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Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

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RIN 1205–AB55

Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement

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

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL or Department) is amending its regulations regarding the certification for the temporary employment of nonimmigrant workers in agricultural occupations on a temporary or seasonal basis, and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers.

This final rule re-engineers the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2A (agricultural temporary worker) status. The final rule utilizes an attestation-based application process based on pre-filing recruitment and eliminates duplicative H–2A activities currently performed by State Workforce Agencies (SWAs) and the Department. The rule also provides enhanced enforcement, including more rigorous penalties, to complement the modernized certification process and to appropriately protect workers.

DATES: This final rule is effective January 17, 2009.

FOR FURTHER INFORMATION CONTACT: For further information about 20 CFR part 655, subpart B, 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 number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For further information regarding 29 CFR part 501, contact James Kessler, Farm Labor Team Leader, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3510, Washington, DC 20210; Telephone (202) 693–0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

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I. Background Leading to the NPRM

A. Statutory Standard and Current Department of Labor Regulations

The H–2A visa program provides a means for U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services when U.S. labor is in short supply. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act) (8 U.S.C. 1101(a)(15)(H)(ii)(a)) defines an H–2A worker as a nonimmigrant admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. Section 214(c)(1) of the INA (8 U.S.C. 1184(c)(1)) mandates that the Secretary of DHS consult with the Secretary of the Department of Labor (the Secretary) with respect to adjudication H–2A petitions, and, by cross-referencing Section 218 of the INA (8 U.S.C. 1188), with determining the availability of U.S. workers and the effect on wages and working conditions. Section 218 also sets forth further details of the H–2A application process and the requirements to be met by the agricultural employer.

Although foreign agricultural labor has contributed to the growth and success of America's agricultural sector since the 19th century, the modern-day agricultural worker visa program originated with the creation, in the INA (Pub. L. 82–144), of the ''H–2 program''—a reference to the INA subparagraph that established the program. Today, the H–2A nonimmigrant visa program authorizes the Secretary of DHS to permit employers to hire foreign workers to come temporarily to the U.S. and perform agricultural services or labor of a seasonal or temporary nature, if the need for foreign labor is first certified by the Secretary.

Section 218(a)(1) of the INA (8 U.S.C. 1188(a)(1)) states that a petition to import H–2A workers may not be approved by the Secretary of Homeland Security unless the petitioner has applied to the Secretary for a certification that:

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

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

The INA specifies conditions under which the Secretary must deny certification, and establishes specific timeframes within which employers must file—and the Department must process and either reject or certify—applications for H–2A labor certification. In addition, the statute contains certain worker protections, including the provision of workers' compensation insurance and housing as well as minimum recruitment standards to which H–2A employers must adhere. *See* 8 U.S.C. 1188(b) and (c). The INA does not limit the number of foreign workers who may be accorded H–2A status each year or the number of labor certification applications the Department may process.

The Department has regulations at 20 CFR part 655, subpart B—''Labor Certification Process for Temporary Agricultural Employment Occupations in the United States (H–2A Workers),'' governing the H–2A labor certification process, and at 29 CFR part 501 implementing its enforcement responsibilities under the H–2A program. Regulations relating to employer-provided housing for agricultural workers appear at 20 CFR part 654, subpart E (Housing for Agricultural Workers), and 29 CFR 1910.142 (standards set by the Occupational Safety and Health Administration); *see* also 20 CFR 651.10, and part 653, subparts B and F.

The Department was charged with reviewing the efficiency and effectiveness of its H–2A procedures in light of the increasing presence of undocumented workers in agricultural occupations and because of growing concern about the stability of the agricultural industry given its difficulty in gaining access to a legal workforce.[1] The Department reviewed its administration of the program and, in light of its extensive experience in both the processing of applications and the enforcement of worker protections, proposed measures to re-engineer the H–2A program in a Notice of Proposed Rulemaking on February 13, 2008 (73 FR 8538) (NPRM or Proposed Rule).

B. Overview of the Proposed Redesign of the System

The NPRM described a pre-filing recruitment and attestation process as part of a re-engineered H–2A program. The Department proposed a process by which employers, as part of their application, would attest under threat of penalties, including debarment from the program, that they have complied with and will continue to comply with all applicable program requirements. In addition, employers would not be required to file extensive documentation with their applications but would be required to maintain all supporting documentation for their application for a period of 5 years in order to facilitate the Department's enforcement of program requirements. The Department's proposal also contained new and enhanced penalties and procedures for invoking those penalties against employers as well as their attorneys or agents who fail to perform obligations imposed under the H–2A program. The program also eliminates duplicative administration and processing by the State Workforce Agencies (SWAs) and the Department by requiring filing of the application only with the Department's National Processing Center (NPC) in Chicago, Illinois. This program would also enable the SWAs to better perform their mandated functions in processing H–2A agricultural clearance orders, by enhancing their ability to conduct housing inspections well in advance of the employer's application date. The SWAs would also continue to clear and post intrastate job orders, circulate them through the Employment Service interstate clearance system and refer potential U.S. workers to employers.

Finally, the Department proposed additional processes for penalizing employers or their attorneys or agents who fail to perform obligations required under the H–2A program, including provisions for debarring employers, agents, and attorneys and revoking approved labor certifications.

C. Severability

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

II. Discussion of Comments on Proposed Rule

The Department received over 11,000 comments in response to the proposed rule, the vast majority of them form letters or e-mails repeating the same contentions. Commenters included individual farmers and associations of farmers, agricultural associations, law firms, farmworker advocates, community-based organizations, and individual members of the public. The Department has reviewed these comments and taken them into consideration in drafting this Final Rule.

We do not discuss here those provisions of the NPRM on which we received no comments. Those provisions were adopted as proposed. We have also made some editorial changes to the text of the proposed regulations, for clarity and to improve readability. Those changes are not intended to alter the meaning or intent of the regulations.

A. Revisions to 20 CFR Part 655 Subpart B

Section 655.93 Special Procedures

The Department proposed to revise the current regulation on special procedures to clarify its authority to establish procedures that vary from those procedures outlined in the regulations. We received numerous comments about this revised language on special procedures.

[1] Fact Sheet: Improving Border Security and Immigration Within Existing Law, Office of the Press Secretary, The White House (August 10, 2007); see also Statement on Improving Border Security and Immigration Within Existing Law, 43 Weekly Comp. Pres. Doc. (August 13, 2007).

Several commenters questioned the effect the proposed language would have on special procedures currently in use. Section 655.93(b) of the current regulations provides for special procedures, stating that: ''the Director has the authority to establish special procedures for processing H–2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary.'' The proposed rule provides that ''the OFLC Administrator has the authority to establish or to revise special procedures in the form of variances for processing certain H–2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary.''

Four associations of growers/producers specifically requested clarification of the phrase ''in the form of variances.'' These associations asked the Department to confirm that the proposed language does not pose a threat to the continued use of the special procedures for sheepherders currently in place. One association expressed concern that this revised language would require hundreds of employers engaged in the range production of livestock to annually document their need for special procedures.

The addition of the phrase ''in the form of variances'' is intended to clarify that special procedures differ from those processes set out in the regulation, which otherwise apply to employers seeking to hire H–2A workers. The special procedures for sheepherders, for example, arise from decades of past practices and draw upon the unique nature of the activity that cannot be completely addressed in the generally applicable regulations. The establishment of special procedures recognizes the peculiarities of an industry or activity, and provides a means to comply with the underlying program requirements through an altered process that adequately addresses the unique nature of the industry or activity while meeting the statutory and regulatory requirements of the program. The special procedures do not enable industries and employers to evade their statutory or regulatory responsibilities but rather establish a feasible and tailored means of meeting them while recognizing the unique circumstances of that industry. The language in § 655.93(b) affirms the Department's authority to develop and/or revise special procedures. The Department does not intend to require any industry currently using special procedures to seek ratification of their current practice, nor does the Department intend to require annual or periodic justifications of an industry's need for special procedures. The Department does reserve the right to make appropriate changes to those procedures after consultation with the industry involved.

Section 655.93(b) in the NPRM enables the Administrator/OFLC ''to establish or revise special procedures in the form of variances for processing certain H–2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary.'' In contrast, the current rule states that the subpart permits the Administrator/OFLC to ''continue and * * * revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews.''

The Department received several comments about the proposed language, universally expressing concern that the new language provides the Department with broader authority for changing or revoking existing special procedures without providing due process with respect to altering the procedures. An association of growers/producers stated that the proposed rule uses ''more ominous terms'' and gives the impression that the Administrator/OFLC has unilateral authority to make changes without safeguards, review, or democratic procedures. One association of growers and producers expressed the view that the revocation language gives the Department authority to revoke the procedures without advance notice and opportunity for comment and is, therefore, a violation of the Administrative Procedure Act.

A law firm that provides counsel to agricultural employers stated that the new language does not adequately solidify the Department's commitment to existing special procedures and recommended that the Department amend the regulation to affirm its commitment to continuing such long-standing special procedures by providing that any proposed changes to the existing special procedures and policies can be made only after publication in the **Federal Register** with at least a 120-day period for public comment. The firm also commented that the proposal to empower the Administrator/OFLC to revoke special procedures would violate Section 218(c)(4) of the INA, which requires the Secretary of Labor to issue regulations addressing the specific requirements of housing for employees principally engaged in the range production of livestock.

The Department has decided, following consideration of these concerns, to retain the NPRM language in the final regulation, but has added language similar to that in the current regulation, to enumerate those special procedures currently in effect as examples of the use of special procedures. It is our belief that this provision, as it now reads, provides both the Department and employers using the H–2A program essential flexibility regarding special procedures, thus permitting the Department to be far more responsive to employers' changing needs, crop mechanization, and similar concerns. In addition, the language on special procedures in the Final Rule reaffirms the Department's continuing commitment to use special procedures where appropriate. The Department has no present intent to revoke any of the special procedures that are already in place, nor does the language of the final regulation give the Department any new power to do so. While it is possible that at some time in the future the Department may need to revoke or revise existing special procedures, that step would be taken with the same level of deliberation and consultation that was employed in the creation of those procedures. To strengthen our commitment to continue the current consultative process, we have changed the word ''may'' in the last sentence of paragraph (b) to ''will.'' The provision also provides the Department with the authority to develop new procedures to meet employer needs and, additionally, provides employers with the opportunity to request that the Department consider additional procedures or revisions to existing special procedures. Proposed paragraph (c) has been deleted as unnecessarily duplicative of the language in paragraph (b).

Two associations of growers and producers requested that the Department formulate special procedures for dairy workers, stating that these requested special procedures should not be different from those already established for sheepherders. The associations stated the provisions for sheepherders have ''special relevance to the current dairy situation'' and also stated the ''special procedures relieve the sheepherding industry from having to make a showing of temporary or seasonal employment.'' The longstanding special procedures that allow sheepherders to participate in the

H–2A program have their origins in prior statutory provisions dating back to the 1950s. The Department is unaware of any comparable statutory history pertaining to the dairy industry. The Department would, of course, consider a specific request from dairy producers or their representatives for the development of special procedures that would be applicable to eligible H–2A occupations (*see* further discussion on this point in the discussion of the definition of ''agricultural labor or services'' below). The Department does not believe, however, that it would be appropriate to speculatively address the merits of a specific special procedures request in this regulation, particularly before a request making a detailed case for the appropriateness of such special procedures has been received.

An individual employer commented that those involved in discussing and considering changes to the H–2A program should preserve the special procedures for sheepherders and extend them to all occupations engaged in the range production of other livestock (cattle and horses). A private citizen provided suggestions for improving the handling of certification for sheep shearers.

The Department has previously established special procedures for open range production of livestock and sheep shearers and does not have any plans to change those procedures at this time and does not believe that it would be appropriate to address in this regulation the merits of the commenters' general suggestions for revising these special procedures. The Department would, of course, be willing to consider a specific request from livestock producers or their representatives for the revision or expansion of special procedures consistent with its authority and this regulation.

Section 655.100—Overview and definitions

(a) Overview

The Department included a provision in the NPRM, similar to a provision in the current regulation, which provides an overview of the H–2A program. This overview provides the reader, especially readers unfamiliar with the program, a general description of program obligations, requirements, and processes.

