuals can find a list of WIOA-related guidance on the Department of Labor web site at http://www.doleta.gov/wioa/. Information on the Employment and Training Administration's technical assistance webinars, tools, and resources are on the WIOA Collection Page - www.wioa.workforce3one.org.

5. How can seafood and other employers best use DOL's resources to recruit, hire, and train workers?

Response: Employers should work with their workforce development boards and local One-Stop Career Centers to access resources that can be helpful in their efforts to recruit, hire, and retain talent. State and local boards promote industry and sector partnership and are responsible for activities to meet the workforce needs of local and regional employers. Local areas can use funds for demonstrated effective strategies to meet those needs, including incumbent worker training, Registered Apprenticeship, on-the-job training, and customized training. Employers are incentivized to meet their workforce needs and offer opportunities for workers to learn with increased reimbursement rates for on-the-job training and customized training. To locate one-stop centers across the country, employers may use America's Service Locator at www.servicelocator.org or call the toll-free number: 1-877-US-2JOBS or 1-877-872-5627.

Employers can find additional resources to recruit, hire, and train workers at the Department of Labor's on-line Business Center resource: http://www.careeronestop.org/BusinessCenter/index.aspx/. Recognizing that there may be some interests in reaching multiple states and local areas at the same time, employers may also be interested in reaching out to State Workforce Agencies, which can be found at http://www.careeronestop.org/businesscenter/stateresources/findstateresources.aspx. Finally, employers may contact the Department's Office of Foreign Labor Certification at http://www.foreignlaborcert.doleta.gov/states_npc.cfm.

○