Only two commenters identified concerns with the overview as written. Both expressed concern with the proposed earlier time period for the recruitment of U.S. workers. They questioned whether U.S. workers who agreed to work on a date far in advance would then be available to work for the entire contract period. The overview, however, simply describes in broad-brush fashion the regulatory provisions that are discussed in detail later in the NPRM, and in and of itself has no legal effect. The concerns and observations expressed by commenters will be addressed in the context of the relevant regulatory provision to which they apply rather than in the overview. The overview has also been edited for general clarity and to reflect changes made throughout the regulatory text.

(b) Transition

The Department, due to past program experience, has decided to add a transition period in order to provide an orderly and seamless transition to the new system created by these regulatory revisions. This will allow the Department to make necessary changes to program operations, provide training to the NPC, SWAs and stakeholder groups, and allow employers and their agents/representatives to become familiar with the new system. Employers with a date of need for workers on or after July 1, 2009 will be obligated to follow all of the new procedures established by these regulations. Prior to that time, the Department has created a hybrid system involving elements of the old and the new regulations as delineated in the new § 655.100(b).

Even though the NPRM put current and future users of H–2A workers on some notice regarding what this Final Rule will require, the rule as a whole implements several significant changes to the administration of the program. Several commenters requested that the Department allow employers some period of time to prepare and adjust their requests for temporary agricultural workers. These regulations implement new application forms, new processes, and new time periods for conducting recruitment for domestic workers to which current and new users of the program will need to become accustomed.

The Department is accordingly adopting a transition period after the effective date of this Final Rule. The transition period establishes procedures that will apply to any application for which the first date of need for H–2A workers is no earlier than the effective date of this rule and no later than June 30, 2009.

During this transition period, the Department will accept applications in the following manner: An employer will complete and submit Form ETA–9142, *Application for Temporary Employment Certification*, in accordance with § 655.107, no less than 45 days prior to their date of need. The employer will simultaneously submit Form ETA–790 *Agricultural and Food Processing Clearance Order* (job order), with the *Application for Temporary Employment Certification* (application) directly to the Chicago NPC. Activities that are required to be conducted prior to filing an application under the Final Rule will be conducted post-filing during this transition period, much as they are under the current rule. The employer will also be expected to make attestations in its application applicable to its future recruitment activities, payment of the offered wage rate, etc. Employers will not be required to complete an initial recruitment report for submission with the application, but will be required to complete a recruitment report for submission to the NPC prior to certification, and will also be required to complete a final recruitment report covering the entire recruitment period.

The employer will not separately request a wage determination from the Chicago NPC. Upon receipt of Forms ETA–9142 and ETA–790, the Chicago NPC will provide the employer with the minimum applicable wage rate to be offered by the employer, and will process the application and job order in a manner consistent with § 655.107, issuing a modification for any curable deficiencies within 7 calendar days. Once the application and job order have been accepted, the Chicago NPC will transmit a copy of the job order to the SWA(s) serving the area of intended employment to initiate intrastate and interstate clearance, request the SWA(s) schedule an inspection of the housing, and provide instructions to the employer to commence positive recruitment in a manner consistent with § 655.102. The NPC will designate labor supply States during this transition period on a case-by-case basis, applying the basic information standard for such designations that is set forth in § 655.102(i).

This transition period process will apply only to applications filed on or after the effective date of this regulation with dates of need no earlier than the effective date and no later than June 30, 2009. Employers with a date of need on or after July 1, 2009 will be expected to fully comply with all of the requirements of the Final Rule. Moreover, after the Final Rule's effective date, the requirements of the Final Rule will fully apply except for those modifications that are expressly mentioned as transition period procedures in § 655.100(b); all other

provisions of the Final Rule will apply on the effective date of the Final Rule.

These transition period procedures are designed to ensure that employers seeking to utilize the program immediately after its effective date, especially those with needs early in the planting season, will not be prejudiced by the new pre-filing requirements regarding wage determinations and recruitment, which might otherwise substantially impact employers' application timing. Because the Department's seasonal H–2A workload begins to peak in January of each year, however, the Department deems it essential to the smooth and continuous operation of the H–2A program throughout calendar year 2009 to make the rule effective as early in the year as possible.

(c) Definitions 655.100

Definition of ''agent,'' ''attorney,'' and ''representative''

The Department did not propose any changes to the definition of ''agent'' from existing regulations but added definitions for ''attorney'' and ''representative'' in the proposed rule. A major trade association commented that the definitions of, and references to, the terms ''agent,'' ''attorney'' and ''representative'' are confusing. The association found the definitions of agent and representative to be duplicative and the distinctions between these two terms, both of which encompass the authority to act on behalf of an employer, unclear. The association also commented that the definition of ''attorney'' is self-evident and appears to be a vehicle for permitting attorneys to act as ''agents'' or ''representatives.'' Further, according to the commenter, the term ''representative'' is also problematic and the Department should consider revising it or eliminating it entirely. The association believes the main purpose of the definition is to deem the person who makes the attestations on behalf of the employer a ''representative,'' but the association believes it is not clear whether the intent of the definition of ''representative'' is to also make the representative liable for any misrepresentations made in an attestation on behalf of an employer. The association recommended the proposed rule should clarify the intent of the definition of ''representative'' and also under what circumstances an agent will be liable for activities undertaken on behalf of an employer. The association recommended a clear set of standards for liability and suggested such standards should not deviate from the current standards where agents, attorneys, and representatives (under the proposed rule) are not liable if they perform the administrative tasks necessary to file labor certification applications and petitions for visas and do not make attestations that are factually based. In addition, the association recommended that the agents, attorneys, or representatives should not be liable for program violations by the employer.

The Department understands the need for clarity in determining who qualifies as a representative before the Department and what responsibilities and liabilities attach to that role and has accordingly simplified the definition of a representative. Although the Department does distinguish between the different roles of attorneys and agents, both groups are held to the same standards of ethics and honesty under the Department's rules. Under the rules, attorneys can function as agents, and either attorneys or agents can function as a representative of the employer. The Department has, in addition, replaced the word ''official'' with ''person or entity'' to parallel the definition of agent.

However, the Department disagrees with the commenter's interpretation of the extent to which an agent or attorney can be held accountable by the Department for their own and their clients' conduct in filing an application for an employer. While agents and attorneys are of course not strictly liable for all misconduct engaged in by their clients, they do undertake a significant duty in attestations to the Department regarding their employer-clients' obligations. They are, therefore, responsible for exercising 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. The debarment provisions at § 655.118 of the final regulations have accordingly been clarified to state that agents and attorneys can be held liable for their employer-clients' misconduct when they ''participated in, had knowledge of, or had reason to know of, the employer's substantial violation.''

The same association also questioned why the Department is ''singling out attorneys'' in the definition of ''representative'' by requiring an attorney who acts as an employer's representative and interviews and/or considers U.S. workers for the job offered to the foreign worker(s) to also be the person who normally considers applicants for job opportunities not involving labor certifications. The association found no apparent rationale justifying why the Department should dictate who and under what circumstances an attorney or any other person should interview U.S. job applicants. It further recommended that the rule eliminate the reference to attorneys or, at a minimum, clarify that the rule does not reach attorneys who merely advise and guide employers through the H–2A program. The Department has accordingly clarified the definition of representative by deleting the sentence limiting the role attorneys can play in interviewing and considering workers, primarily because, unlike other labor certification programs administered by the Department, the relatively simple job qualifications that apply to most agricultural job opportunities render it unlikely that U.S. workers would be discouraged from applying for those jobs by the prospect of being interviewed by an attorney.

A specialty bar association urged that the definition of ''agent'' be changed in order to prevent abuses related to foreign nationals paying recruiters' fees. The association suggested that the Department limit representation of employers to that recognized by DHS: attorneys duly licensed and in good standing; law students and law graduates not yet licensed who are working under the direct supervision of an attorney licensed in the United States or a certified representative; a reputable individual of good moral character who is assisting without direct or indirect remuneration and who has a pre-existing relationship with the person or entity being represented; and accredited representatives, who are persons representing a nonprofit organization which has been accredited by the Board of Immigration Appeals.

The Department acknowledges that its allowance of agents who are not attorneys and who do not fit into the categories recognized by DHS creates a difference of practices between the two agencies. However, the Department has for decades permitted agents who do not meet DHS's criteria to appear before it. Agents who are not attorneys have adequately represented claimants before the Department in a wide variety of

activities since long before the development of the H–2A program. 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. The Department has, however, added language to the definition of both ''agent'' and ''attorney'' to clarify that individuals who have been debarred by the Department under § 655.118 cannot function as attorneys or agents during the period of their debarment.

Definition of ''adverse effect wage rate''

The Department proposed a revised definition of ''adverse effect wage rate,'' limiting its application to only H–2A workers. A law firm commented that the proposed definition of ''adverse effect wage rate'' appears to apply only to H–2A workers and not to U.S. workers who are employed in ''corresponding employment.'' The Department has clarified the definition to make clear that those hired into corresponding employment during the recruitment period will also receive the highest of the AEWR, prevailing wage, or minimum wage, as applicable. The firm also requested the same revision to 29 CFR Part 501 regulations. The Department believes that this requirement is adequately explained in the text of the regulations at § 655.104(l) and § 655.105(g).

Definition of ''agricultural association''

The Department added a definition for ''agricultural association'' in the proposed regulation. A major trade association commented that the proposed definition does not acknowledge that associations may be joint employers and suggests that the definition could cause confusion because other sections of the proposed regulation acknowledge that associations may have joint employer status. The association recommended the definition clarify that agricultural associations may serve as agents or joint employers and define the circumstances under which joint employer arrangements may be utilized. A professional association further commented that associations should not be exempt from Farm Labor Contractor provisions if the associations are performing the same activities as Farm Labor Contractors.

The Department agrees that agricultural associations play a vital role in the H–2A program and seeks to minimize potential confusion about their role and responsibilities. The regulation has been revised to clarify that agricultural associations may indeed serve as sole employers, joint employers, or as agents. The definition of ''H–2A Labor Contractors'' has also been revised to clearly differentiate labor contractors from agricultural associations and that an agricultural association that meets the definition in this part is not subject to the requirements attaching to H–2A Labor Contractors. Finally, the regulation has been clarified by specifying that ''processing establishments, canneries, gins, packing sheds, nurseries, or other fixed-site agricultural employers'' can all be encompassed by agricultural associations.

Definition of Application for Temporary Employment Certification

The Department has added to the Final Rule a definition of *Application for Temporary Labor Certification.* An Application for Temporary Labor Certification is an Office of Management and Budget (OMB)-approved form that an employer submits to DOL to secure a temporary agricultural labor certification. A complete submission is required to include an initial recruitment report.

Definition of ''date of need''

The Department slightly modified the definition of ''date of need'' to clarify that the applicable date is the one that is specified in the employer's Application for Temporary Employment Certification.

Definition of ''employ'' and ''employer''

In the NPRM, the Department added a definition for ''employ'' and made revisions to the existing 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–2A program. The association believes the status of an employer under the H–2A program is defined by the labor certification and visa petition processes and that the incorporation of the broad FLSA and MSPA definitions of ''employ'' insinuate broad legal concepts that add unnecessary confusion. The association further recommended that the Department eliminate the fourth criterion related to joint employment status in its proposed definition of ''employer'' and, instead, provide a separate definition of joint employer associations and the respective liabilities of the association and its joint employer members.

The Department agrees with these comments and has, accordingly, removed the definition of ''employ'' as superfluous and created a separate definition of ''joint employment'' (using that portion of the definition of employer which discussed joint employers) to eliminate any confusion between the two terms. The definition of ''employer'' has also been revised. First, the Final Rule clarifies the proposal's statement that an employer must have a ''location'' within the U.S. to more specifically state that it must have a ''place of business (physical location) within the U.S.'' Second, out of recognition that some H–2A program users, such as H–2ALCs, are itinerant by nature, and that SWA referrals may thus occasionally need to be made to non-fixed locations, the Final Rule states that an employer must have ''a means by which it may be contacted for employment'' rather than a specific location ''to which U.S. workers may be referred.'' Finally, the Final Rule clarifies that an employer must have an employment relationship ''with respect to H–2A employees or related U.S. workers under this subpart'' rather than less specifically referring to ''employees under this subpart,'' and deletes the references to specific indicia of an employment relationship because the applicable criteria are spelled out in greater detail in the definition of ''employee.'' The definition of ''joint employer'' is modified slightly from the concept that appeared in the NPRM to clarify that the two or more employers must each have sufficient indicia of employment to be considered the employer of the employee in order to meet the test for joint employment.

Definition of ''farm labor contracting activity'' and ''Farm Labor Contractor (FLC)''

The Department proposed adding definitions for ''farm labor contracting activity'' and ''Farm Labor Contractor (FLC)'' to this section. In the Final Rule, the Department has eliminated the definition for ''farm labor contracting activity'' and revised the definition for ''Farm Labor Contractor.'' The revised definition is now contained under the heading ''H–2A Labor Contractor.''

A law firm commented that neither agents nor attorneys should be required to register as H–2A Labor Contractors. The commenter did not specifically address why it believed agents and attorneys would be required to register under the proposed definitions, so the Department is unable to respond to this point. As a general matter, however, an agent or attorney, if performing labor contracting activities as they appear in the revised definition of an H–2A Labor Contractor, would be required to register

as, and would be held to the standards of, an H–2A Labor Contractor.

A group of farmworker advocacy organizations commented that the definition proposed for Farm Labor Contractor (H–2A Labor Contractor) would exclude recruiters of foreign temporary workers from the scope of the rule, making enforcement impossible. This organization pointed out that under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), H–2A workers are not migrant or seasonal agricultural workers and, therefore, a contractor recruiting workers to become H–2A visa holders would not fit within the proposed regulatory definition. The organization also commented that the reference to ''fixed-site'' employers in the ''farm labor contracting activity'' definition could present problems in some employment situations, such as employment for a custom harvester, where the employer would not have a fixed site. An association of growers/producers suggested the MSPA definitions for ''farm labor contracting activity'' and ''Farm Labor Contractor'' should be used.

In response to the comments, the Department has deleted the definition of ''agricultural employer'' and included a separate definition for ''fixed-site employer.'' The Department also deleted the definition of ''Farm Labor Contractor'' in the final regulation and replaced it with a new definition for ''H–2A Labor Contractor.'' This will differentiate the two terms since the definition of an ''H–2A Labor Contractor'' does not match the definition of a ''Farm Labor Contractor'' as used in MSPA, and the operational differences between the H–2A program and MSPA do not allow perfect parallels to be drawn between the two statutory schemes. The definition of ''farm labor contracting activity'' has been deleted as redundant since the activities have been made part of the definitions of ''fixed-site employer'' and ''H–2A Labor Contractor.''

Definition of ''joint employment''

The Department included in its definition of ''employment'' a reference to what would constitute ''joint employment'' for purposes of the H–2A program. The Department received one comment suggesting the inclusion of the definition of ''joint employment'' within the definition of ''employment'' was confusing. The Department has accordingly removed the last phrase from the proposed definition of ''employer'' and provided a separate definition for ''joint employment.''

Definition of ''prevailing''

The Department proposed a revision to the definition of ''prevailing'' to include, ''with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H–2A and non-H–2A employers) for the occupation in the area of intended employment.'' This represented a change from the current rule, which does not refer to ''commonly provided'' practices or benefits but instead uses a percentage test (50 percent or more of employers in an area and for an occupation must engage in the practice or offer the benefit for it to be considered ''prevailing,'' and the 50 percent or more of employers must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area''). The Department received comments on the change, specifically inquiring whether the SWAs would continue to conduct prevailing wage and practice surveys, and requesting that if the Department intends to no longer require SWAs to conduct prevailing wage and practice surveys, the change should be discussed in the preamble.

The Department has determined that, to provide greater clarity and for ease of administration, the definition of ''prevailing'' will revert to the definition in the current regulation that requires that 50 percent or more of employers in an area and for an occupation engage in the practice or offer the benefit and that the 50 percent or more of the employers in an area must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area.

The Department notes it does not intend to change the provision on prevailing wage surveys currently undertaken by SWAs. The Department has included specific definitions for the terms ''prevailing piece rate'' and ''prevailing hourly rate,'' the two kinds of wage surveys that have traditionally been undertaken by SWAs, and has included express references to both types of surveys throughout the rule.

Definition of ''strike''

The Department has been added to the Final Rule a definition for the term *strike*. The definition conforms to the changes explained in the discussion of § 655.105(c), and 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.

Definition of ''successor in interest''

The Department's proposal included a debarment provision allowing for debarment of a successor in interest to ensure that violators are not able to re-incorporate to circumvent the effect of the debarment provisions. A national agricultural association commented that this provision as drafted could result in an innocent third party buying the farm of a debarred farmer and being subject to debarment, even though the successor is free of any wrongdoing, and thus the rule would place roadblocks on the sale of assets to innocent parties.

The Department agrees with this commenter. We have addressed this issue by including 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.

Definition of ''United States''

The Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII (CNRA), applies the INA to the Commonwealth of the Northern Mariana Islands (CNMI) at the completion of the transition period as provided in the CNRA, which at the earliest, would be December 31, 2014. Accordingly, the H–2A program will not apply to the CNMI until such time. However, the CNRA amends the definition of ''United States'' in the INA to include the CNMI. It should be noted that the amendment to the INA of the definition of ''United States'' does not take effect until the beginning of the transition period which could be as early as June 1, 2009, but may be delayed up to 180 days. Accordingly, the Department has included CNMI in the definition of ''United States'' with the following qualification: ''as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII.'' The Department will publish a notice in the **Federal Register** at such time that its regulations regarding the foreign labor programs described in the INA, including the H–2A program, will apply to the Commonwealth.

Definition of ''Within [number and type] days''

The Department has added to the Final Rule a definition of the term *within [number and type] days*. The definition clarifies how the Department will calculate timing for meeting filing

deadlines under the rule where that term, in some formulation, appears. The definition specifies that a period of time described by the term ''within [number and type] days'' will 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 the rules back to the Department, as evidenced by a postal mark or other similar receipt.

Definition of ''Work contract''

The Department has added to the Final Rule a definition of the term *work contract*. The definition was borrowed from the definition section of 29 CFR part 501 of the NPRM, with minor modifications made for purposes of clarification.

d. Definition of ''agricultural labor or services''

The Department proposed changes to the definition of ''agricultural labor or services'' to clarify, as in the current regulation, that an activity that meets either the Internal Revenue Code (IRC) or the Fair Labor Standards Act (FLSA) definition of agriculture is considered agricultural labor or services for H–2A program purposes and, more significantly, to remove limitations on the performance of certain traditional agricultural activities which, when performed for more than one farmer, are not considered agricultural labor or services under the IRC or the FLSA, including packing and processing.

The Department received several comments supporting these changes, with some specific suggestions for additional changes. A major trade association complimented the Department on providing ''bright line'' definitional guidance regarding the activities that constitute agricultural work to be covered by the H–2A program as distinct from the H–2B program. A number of these commenters mentioned that the Department's inclusion of packing and processing activities in work considered as agricultural provides an option for obtaining legal workers, especially in light of the numerical limitations on H–2B visas. One association of growers/producers supported the expansion of the current definition to include packing and processing but suggested that agricultural employers who have previously used the H–2B program for packing or processing operations be allowed to continue using the H–2B program. Another association of growers/producers suggested that the definition be changed to allow product that is moving from on-farm production directly to the end consumer be included as permissible work for H–2A workers, and suggested that the definition provide that it is a permissible activity for H–2A workers to work on production of a purchased crop when the crop is purchased by a farm because of weather damage to that farm's crops in a particular year.

The Department appreciates the general support for the proposed changes and has retained them in the final regulation. Regarding packing and processing activities, the proposed definition includes as agricultural activities ''handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm.'' In response to the request to allow employers who have used the H–2B program for packing or processing operations to continue using the H–2B program, the Department has revised the definition to clarify that while the Department cannot permit H–2A workers and H–2B workers to simultaneously perform the same work at the same establishment, the distinctions between establishments at which operations of this nature should be performed by H–2A workers and those at which the operations should be performed by H–2B workers are too fine for the Department to reasonably distinguish between them with sufficient precision to establish a bright line test. The Department will therefore defer to operators as to whether the ''handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering'' operations at their particular establishment are more properly governed by the H–2A or the H–2B program, but will not accept applications for both kinds of workers to simultaneously perform the same work at the same establishment.

The Department agrees with the comment that H–2A workers should be permitted to work in the production of a purchased crop, as well as work in processing or packing a farm product that is moving from on-farm production directly to the end consumer. Moreover, the Department believes such activities are permitted by the definition in the proposed rule and therefore the provision requires no additional language in the Final Rule.

The Department has clarified the Final Rule to reflect existing law, which provides that work performed by H–2A workers, or workers in corresponding employment, which is not defined as agriculture under Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. 203(f), is subject to the provisions of the FLSA as provided therein, including the overtime provisions in Section 7(a)(29 U.S.C. 207(a)).

Incidental Activities

The Department also proposed clarifications to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H–2A labor certification was approved may be performed by an H–2A worker. A number of commenters, including a professional association, a major trade association, and several associations of growers/producers supported this change, stating that it was positive and would provide more flexibility for employers. A major trade association commented this change would allow employers to include duties in H–2A certified job opportunities that reflect the actual duties performed by farm workers and further commented that, ''[p]resumably the provision will cover a farm worker who engages in incidental employment in the farm's roadside retail stand, a farm worker who assists in managing 'pick your own' activities, and a farm worker who occasionally drives a tractor pulling a hay wagon for a hay ride, to cite a few examples of incidental activities customarily performed by farm workers that have been disallowed in the past.'' This commenter's understanding of the Department's interpretation is correct.

One association of growers/producers commented that allowing H–2A workers to perform duties typically performed on a farm benefits the employee as well as the employer. A trade association commented that being able to use workers in other jobs not listed on the contract is needed, particularly when weather prevents field work.

The Department has revised the wording in the definition of ''agricultural labor or services'' provided in § 655.100(d)(1)(vi) to provide additional clarity for employers. The definition now reads: ''Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (i.e., less than 20 percent of the total time worked on the job duties that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H–2A worker was sought.'' The Department recognizes that, due to the unpredictable nature of weather

conditions and agricultural work itself, employers need some flexibility in assigning tasks, and that it would be difficult if not impossible to list all potential minor and incidental job responsibilities of H–2A workers on the *Application for Temporary Employment Certification*. The proposed amendment of the definition is intended to recognize the reality of working conditions at agricultural establishments and ensure that an H–2A worker's performance of minor and incidental activity does not violate the terms and conditions of the worker's H–2A visa status. The further revision to the definition will assist employers in determining whether activities or work not included on the *Application for Temporary Employment Certification* can reasonably be considered as minor and incidental.

Inclusion of Other Occupations

The Department proposed to include logging employment in its definition of ''agricultural labor or services'' for purposes of the H–2A program. Two commenters voiced their support for this inclusion; we received no comments in opposition. The Department also sought comments as to whether there are other occupations that should be included within the definition of agriculture used in the H–2A program. The Department received several suggestions of other industries that should be considered, including livestock and dairy producers, fisheries, nurseries, greenhouses, landscapers, poultry producers, wine businesses, equine businesses, turf grass growers, mushroom producers, maple syrup producers, and employers engaging in seasonal food processing as well as growers who operate processing and packing plants.

Of those requesting expansion of the definition to include other occupations, representatives of the dairy industry submitted the most comments. A major trade association and a number of associations of growers/producers commented that the dairy industry is unable to use the H–2A agricultural worker visa program and that this exclusion is unfair. They stated dairy farmers need and deserve the same access to legal foreign workers as other sectors of the agricultural industry. The association suggested that H–2A visas for dairy workers should last at least three years rather than one. Two trade association commenters stated they understood the importance under the statutory definition of H–2A workers needing to be temporary or seasonal, but not why the jobs themselves needed to be temporary or seasonal. A farm bureau provided comments suggesting dairy and livestock operations should be allowed to designate seasonal jobs within their operations for which H–2A workers could be employed. This association commented that current worker patterns suggest typical milkers stay in their positions for 9 to 10 months and then voluntarily leave, but return to seek a job after 2 to 3 months.

The Department also received comments from an association of growers/producers and from two individual employers requesting that reforestation work be considered as agricultural labor. These commenters assert that there are reforestation activities including planting, weed control, herbicide application and other unskilled tasks related to preparing the site and cultivating the soil and that workers who perform these tasks deserve consideration for eligibility for H–2A visas, as do workers who perform the same or similar tasks in cultivating other agricultural and horticultural commodities on many of the same farms. These commenters also pointed out that workers performing reforestation tasks for farmers or on farms are clearly agricultural employees under the FLSA and, additionally, believed the Internal Revenue Code supports their position for considering reforestation work performed on a farm or for a farmer as agricultural labor or services.

Following review of the comments discussed above, the Department has decided the definition of agriculture should not be further expanded at this time and no additional activities have been selected for inclusion as agricultural activities beyond those included in the NPRM. In most cases where there was the suggestion for the inclusion of a particular industry or activity in the definition of agriculture there was not strong support for the inclusion by representatives of that industry, as indicated by the number and source of the comments received. For example, one commenter supported adding maple syrup harvesting and ancillary activities to the definition of agricultural labor. The suggestion did not come from someone actually involved in the maple syrup industry, however, but rather from a State Workforce Agency. While the Department appreciates the input of such commenters, it would be inappropriate to impose on those industries (most of which currently qualify for the H–2B program rather than the H–2A program) changes that the industry itself did not seek.

The two exceptions to this pattern in the comments were the dairy industry and the reforestation industry, both of which, as discussed above, submitted comments evidencing industry-based support. The Department's analysis of the comments from the dairy industry, however, indicates it is not the program's definition of agriculture, which already includes dairy activities, that presents a potential barrier to the industry's use of the H–2A program, but rather the statutory requirement for the work to be temporary or seasonal in nature.

The H–2A program, by statute, provides a means for agricultural employers to employ foreign workers on a *temporary* basis. Many dairy-related job needs, however, appear to be year-round and permanent in nature.

While the H–2A program is specially designed for agricultural employers, they are not limited to using only the H–2A program. The employment-based permanent visa program is also open to agricultural employers with a permanent need for which they are unable to secure U.S. workers. At the same time, year-round operations are permitted to seek certification to utilize H–2A workers for seasonal or temporary jobs within their industries when they can substantiate the temporary or seasonal nature of the jobs. The Department recognizes that an employer may have both permanent and temporary jobs in the same occupation. However, employers should be aware that the Department does not typically approve subsequent applications requesting foreign workers for the same position when, taken together, those applications would cover a continuous period of time in excess of 10 months, unless exceptional circumstances are present.

The comments from the reforestation industry, while thoughtful, represented the input of only two individual employers and a single employer association who do not necessarily provide a representative sample of the entire reforestation industry. The Department is reluctant to overturn the regulatory practices of several decades and impose the significant obligations of an H–2A employer on an entire industry without significant input from that industry. While the Department is willing to further explore whether to include the reforestation industry in the definition of agriculture, it does not believe a decision to do so is warranted at this time.

''On a seasonal or other temporary basis''

The Department proposed a definition of the key terms ''on a seasonal or other temporary basis'' in the definition of

agricultural labor or services in the NPRM that continued the interpretation of the current regulation. We received several comments related to the phrase ''on a seasonal or other temporary basis.'' A trade association suggested the rule borrow the temporary and seasonal concepts from the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) definitions that are appropriate in an H–2A context without incorporating the MSPA regulations and related judicial precedent. It was the association's belief that this approach would allow an H–2A worker to be admitted for longer than a 10-month period. An association of growers/producers suggested the definition of temporary or seasonal should apply to the worker rather than the job and also that year-round farming operations/nurseries should be allowed to access a workforce to provide year-round services by rotating ''shifts'' of workers with different contract/visa periods. Another trade association also suggested the definition and interpretation of temporary and seasonal could be expanded.

The Department does not agree that the definition of temporary or seasonal should focus on the worker rather than the job. The INA is clear that the employer must have a need for foreign labor to undertake work of a temporary or seasonal nature for which it cannot locate U.S. workers. The Department's position has traditionally been that job opportunities that are permanent in nature do not qualify for the H–2A program. The controlling factor is the employer's temporary need, generally less than 1 year, and not the nature of the job duties. *See Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982); *see* also *Global Horizons, Inc.* v. *DOL*, 2007–TLC–1 (November 30, 2006) (upholding the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H–2A application); *see also* 11 U.S. Op. Off. Legal Counsel 39 (1987). An H–2A worker could, however, be employed continuously by successive H–2A employers having a temporary need for the worker's services and thus be employed and remain in the U.S. for a period beyond one year.

In addition, the Department has made several edits to the Definitions section of the NPRM to provide consistency with other changes to the regulatory text and to clarify the Final Rule. For example, the definition of ''*Application for Temporary Employment Certification*'' has been amended to help ensure the public has a clear understanding of what this regulation requires. Other definitions, such as ''temporary agricultural labor certification determination'' and ''unauthorized alien,'' have been eliminated because they are not used in this regulation. We have also made non-substantive changes to provide clarity and to comport with plain English language requirements.

Section 655.101 Applications for Temporary Employment Certification in Agriculture

(a) Instituting an Attestation-based Process

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H–2A program. The Department received several comments in favor of the new process, several opposed, and others generally in favor but suggesting changes to the process as outlined in the Department's proposal.

Some commenters believed that attestations to future events should not be required, and that attestations should be made under the ''applicant's best knowledge and belief'' standard and not the ''under penalty of perjury'' standard because applicants cannot know what will happen in the future.

The Department believes that the attestations the Final Rule requires employers to make do not require employers to predict future events, but rather represent straightforward commitments to comply with program requirements. Such compliance is fully in the control of the employer. It is, therefore, not necessary to delete or modify the manner in which attestations are made.

(1) Support for an Attestation-based Process

Those commenters who favored the shift to an attestation-based process generally believed the new process would make the H–2A application more efficient and less burdensome for employers. One State government agency commented that the process would enable the SWAs to focus on job orders, referrals, and housing inspections while relieving them of the burden to review the applications themselves. Another commenter supported the shift but encouraged the Department to ensure the ''Administrator * * * acquires the agricultural expertise necessary to provide training and guidance to those who are reviewing and overseeing the operating of a program that is critical to future U.S. agricultural production.''

The Department appreciates support for its proposed process. As of June 1, 2008, the Department has centralized the Federal processing of all applications for H–2A temporary foreign workers in the Chicago National Processing Center. This centralization will enhance the Department's ability to handle the expected increases in the usage of the H–2A program and ensure consistency in application of program requirements. The Department recognizes the unique needs and timeframes associated with this program and anticipates that centralization will lead to the development of greater expertise to meet those needs and timeframes. It also believes that centralized processing of applications will facilitate the identification of areas where program training should be enhanced and that the centralized environment will maximize the effectiveness of such training.

An association of growers/producers supported the attestation-based process but found the process, as described in the proposed regulation, confusing and duplicative. This commenter requested that all of the attestation requirements be consolidated into one rule clearly stating which facts are to be verified.

The Department appreciates the commenter's suggestion about consolidation of the attestation requirements and, as provided in the proposal, has retained the comprehensive listing of the requirements in § 655.105, ''Assurances and Obligations of H–2A Employers'' and § 655.106, ''Assurances and Obligations of H–2A Labor Contractors.'' It was not clear if this commenter was requesting a consolidated listing of the attestations required by both the Departments of Labor and Homeland Security. The Department of Labor is including in the comprehensive lists only those attestations that DOL requires. The commenter did not include specific examples of duplication or confusing information and the Department, therefore, is unable to provide any further response.

(2) Legality of the Attestation-based Process

Several of the commenters who opposed the change asserted an attestation-based process conflicts with the statutory mandate in Section 218 of the INA (8 U.S.C. 1188). These commenters interpreted the INA to require the Department to make a determination based upon an active verification of the H–2A application. One group commented that the attestation process violates the statute's Congressional mandate. Two organizations expressed the belief that the certification process has always been understood to require active

oversight by the Department of the employer's recruitment and hiring of U.S. workers as well as the details of the job offer. One commenter, an advocacy organization, voiced the opinion that the statutory standard is not whether the employer has made adequate assurances that it has or will meet the obligations of the H–2A program but is whether the employer has actually met them. Another commenter opined that labor certifications were not meant to be attestation-based and that this approach will dramatically reduce government oversight of this program. These commenters believe that the Secretary will not be able to certify that wages and working conditions have not been adversely affected and that this regulation is contrary to the statute.

The attestation-based process implemented by the Final Rule is not inconsistent with any statutory requirements, but rather is a reasonable means selected by the Department to fulfill its statutory responsibilities. The Department does not interpret Section 218 of the INA to specify a particular methodology that the Department must employ to determine that all of the statutory criteria have been met, and indeed, various aspects of the Department's methodology have changed through the years. The attestation-based system, backed by audits, that is implemented by the Final Rule is an acceptable means, within the reasonable discretion of the Secretary, for the Department to ensure that the statutory criteria for certification are met and that program requirements are satisfied. Similar approaches have been used by the Department in other contexts (such as approval of permanent labor certifications) to fulfill its statutory responsibilities. Indeed, as discussed in greater detail in various sections below, under the statutory time limits for filing applications and issuing certifications the Department typically makes certification determinations on applications prior to the completion of many of the recruitment requirements and without any direct observation or inspection by the Department or its SWA agents that rental housing secured by employers complies with all of the applicable legal standards.

No system for review and approval of applications, of course, is foolproof, and the statute prescribes appropriate penalties for situations in which the terms of approved labor certifications are later violated. *See* 8 U.S.C. 1188(b)(2)(A). There will always be bad actors who attempt to circumvent program requirements. Employers sometimes violate program requirements under the current H–2A application process, and the Department has also detected violations in other foreign worker programs it administers. Under the final rule, the Department will have more enforcement tools at its disposal than ever before to deal with such violations. The Department believes that the attestation-based process fully complies with all statutory requirements and, when utilized in concert with a strong audit and review process, represents the best means for the Department to deploy its limited resources in a manner that ensures that statutory timelines are met and that the program's integrity is maintained.

(3) Protections for U.S. Workers in an Attestation-based Process

Several commenters believed the proposed attestation-based process would not provide adequate protections for U.S. and H–2A workers because it would reduce the oversight responsibilities of the Department. Some of these commenters also said the current system should be maintained to ensure that the Department oversees worker protection, especially in the areas of housing and wages. An organization commented that while this change may ease the application process for employers it ignores the damage that could be caused by false attestations and a lack of active oversight of the job terms, recruitment, and hiring of U.S. workers. A farmworker advocacy organization questioned the change to an attestation-based process claiming there is a long history of labor abuse in agriculture and saying they believed that when ''self-inspection procedures'' are implemented they are generally based upon a prior record of compliance and an accompanying determination that resources would be better utilized in another pursuit. Another farmworker advocacy organization commented that the attestation-based process, as proposed, would further remove and diminish the Department's role in assuring all reasonable efforts to locate U.S. workers had been exhausted before foreign guest workers could be certified. Another commenter voiced concern that the proposed process would eliminate the current process of follow-up correspondence that has been instrumental in ensuring that employers have actually undertaken the required recruitment steps. A worker advocacy organization commented the proposed process, with its emphasis on meeting paper requirements, would be ''ill suited to deal with the inherent disparities in bargaining power between U.S. agricultural employers and impoverished workers from the developing world.''

The Department believes these commenters' concerns, while not invalid, are substantially resolved by the safeguards that have been built into the new process. The new program model emphasizes compliance through enforcement mechanisms such as audits, revocation of approved certifications, and debarment from the program. In light of these enforcement tools, employers will have a substantial incentive to be truthful in their representations that they cannot find U.S. workers willing to engage in agricultural work at the appropriate wage, because good-faith compliance with program obligations is necessary to maintain continued access to a legal nonimmigrant workforce. Because the rule requires pre-filing recruitment, the Department will also have an opportunity to review recruitment reports and (through its SWA partners) to conduct housing inspections before applications are approved. Job orders must also be reviewed, approved, and circulated by the SWAs before labor certifications can be granted, making it impossible for even bad actor employers to entirely circumvent the program's core recruitment requirements. Finally, it is worth noting that the bulk of the program's requirements, including requirements to pay workers at prescribed rates, maintain housing conditions, and provide transportation that complies with applicable safety requirements, have always been, and must necessarily be, enforced by the Department after the labor certification has been granted.

Although not a factor in our evaluation of the comments here, the Department also notes that many commenters who opposed the attestation-based system in this rulemaking, claiming that it will adversely affect U.S. workers, have enthusiastically endorsed proposed legislation before the U.S. Congress that would in fact mandate that the Department adopt an attestation-based application system in the H–2A program. Those organizations in their comments on this rulemaking made no attempt to explain their contradictory public positions regarding the merits of an attestation-based application system.

(4) Improvements for Employers in an Attestation-based Process

Several commenters questioned whether the proposed process would yield a simplified process for employer applicants. These commenters believed the new process requires the same amount of paperwork and only relieves employers of submitting documentation while at the same time imposes

additional requirements including post-filing audits, increased penalties, and a five-year records retention requirement. Several commenters were concerned that the attestation-based process would lead to increased liabilities for employers.

The Department does not believe that employers, attorneys, and agents wishing to comply with program obligations will be adversely affected by the institution of an attestation-based process. The process is designed to give employers specific notice of the assurances they are making to the Department and what their obligations are. Once the employer is on notice of those assurances, it is better able to understand what it must do to comply with H–2A requirements and to conform its conduct to those requirements.

A trade association of agricultural employers agreed with the shift to an attestation-based process but believed the process as outlined in the proposed regulations was not a true attestation-based process and recommended the process used in the H–1B program serve as a model. Other commenters also recommended use of a process similar to the one used in the H–1B program. Several commenters also suggested that the Department combine the *Application for Temporary Employment Certification* with the I–129 petition for simultaneous submission to the Departments of Labor and Homeland Security.

In response to the proposals to convert the proposed attestation-based process into a process modeled after the H–1B labor condition application, the statutory differences between the two programs are sufficiently substantial to make such an idea impractical. In the H–1B program, the Department is statutorily limited to reviewing the attestations made by an employer for ''completeness and obvious inaccuracies.'' 8 U.S.C. 1182(n)(1)(G)(ii). The Department believes the different H–2A statutory language suggests that a different application and review process is appropriate for the H–2A program. The Department appreciates the suggestion that simultaneous submissions to the Department and DHS could lead to further application efficiencies for employers. However, the Department believes that the complexity of the current statutory requirements for the H–2A program would make it unworkable to combine the Department's application with the petition submitted to DHS. A proposal presented by the Department several years ago to employ such a process in the H–2B program for temporary nonagricultural workers was met with significant opposition. To attempt to undertake a similar process with the significantly more complex H–2A program does not appear feasible at this time.

Some commenters appeared not to understand the proposed attestation process. The Department received comments stating that it is not clear what should be included with the attestation. The Department has accordingly clarified in the Final Rule that the application must be accompanied by the prevailing wage determinations obtained in anticipation of the recruitment for the application as well as the initial recruitment report. The employer will be required to keep all other supporting documentation in case of an audit, which means the employer should keep all records relating to compliance with the H–2A program, including advertising, job orders, recruitment logs/reports, and housing inspection requests. To eliminate any lingering confusion over document retention requirements, the Department has spelled these out in a new regulatory section (§ 655.119) in this Final Rule.

(b) SWA Involvement/Application Submission

The NPRM revised the application submission requirements by proposing to have employers submit applications only to the NPC rather than to both the NPC and SWA as currently required. Most of the comments received about this proposal were in favor of it, but a few commenters expressed concerns about the reduced role for SWAs. One person commented that eliminating the SWA involvement would leave employers who seek assistance and guidance from the government in completing applications more disposed to making errors and would increase their potential liability. A farmworker advocacy organization commented that SWA knowledge has proven useful to workers in the past and that the advantage of SWA involvement is the detailed knowledge their experienced staff can bring to bear about local agricultural practices and the use of agricultural labor in their area. The commenter also believed that the proposed process, which requires the employer to place a job order with the SWA, means that the SWA must take on faith that the employer's job offer is consistent with the terms of the H–2A application because the SWA will no longer receive a copy of the application. This organization recommended that applications should be filed with the SWA as well as the NPC so the SWA could advise the NPC if the application did not appear legitimate. A growers and producers association believed retaining responsibility for the substantive review by the NPC staff could remain a problem because of their lack of expertise related to agriculture.

A State governor suggested the process could be improved by eliminating the Department from the process. The governor believes the States know their agricultural industry better, can resolve issues more quickly, and are in the best position to identify and enforce sanctions against fraud. Conversely, a professional association of immigration attorneys recommended the SWA be eliminated from the recruitment process and, alternatively, the employer handle all recruitment for the positions, including accepting applications received as a result of a job order placed by the SWA in the interstate and intrastate system.

The Department remains committed to modernizing the application process and continues to believe the submission of applications directly to the NPC is the most effective way of accomplishing this goal. 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 of the agricultural industry; to the contrary, NPC reviewers who have handled H–2A applications have, in some cases, more experience with such applications than many SWA staff.

The SWAs will, moreover, continue to play an important role in the H–2A application process. SWAs will be responsible for posting job orders, both intrastate and interstate, under § 655.102(e) and (f) and 20 CFR Part 653, thus reducing the risk for employers to make mistakes with respect to job descriptions, minimum requirements, and other application particulars. SWAs will review the job offer, its terms and conditions, any special requirements, and the justifications therefor. As part of their duties to post job orders pursuant to 20 CFR Part 653, SWAs will also refer eligible workers to employers as well as conduct housing inspections and follow up on deficiencies in the job order. Finally, SWAs will continue an active role in conducting prevailing hourly wage, prevailing piece rate, and prevailing practice surveys.

Two commenters noted potential coordination or communication issues could result when the SWA did not also receive the application. One commenter was concerned there would be no assurance that the job order posted by

the SWA would be the same as that on the application. The other commenter pointed out the proposed regulations provided that the SWA receive a copy of the notice of deficiency when one was issued, but the SWA would not have a copy of the submitted application and thus could have inadequate information to be of assistance to the involved employer. An association of growers/producers recommended the Department provide training to H–2A employers about the need to send a formal request to the SWA to request a housing inspection and also recommended the Department notify the SWA when an application was received for processing so the SWA could, in turn, contact the employer.

The Department appreciates the concerns about the need for communication between the NPC and the SWA and reiterates that there was never any intent to eliminate the SWA from all H–2A activity. As discussed above, SWAs remain an integral partner in key respects: The placing of the intrastate/interstate job orders, conducting prevailing hourly wage, prevailing piece rate, and prevailing practice surveys, referring eligible workers, and conducting housing inspections, all activities for which SWAs will continue to receive grants from the Department. Moreover, nothing in the regulations precludes the Department from contacting SWAs, where there is reason to believe that it is necessary, to verify that the terms in the employer's Application for Temporary Employment Certification are consistent with the terms of the job offer.[2] However, SWAs will no longer process H–2A applications. Accordingly, to minimize confusion about roles and responsibilities, the Department has removed from § 655.107(a)(3) (§ 655.107(b) of the Final Rule) the provision requiring that SWAs be sent deficiency notices.

(c) Electronic Filing

The Department invited comments on the concept of a future electronic filing process for the H–2A program and received comments supporting the concept, although some also included suggestions for on-line training, the establishment of a toll-free help line, and an outreach and education component. A trade association recommended that a paper-based option should also remain available. One commenter noted that the Department did not provide an effective date for the electronic filing process.

The Department appreciates the support for electronic filing and is in the process of developing a system that will include the ability to complete and submit an application form online with sufficient security (PIN numbers, features to deter fraud and maintain system integrity, electronic notifications, etc.). The Department is aware of the need to provide outreach and training prior to the implementation of electronic filing and will involve user groups in these efforts. Additionally, the Department will ensure an adequate notice process and timeframe for transitioning to a new or revised electronic application system.

(d) H–2A Labor Contractor Applications

The Final Rule has been clarified slightly to more clearly state the obligations of H–2A Labor Contractors in filing applications. The proposed rule stated that H–2ALCs must have a place of business in the United States ''to which U.S. workers may be referred.'' Because H–2ALCs may be mobile, however, and because referrals during the season may need to be made to whatever location an H–2ALC is working at rather than to the physical location of the H–2ALC's place of business, the final rule has been modified to state that H–2ALCs must have a place of business in the United States ''and a means by which it may be contacted for employment.'' This slightly modified requirement will ensure that referrals can be made to H–2ALCs during the course of a season (where such referrals are provided for by the Final Rule), and that U.S. workers will have a means of contacting the H–2ALC to secure employment. All other changes made to the paragraph on filing requirements for H–2ALCs were purely stylistic and made for purposes of clarity.

(e) Master Applications

Both the current and proposed regulations require an association of agricultural producers filing an application to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members. Although the current regulations do not specifically describe a ''master application'' that can be filed by associations, they are clearly contemplated by 8 U.S.C. 1188(d), and the Department has permitted them to be filed as a matter of practice. *See* 52 FR 20496, 20498 (Jun. 1, 1987) (cited in ETA Handbook No. 398).

The Department received several comments objecting to the omission of a provision in the NPRM for the filing of master applications. An association of growers/producers commented that the Department should encourage agricultural employers in small commodity groups or large associations of employers to jointly participate in the H–2A program, as this will make processing more efficient for both the Department and farmers. Another association of growers/producers stated that using an association application is the only possible solution for the H–2A program to accommodate growers who need harvest workers for a short period of time (one month or less). A major trade association also commented that the master application significantly reduces the paperwork and bureaucratic burden for the associations and its members, as well as for the Department.

A major trade association and other associations of growers/producers recommended that the Department retain and improve the master application process and fully incorporate it into the H–2A regulatory structure. The association recommended the master application also be simplified as part of the new H–2A application process. It recommended the regulations include the essential components of the master application process that has been followed in practice, including the filing of one application on behalf of multiple employers seeking workers in virtually the same occupation, permitting the association to place the required advertisements and conduct the required positive recruitment on behalf of all participants but without the listing of every individual employer in the advertisement as currently required, permitting referral of workers to the association, and allowing the association to place workers in the job opportunities. The association further recommended the master application process also apply to applications filed by associations acting as agents.

The statute governing the H–2A program requires that agricultural associations be permitted to file H–2A applications, *see* 8 U.S.C. 1188(d), and that they be permitted to do so either as agents or as employers, *see* 8 U.S.C. 1188(c)(3)(B)(iv) and (d)(2). Consequently, the Department has, as a matter of longstanding practice,

[2] There is also no prohibition preventing a SWA from contacting the Department to ensure that the employer's job order and Application for Temporary Employment Certification are consistent. As a practical matter, a SWA will rarely be able to do so before posting a job order, because Applications for Temporary Employment Certification generally are not filed with the Department under the Final Rule until at least 15 days after the job order has been submitted to the SWA. Communication between SWAs and the Department has always been essential to identifying and putting a stop to deceitful employer behavior, however, and the Department expects that such communication will continue under the Final Rule.

accepted master applications from agricultural associations. In response to the comments received on this subject, the Department has decided to include specific language concerning such applications in the regulation text at § 655.101(a)(3).

The basic theory behind master applications is that agricultural associations should be able to file a single H–2A application on behalf of all their employer members in essentially the same manner that a single employer controlling all the work sites and all the job opportunities included in the application would. Two important limitations apply to such applications. First, all the workers requested by the application must be requested for the same date of need. If an agricultural association needs workers at different times, it must file a separate Application for Temporary Employment Certification for each date of need, just as a single employer would. Second, the combination of job duties and opportunities that are listed in the application must be supported by a legitimate business reason, which must be provided as part of the application. The purpose of this limitation is to prevent agricultural associations from creating undesirable combinations of job duties and opportunities for the sole purpose of discouraging U.S. workers from applying for the jobs. So long as a legitimate business reason exists supporting the combination presented, however, the Department will deem it acceptable. An acceptable business reason for a combination of job duties and opportunities could include, for example, the efficiencies that closely proximate employers expect to gain from having access to a flexible, readily available pool of workers, even though the employers in question do not grow the same crops, which may be necessary for agricultural employers to deal with uncertain and weather-dependent planting and harvesting times.

The Department is aware that this may mean that at times a U.S. worker wishing to perform only one type of job duty, such as picking asparagus, may be required to perform an additional job duty, such as harvesting tobacco, in order to secure an agricultural job with that association. It is not at all uncommon, however, for jobs in the United States to include multiple job duties, some of which workers may view as more desirable than others. Indeed, many job opportunities offered under the current H–2A regulations include multiple job duties, some of which may be more desirable than others. There is nothing in the statute governing the H–2A program indicating that Congress intended to require agricultural employers to allow prospective workers to selectively choose which job duties they want to perform and which job duties they do not, with regard to a particular job opportunity. The Department is requiring that combinations of job duties be supported by a legitimate business reason to prevent the deliberate and unnecessary discouragement of U.S. workers from applying for job opportunities, but the Department does not believe that further restrictions on job duty combinations are warranted or necessary to fulfill the statutory criteria for certification.

(f) Timeliness of Filing Application

As required by statute, the provision stating a completed application is not required to be filed more than 45 calendar days before the date of need was retained in the proposed rule. The Department has continued that requirement in § 655.101(c). The Department received some suggestions for changes to the proposed timeframes for submitting applications. Two commenters suggested the Department should at least provide the employer with the option of applying not more than 45 days before the date of need, undertaking the recruitment after the application has been accepted, and continuing to accept referrals under the 50 percent rule.

The Department may not require an application to be filed more than 45 calendar days before the date of need under 8 U.S.C. 1188(c). The Department does not agree with the suggestion for offering employers the option of applying not more than 45 days prior to the date of need, doing post-acceptance recruitment, and continuing to accept referrals under the 50 percent rule. Given the need to maintain consistency in the program's requirements, the Department cannot offer varying options for recruitment timeframes.

(g) Emergency Situations

The NPRM did not contain the current regulatory provision (currently found at § 655.101(f)(2)) allowing the Administrator/OFLC to waive the required timeframe for application submission for employers who did not use the H–2A program during the prior agricultural season or for any employer for good and substantial cause. The Department received a number of comments objecting to its elimination. A major trade association stated the elimination would preclude many employers from legalizing their workforce simply because their decision to join the program was made too late to meet the required timeframes. Another major trade association commented that a provision allowing filing after the deadline is even more essential because the *de facto* deadline for meeting requirements under the final regulation is further in advance of the date of need than the current requirement. One association of growers/producers cited the situation following Hurricane Katrina when many employers needed to secure additional H–2A workers as an example of the need for an emergency application process.

Most of those requesting that the provision for an emergency application be reinstated also commented that if an emergency application is filed in an area of intended employment and for a job opportunity for which other employers have previously been certified for the same time frame, the emergency application should be certified immediately. These commenters also suggested that post-application recruitment could be extended for emergency applications to ensure that their availability would not create an incentive to avoid the pre-filing recruitment efforts.

The Department agrees that a provision allowing the Certifying Officer (CO) to waive the required timeframe for submission of applications in emergency situations is necessary and has included such a provision in the Final Rule at § 655.101(d). The provision, which substantially replicates the current regulatory provision governing emergency situations, requires submission of a completed application, except for the initial recruitment report that would otherwise be required, and a statement of the emergency situation giving rise to the waiver request. The emergency situation giving rise to a request for a waiver may include a lack of experience with the H–2A program obligations (including housing and transportation requirements) or for other good and substantial cause. The Department anticipates that employers who were non-users of the program during the previous year may fail to meet the filing deadline due to miscalculation of the time needed to complete the application. The Department will entertain waiver requests from employers in this situation but will consider them only after first verifying that the employer did not use the program during the prior year.

The Department is not providing an explicit definition of good and substantial cause in order to preserve flexibility when faced with unanticipated situations or conditions.

We have provided some examples in the regulatory text to assist employers in determining what might constitute sufficient cause warranting a waiver. One example provided is a dramatic change in the weather conditions resulting in a substantial change to the anticipated date of need for H–2A workers with significant attendant crop loss unless the waiver is granted. However, the employer must be able to demonstrate that the situation or condition leading to the request for a waiver was genuinely outside of the control of the employer.

The Department is requiring, in the Final Rule, that the employer who requests a waiver must conduct some recruitment as a condition for obtaining that waiver. The employer will be required to submit a job order to the relevant SWA(s) and conduct positive recruitment from the time of filing the application until the date that is 30 days after the employer's date of need. The SWA must transmit the job offer for interstate clearance as in a normal application process. We have also added a provision that requires the CO to specify a date upon which the employer must submit a recruitment report consistent with the requirements of this part.

The Department recognizes that the suggestions that waivers be approved if other applications for similar occupations and dates of need in the same geographic locations have been previously certified are intended to expedite the process. However, each application is unique and the Department must consider each request on its own merits, and therefore does not believe it should commit to approving requests solely because there have been prior approvals for employers with similar job opportunities and dates of need in the same area.

Finally, the Department made changes in § 655.101 to conform to other changes made to the rule. Such changes include, but are not limited to, changes to clarify a potential electronic filing of future applications. In addition, the Department has made non-substantive changes to enhance readability.

Section 655.102 Required Pre-Filing Activity

The Department has changed the title of this section from ''Required Pre-filing Recruitment'' to ''Required Pre-filing Activity'' to include the activities other than recruitment that are discussed in this section.

(a) Section 655.102(a) Time of Filing of Application

The NPRM proposed requiring that applications be filed at least 45 days before the employer's date of need (as required by statute) with a pre-filing recruitment period commencing no more than 120 days prior to the date of need and not less than 60 days prior to the date of need. The Department received a number of comments on the change to a pre-filing recruitment framework and the related timing for that recruitment.

The Department received multiple comments opposing this proposed timeframe; several commenters were generally opposed to the expanded timeframe and others raised more specific concerns. Several commenters questioned the Department's legal authority for a shift to pre-filing recruitment. The Department also received comments arguing that the proposed pre-filing recruitment requirement has the effect of moving the deadline for filing an application. Several commenters argued that the proposed requirement that employers begin recruitment earlier than they are required to file applications would be inconsistent with the Congressionally set timeframes and thus beyond the Department's statutory authority.

The Department disagrees strongly with the premise that its revised recruitment steps are a violation of the statute. The INA is clear that the Department may not require an application for labor certification to be filed more than 45 days prior to the date of need. *See* 8 U.S.C. 1188(c)(1). The statute is silent on how the Department implements the certification process: It does not specify when the recruitment of U.S. workers should take place, whether prior to or subsequent to filing. The INA clearly contemplates at 8 U.S.C. 1188 that recruiting U.S. workers is a separate activity from filing and considering applications, and the statute does not provide any express timeframes during which recruitment must be conducted. There is thus nothing in the statute that prevents the Department from requiring employers to recruit before filing an application, much as it requires that recruitment be conducted prior to the filing of an application in other immigration programs. The Department has determined that program integrity would be improved by being able to review a preliminary recruitment report at the time the application is filed, a requirement that is consistent with both the intent and the language of the statute.

Several commenters opined that it was not feasible for employers to make accurate assessments of timeframes and the number of workers needed so far in advance and many questioned how effective an early recruitment period would be in helping employers to locate U.S. workers who would still be available at the time the work actually began. Additionally, many commenters believed the earlier recruitment would not benefit U.S. agricultural workers seeking employment because it is inconsistent with the traditional job-seeking patterns of these workers.

Some commenters expressed concern that extending the recruitment time would either not increase the number of U.S. worker applicants for a position, or would increase the number of U.S. workers who applied for a position but would not translate into more actual workers taking the jobs, as many would not report to work. A trade association also commented that the employer is put at risk because, by the time the jobs begin, U.S. applicants may have long since changed their minds or accepted other employment. A State government agency commented that most agricultural workers would not make a commitment to a job so far in advance of the start date. One individual employer believed the proposed pre-filing recruitment would actually have the opposite effect the Department anticipates because U.S. workers would be reluctant to make commitments so far in advance of the start date. An employer association recommended that the final regulation specifically permit employers to ask workers identified during the recruitment process to attest to or affirm their intentions to actually report to work to perform the jobs.

An association of growers/producers shared its data from the 2006–2007 season which shows only 9 percent of U.S. applicants applied during the first 15 days of the current 45-day recruitment period and questioned whether a longer timeframe would yield additional applicants. The association also reported 83 percent of the applicants who applied during the initial 15-days of the recruitment period failed to report for work on the date of need, as compared to a 60 percent failure-to-report rate for applicants who applied during the last 30 days of recruitment leading up to the date of need.

Some commenters stated that the current recruitment timeframes are adequate for identifying and hiring U.S. workers and others advocated alternate timeframes. Commenters presented a number of options for the recruitment timeframe, including the current

timeframe, and options ranging between 90 to 75 days prior to the date of need for beginning recruitment and 60 to 45 days prior to the date of need for filing the application. In the words of one trade association, which was representative of the comments received on this point: ''For the sector for which H–2A is predominantly applicable—fruits and vegetables—the ability to predict months in advance when labor will be required is simply impossible.''

The Department takes seriously its twin obligations, consistent with all H–2A statutory requirements, to ensure both that an adequate workforce is available to U.S. agricultural producers and that U.S. workers have a meaningful opportunity to apply for all open agricultural job opportunities. The Department believes it can best fulfill its statutory responsibilities by requiring employers to recruit in advance of filing, which will enable employers to submit preliminary recruitment reports with their applications, giving the Department better information than it has ever had before about the availability of U.S. workers before the Department is required by the tight statutory timeframes to make a determination on an application. The current pattern of forcing positive recruitment combined with the Department's near simultaneous evaluation of the application into a substantially narrow window of only 15 days is simply inadequate to address these workforce and program integrity needs. Based on the comments received, however, the Department has come to believe that requiring employers to seek and secure a workforce 120 days in advance of need may not be practicable, given the substantial likelihood that over such an extended period variables such as weather conditions, competition from other industries for available workers, and competition among farms and crops could intervene and result in increased labor uncertainty for employers.

The Final Rule accordingly shortens the pre-filing recruitment period described in the NPRM. Employers will be required to initiate recruitment no more than 75 days prior and no less than 60 days prior to the anticipated date of need. Reducing the pre-filing recruitment time period in this manner from the time period that was proposed, while simultaneously adjusting the Department's proposal by extending the referral period beyond the date of need (discussed further below), will ensure U.S. workers have access to these job opportunities, and enable employers to recruit effectively for U.S. workers without adversely affecting planting and harvesting schedules. This revised recruitment schedule, which is closer in time to the employer's actual date of need, also addresses the commenters' concerns about the job search patterns of likely U.S. workers. The Department declines, at this time, to implement any requirement that U.S. workers affirm in writing their intent to show up for work when needed, as that is a contractual matter between the worker and the employer. The Department notes that it has afforded employers some flexibility in the Final Rule in § 655.110(e), ''Requests for determinations based on nonavailability of able, willing, and qualified U.S. workers,'' to address situations where U.S. workers have failed to appear as promised.

(b) Section 655.102(b) General Attestation Obligation

(1) General Comments Regarding the Attestations

A group of farmworker advocacy organizations commented on the language in the proposed regulation that states ''the employer shall attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply.'' The organization stated it is the employer's duty to hire all qualified U.S. workers who apply and believed the proposed language did not make this clear.

An association of growers requested that the language describing the time period for acceptance of referrals be modified by adding the word ''first'' before ''begin to depart'' because not all foreign workers depart on the same date. A professional association requested the regulation be changed to permit employers to stop local recruitment efforts no more than five days prior to the date of need rather than three days as proposed. This change was requested to accommodate the actual transit time required for workers to arrive from abroad. As discussed in more detail below, the points made by these commenters have been rendered moot by changes made to this provision.

(2) The ''50 Percent Rule'' and the Cessation of Recruitment

The Department sought comments on program users' experience with the ''50 percent rule,'' which requires employers of H–2A workers to hire any qualified U.S. worker who applies to the employer during the first 50 percent of the period of the H–2A work contract. We received numerous comments and several commenters offered alternative approaches.

Several commenters questioned the Department's authority to make changes to the 50 percent rule, citing the 1986 IRCA amendments which added the 50 percent rule to the INA as a temporary 3-year statutory requirement, pending the findings of a study that the Department was required to conduct regarding its continuation. In 1990, pursuant to what is now INA § 218(c)(3)(B)(iii), ETA published an Interim Final Rule to continue the 50 percent requirement. *See* 55 FR 29356, July 19, 1990. That rule was never finalized.

As the Department stated in the NPRM, since the 1990 publication of the Interim Final Rule continuing the 50 percent rule, it has gained substantial experience and additional perspective calling into question whether the Department's 1990 decision was in fact supported by the data contained in the 1990 study, and whether the rule is in fact a necessary, efficient and effective means of protecting U.S. workers from potential adverse impact resulting from the employment of foreign workers.

The Department received several comments in support of retaining the 50 percent rule as it is currently administered. Commenters asserted that the rule is an important method for granting U.S. workers job preference over foreign temporary workers and creates an incentive for pre-season recruitment of U.S. workers. Some commenters stated their belief that many U.S. workers gain jobs under the 50 percent rule and that its elimination would deprive many U.S. workers of jobs unfairly, although these commenters did not provide any data to support their assertion.

Several commenters believed that few employers have had to lay off H–2A workers under the 50 percent rule, and that the rule has enabled many U.S. workers to secure jobs, and that elimination of the rule would unfairly deprive them of those jobs. The commenters believed that by eliminating this rule, the Department may keep U.S. farmworkers from applying for jobs they would otherwise be able to take. Other commenters believed that for those U.S. workers who learn of an H–2A job, the proposal would eliminate the protections that safeguard against employers rejecting qualified U.S. workers.

One commenter argued that the 50 percent rule provides an incentive that should be maintained to create an attractive working environment, and that it is critical to the integrity of the H–2A program. The commenter asserted that it prevents growers from engaging in practices that are tolerated by H–2A workers only because of their greater economic vulnerability and in turn

ensures that labor standards are not driven down for U.S. workers unable to compete with H–2A workers who have no choice but to endure such conditions.

While one commenter admitted that they could not provide data regarding the cost and benefits of the 50 percent rule, they expressed the belief that employers will hire fewer domestic workers without it, thereby adversely affecting an already vulnerable population. A number of commenters noted that the elimination of the 50 percent rule would make it more difficult for traditional farm workers who move with crops along the traditional migrant streams to secure jobs. The commenter believed that U.S. workers will be ''absolutely foreclosed'' from much if not most H–2A related employment if they cannot be hired just before, at, and past the date of need. An obligation to continue to hire U.S. workers after the departure of any foreign workers to the U.S. for employment was viewed by the commenter as critical to maintaining and developing a U.S. agricultural workforce.

Finally, another commenter observed that the 50 percent rule has served as an important tool for ensuring that the H–2A program does not adversely affect U.S. workers, and that at a time of increasing unemployment, the Department should not choose this particular moment to abandon these long-standing labor protections for U.S. workers.

Several other commenters argued the 50 percent rule should be abolished. These commenters argued that H–2A users have long considered the 50 percent rule to be unfair and unreasonable. They observed that no other temporary or permanent worker program has an even remotely corresponding requirement. Commenters also observed that the 50 percent rule was purportedly designed to enable domestic workers to accept agricultural employment opportunities, but that its costs outweigh its benefits. Commenters shared experiences that many of the domestic workers who apply under the 50 percent rule do so to maintain government benefits under the Unemployment Insurance program (the UI program requires unemployed workers to show that they have actively sought employment each week in order to continue benefits). They also found that while the rule does not actually provide substantial additional employment to domestic workers, it creates needless insecurity and uncertainty for H–2A workers who are employed under H–2A contracts.

A commenter from a state agency asserted that the elimination of the rule would relieve the SWA from having to track these H–2A job orders and would remove unnecessary burdens on employers. The commenter believed that there is no tangible evidence that the rule produces the desired results of increasing employment of domestic workers:

> My experience is that it is rare for [U.S.] workers to search our Internet postings for agricultural positions in the middle of a growing season. Employers find this requirement confusing and worrisome. Smaller employers have expressed concern that they could lose their fully trained and settled foreign worker(s), suddenly disrupting their operation. Unfortunately, their experience is that U.S. workers who drop in during a season have a tendency to not stay till the end of the contract period. If this practice had historically produced significant results, the government-mandated grower investment of time and money might be justifiable, but it has not.

One commenter stated that there is no need for the 50 percent rule where recruiting indicates that there are no or few local workers. The commenter also found no need for the rule in situations where the employers typically hire a large number of local workers. The commenter went on to argue that if the Department wants to retain the rule, it should do so only as a condition of approval of an application where there is evidence indicating that there are a relatively large number of local workers but the employer has indicated that it intends to hire few if any local workers.

A number of commenters observed that all available data support the view that relatively few U.S. workers desire employment in agriculture. They argued that it necessarily follows from this fact that the 50 percent rule provides almost no benefit to U.S. workers, yet its presence dissuades employers from participating in the program because of the uncertainty it creates. These commenters concluded that the rule should be abandoned. One commenter believed that if the Department wished to retain the rule, it should reserve the right to do so on a case by case basis, as a condition of approval for an application where the CO and SWA believed that insufficient local recruiting has been accomplished. The Department believes that this idea may have some merit, but has not devised a means to implement it at this time.

A number of agricultural employers commented that the rule requiring H–2A employers to hire any qualified U.S. worker during the first 50 percent of the H–2A work contract makes it very difficult for a producer to manage labor supply and costs over the life of the contract. Commenters from state agencies found that the features of the rule are seldom completely understood by the growers who need the H–2A program, adding to their impression that the entire process is complicated and rife with red tape. Another State commenter found the rule to be antiquated and ineffective.

Another commenter observed that the rule has been disruptive and non-productive for both workers and employers and that its elimination will provide much-needed stability in the workforce obtained by the employer. A commenter found that a cost-benefit analysis of the situation indicates that continuing to recruit U.S. workers beyond the date of need results in no corresponding benefit. One farmer observed,

> It's just not right that after I have made the best attempt to hire domestic workers that once halfway through the season I be forced to replace a trained H–2A worker. I really would prefer to hire local workers and keep that wage money at home, if I could find them.

Commenters from various farm bureaus around the country argued that under current conditions, the 50 percent rule is without foundation. They argued that anecdotal evidence shows that few, if any, employees referred for employment after the employer's date of need apply for or maintain their work status. They believed that agricultural employers, especially those with perishable crops, must be able to operate with greater certainty. Once an operation begins, the success of the work effort is the product of coordinated teamwork. Employers are willing to make strong recruitment efforts before the date of need, but they seek certainty and continuity once the work period has begun.

A commenter from a farming association found that the actual benefits of the 50 percent rule for domestic workers are, to all practical intent, illusory. The commenter strongly supported eliminating the rule entirely, arguing that such an approach would result in a substantial improvement in program operations. The commenter argued that while the Department has a statutory obligation to protect the rights of U.S. workers when implementing the program, it is necessary to strike a balance between the priority given to U.S. workers and the rights of employers, who have met all of the legal obligations that attach to employing H–2A workers. It went on to argue:

> The current 50 percent rule, while seemingly a provision to protect U.S.

workers, is more disruptive to farm operations and a disincentive to program participation than it is a true protection for workers. There is no reason to mandate that a grower's obligations to find and recruit eligible U.S. workers should extend past the recruitment period; imposing such an obligation serves only to disrupt operations of the producer and does little to protect U.S. workers * * *. The fact is, and all available data support this view, relatively few U.S. workers desire employment in agriculture * * *. The work is arduous, episodic, taxing, requires relatively little skill and virtually no education. Within the U.S. economy the pay—while increasing—is relatively low. These jobs provide tremendous economic opportunity for migrant workers but are not perceived as offering the same benefit to U.S. workers. In fact, approximately 10 million individuals in the U.S. economy today choose to work in jobs which pay them less than they could earn in agriculture. The 50 percent rule provides virtually no benefit to U.S. workers yet its presence has clearly been a disincentive to program participation. It should be abandoned.

Other commenters offered alternatives to the 50 percent rule including a 25 percent rule, recognizing that referrals after the date of need may serve a useful purpose but extending through 50 percent of the contract completion might be too long. One farming association suggested that the obligation to accept domestic referrals should terminate not later than three days before the date of need.

A number of state agencies suggested that SWAs should leave job orders open for 30 days after the date of need and employers should be required to offer employment to any qualified and eligible U.S. workers who are referred during that time, also recognizing that the current 50 percent of the contract period is too long and perhaps too uncertain to manage.

Another commenter similarly recommended that employers be required to begin recruitment no more than 60 days prior to the date of need and continue until between one and 30 days after the date of need, with adjustments made according to the expected duration of the job opportunity. Under this commenter's proposal, the determination of the end date for recruitment should be no earlier than the date of need, but the 50 percent rule should be revisited and adjusted to lessen its potential negative impact on the agricultural employer's workforce. Finally, another commenter suggested a continued obligation of 50 percent of the work period or 30 days, whichever is longer.

It is clear to the Department from these comments that many view the current 50 percent rule as a substantially burdensome requirement that does not provide a corresponding benefit to U.S. workers.[3] Others see the rule as benefiting U.S. workers by providing them expanded job opportunities. Based on the comments it has received and its substantial experience in operating the H–2A program, the Department believes that the 50 percent rule clearly does provide some benefits to U.S. workers, but that the rule creates substantial uncertainty for employers in managing their labor supply and labor costs during the life of an H–2A contract and serves as a substantial disincentive to participate in the program.

Based on the comments it received, the Department has decided to modify the rule. The requirements of 8 U.S.C. 1188(c)(3)(B)(iii) were fully satisfied when the Department promulgated interim final regulations on July 19, 1990. Nevertheless, the language of that provision suggests that when issuing regulations dictating whether agricultural employers should be required to hire U.S. workers after H–2A workers have already departed for the place of employment, the Department should weigh the ''benefits to United States workers and costs to employers.'' After considering its own experience and the experience of its SWA agents, the Department agrees, on balance, with those commenters who argued that the costs of the 50 percent rule outweigh any associated benefits the rule may provide to U.S. workers. It is beyond dispute that the obligation to hire additional workers mid-way through a season is disruptive to agricultural operations and makes it difficult for agricultural employers to be certain that they will have a steady, stable, properly trained, and fully coordinated work force. It is also apparent from the comments received that the current rule is poorly understood by employers, difficult for the SWAs to administer, and a disincentive for employers to use the H–2A program. Finally, the rule requires agricultural employers to incur additional unpredictable and unnecessary expenses, forcing them to choose between either hiring a greater number of workers than they actually need to complete their work part-way through a season, or discharging some or all of their H–2A workers, in which case the employer will lose its entire investment in those workers and will be required to incur the immediate additional expense to transport the workers back to their home countries. It is for all of these reasons that no other permanent or temporary worker program administered by the Department contains such a burdensome requirement, even though most of these programs are subject to similar statutory or regulatory requirements that the Secretary certify (1) that there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or services needed and (2) that the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is clear to the Department that the current 50-percent rule does provide some benefits to U.S. workers, since at least some U.S. workers secure jobs through referrals made pursuant to the rule. The number of such hires, however, appears to be quite small. Moreover, the comments indicate that many workers hired pursuant to the 50-

[3] In December 2007, the Department commissioned a survey of stakeholder representatives to evaluate the effectiveness of the 50 percent rule as a mechanism to minimize adverse impacts of the H–2A program on U.S. farm workers. The Department had conducted a similar study of the impact of the 50 percent rule in 1990, but upon reviewing that study as part of the H–2A review which led to this recent NPRM the Department concluded that it was of limited utility because it covered only two states—Virginia and Idaho—and because, given the significant changes that have occurred in the field of agricultural employment over the last two decades, it was substantially out of date. The surveyors for the new study conducted interviews with a number of stakeholders to gather information on the impact of the 50 percent rule and how it is currently working. The surveyors queried a far more representative sample of entities affected by the 50 percent rule than the 1990 study had, including employers, state workforce agencies, and farm worker advocacy organizations.

While the new study identified a diversity of opinion about the value and effectiveness of the current 50 percent rule, the researchers found that the rule ''plays an insignificant role in the program overall, hiring-wise, and has not contributed in a meaningful way to protecting employment for domestic agricultural workers.'' *See* ''Findings from Survey of Key Stakeholders on the H–2A '50 Percent Rule','' HeiTech Services, Inc. Contract Number: DOLJ069A20380, April 11, 2008. The researchers estimated that the number of agricultural hires resulting from referrals to employers during the 50 percent rule period was exceedingly small, with H–2A employers hiring less than 1 percent of the legal U.S. agricultural workforce through the 50 percent rule. All of the categories of surveyed stakeholders, including employers, state workforce agencies, and even farm worker assistance and advocacy organizations, reported that U.S. workers hired under the 50 percent rule typically do not stay on the job for any length of time when hired, frequently losing interest in the work when they learn about the job requirements. Many of the survey respondents, including representatives from each of the three groups, suggested that the rule should be either eliminated or modified.

The Department did not specifically rely on either of the two surveys in crafting the Final Rule. It does, however, believe that the information provided adds some additional depth to the discussion contained in this preamble. Accordingly, it has posted the studies on the Department's Web site.

percent rule do not complete the entire work period, adding costs to employers and further diminishing the total economic benefits derived from the rule by U.S. workers. It is also relevant that under the Final Rule, the period of time that a job order is posted by a SWA prior to an employer's dates of need has been substantially expanded from the current rule, which will provide U.S. workers with more up-front information about agricultural job opportunities, rendering mandatory post-date-of-need hiring less necessary.

In sum, after considering the best information currently available, the Department has concluded that the benefits of the 50-percent rule to U.S. workers are not, on balance, sufficient to outweigh its costs. The Department has also determined that modifying or eliminating the 50-percent rule would not compromise the Department's ability to ensure that U.S. workers are not adversely affected by the hiring of H–2A workers, just as the absence of a 50-percent rule from the other permanent and temporary worker programs administered by the Department has never been thought to compromise the Department's ability to ensure that U.S. workers are not adversely affected by the hiring of foreign workers under those programs. If it is true, as some commenters suggested, that some U.S. agricultural workers simply drift from employer to employer without paying attention to actual advertising about agricultural job opportunities, the Department is confident that farm worker advocacy and assistance organizations will help to spread the word about advertised agricultural job openings, much as they do today. The available hiring and referral data strongly suggest, however, that such workers only rarely secure their jobs through the 50-percent rule today. It is also worth noting that to the extent workers can identify agricultural job openings before those jobs have started, they will gain the additional benefit of a longer period of employment.

Despite these conclusions, the Department is concerned that the sudden and immediate elimination of the 50-percent rule might prove disruptive to the access of some U.S. workers to agricultural employment opportunities. If some U.S. workers have become accustomed to the ability to secure H–2A-related employment after the jobs have already started, those workers may benefit from a transition period that will allow those workers to adjust their employment patterns. A transition period would also allow the Department to collect additional data about the costs and benefits of mandatory post-date-of-need hiring under the new rule structure over a period of several years, allowing the Department to assure itself that its initial conclusions regarding the rule are sound.

For these reasons, the Department has created a five-year transitional period under the Final Rule during which mandatory post-date-of-need hiring of qualified and eligible U.S. worker applicants will continue to be required of employers for a period of 30 days after the employer's date of need. In determining precisely what form mandatory hiring should take during this transitional period, the Department considered all of the various options presented by commenters. Several commenters suggested limiting the period during which employers are required to engage in mandatory post-date-of-need hiring to 30 days. The Department has adopted this suggestion as the transitional period rule, both for ease of administration and to minimize the extent to which the various costs and considerations outlined above will burden employers during the transition. The Department believes that the use of this 30-day post-date-of-need mandatory hiring period during the five-year transition period will allow a smooth adjustment of the expectations of U.S. workers and will provide the Department additional time to collect data on the effect of the rule. At the end of the transition period, the mandatory post-date-of-need hiring requirements under the Final Rule will expire, and employers will only be required to accept referrals of U.S. workers until the first date the employer requires the services of H–2A workers. However, the Department intends to conduct a study of the impact of this transitional 30-day rule on U.S. workers and on employers during the five-year transition period, and under the rule retains the ability to indefinitely extend the 30-day rule by notice published in the **Federal Register** should the Department's study determine that the rule's benefits outweigh its costs.

We believe this framework addresses the concerns of many of the commenters, both for and against continuation of the 50-percent rule, and strikes an appropriate balance between the concerns of agricultural employers and the need to protect U.S. workers' access to the employment opportunities under the H–2A program. Having a set period of time during the transition period, not tied to a percentage of the contract length, will provide employers more predictability and be easier to administer for employers, workers and SWAs making referrals. The language of § 655.102(b) as originally proposed implied that mandatory post-date-of-need hiring would no longer be required by the H–2A regulations. The language creating the transitional 30-day mandatory hiring period outlined above may be found at § 655.102(f)(3) of the Final Rule.

To the extent that the 30-day rule applies, the employer would require similar safeguards as under the 50-percent rule so long as the employer continues to have an affirmative obligation to hire U.S. workers beyond the date of need. Accordingly, the Department has included a provision in § 655.102(f)(3)(ii) of the Final Rule on the prohibition of withholding of U.S. workers. The provision is similar to the provision in § 655.106(g) of the current regulations, but has been modified to reflect the centralization of the application process with the NPC. Under the final rule, the CO, and not the SWA, receives and investigates the complaint and makes a determination whether the application of the 30-day rule should be suspended with respect to the employer.

(c) Section 655.102(c) Retention of Documentation

The Department proposed in the NPRM a 5-year retention requirement for all H–2A applications and their supporting documents. The vast majority of commenters who provided observations on this provision voiced concern with the proposed 5-year document retention period and recommended 3 years, stating that they did not have adequate staff to comply with the requirement or that it is not an industry standard and not legally consistent with other regulations and might even discourage use of the H–2A program. The Department has reconsidered its position and has changed the retention requirement to 3 years.

One commenter suggested that all record retention requirements and periods be combined into one section of the amended regulations to provide program participants with clearer guidance for these obligations. The Department agrees and has added a new § 655.119 to the regulatory text. The new section lists all the document retention requirements.

Another commenter requested that the Department add a sentence to the rule indicating that the employer is not liable for eliminating records after the retention period expires. The Department has not added an express provision to this effect, as we believe the cessation of the employer's

responsibility to retain the records after the retention period expires is self-evident. The Department suggests, however, that there may be some benefits to employers keeping records beyond the required 3-year period; if the employer later faces an allegation of fraud or some other alleged violation that has a statute of limitations of longer than 3 years, retained documents may help the employer defend itself. Indeed, if a proceeding or investigation relating to the retained records has already been initiated, it should be understood that the employer is obligated to retain the records that are the subject of the proceeding or investigation until it has come to a conclusion.

One commenter requested that the Department allow applicants who are denied certification to discard records 180 days after the denial. The Department has decided to eliminate the requirement to retain records pertaining to denied certifications in its entirety. If an application is denied on grounds of fraud or malfeasance, the Department expects that it will have already obtained copies of any documents necessary to prove the fraud or malfeasance during the process of denying the certification, and thus the retention of such documents by the employer would be needlessly duplicative. Under the Final Rule, any employer who has been denied certification can discard the records immediately upon receiving the denial notice, or, if the employer appeals the decision, whenever the decision to deny certification becomes final. If the denial is ultimately overturned on appeal and certification is granted, the application of course becomes subject to the document retention requirements for approved cases.

A SWA requested that we define who is responsible for monitoring the documentation and ensuring compliance. This Final Rule places responsibility squarely with the employer to maintain the documentation. The NPC, through the audit function as well as the other enforcement tools at its disposal, will ensure compliance. SWAs would not be responsible for monitoring documentation or ensuring compliance with this provision.

(d) Section 655.102(d) Positive Recruitment Steps

The Department proposed ''positive recruitment'' steps including posting a job order with the SWA serving the area of intended employment; placing three print advertisements; contacting former U.S. employees who were employed within the last year; and recruiting in additional States designated by the Secretary as States of traditional or expected labor supply.

Many commenters, primarily employers and employer associations, expressed concerns with the specific proposed pre-filing recruitment steps. Many argued that the proposed longer recruitment period and increased advertising would simply increase the cost of the recruiting effort without increasing the benefits and that the increased steps were duplicative. These commenters believe that their workforce shortage problem is not due to a lack of awareness of available jobs, but rather is because of a lack of willing and available U.S. workers. They suggested that rules be promulgated to use only the current state employment service system and not require agricultural employers to perform a substantial prolonged search for U.S. workers before being able to apply for an H–2A labor certification. According to these commenters, the time required in the current rules is sufficient to identify and notify the U.S. work force of the availability of particular jobs.

Requiring pre-filing recruitment is, in the Department's view, essential to the integrity of an attestation-based process. Only with sufficient time for adequate recruitment can the Department ensure that the potential U.S. worker pool is apprised of the job opportunity in time to access that opportunity. The current recruitment time frame, in which employers file applications 45 days prior to the date of need, recruit for 15 days thereafter, and in which a CO must adjudicate the application no later than 30 days prior to need, has proven unworkable. COs are today certifying the absence of U.S. workers based on, at best, a handful of days of recruitment activity, which is insufficient to apprise U.S. workers of job opportunities through either the SWA employment service system or other positive recruitment activities.

The belief of some commenters that the time allotted in the present regulatory scheme for recruiting is sufficient to canvass the potential U.S. workforce is, in the Department's view, incorrect. The Department has heard significant concerns voiced by the farmworker advocate community that there is an inability to access job opportunities within the short recruitment period provided in the current system. The Department takes seriously these concerns about the length of the recruitment, particularly in light of the Department's modification of the 50 percent rule (discussed above with respect to § 655.102(b)) and the possibility that it will be phased out entirely after a period of five years. The movement of the recruitment period to a time prior to the filing of the application provides a clear and well-defined time for the employer to make available and for the U.S. farmworker to access job opportunities, and provides the Department with better information with which to make its certification determination. The establishment of a 30-day post-date-of-need referral period for the next five years further ensures that the expectations of workers will not be unduly disrupted.

A trade association recommended SWAs be removed from the recruitment process altogether, and only be involved in the inspection of worker housing and workplace conditions after approval of the labor certification and visa and the commencement of work. A State agency representative recommended the SWAs receive copies of the ETA–750 (*Application for Temporary Employment Certification*) and ETA–790 not for review but to ensure the SWA would have access to accurate information.

The Department notes that it is statutorily prohibited at this time from amending the Wagner-Peyser regulations to remove SWAs from the H–2A process. *See* Public Law 110–161, Division G, Title I, Section 110. Nor does it believe such a step would be beneficial at this time. SWAs provide an effective means of completing many required activities, such as inspections of employer-provided housing. SWAs are also integral to the process of receiving and posting agricultural job orders. The Department declines to require that SWAs also receive the form ETA–750, as they will receive far more significant information in the form ETA–790 job clearance order request.

A group of farmworker advocacy organizations also claimed that the proposed changes to the recruitment process were inconsistent with INA requirements, portions of the Wagner-Peyser Act, and MSPA. The organization believed the proposed regulations changed the standards for employer recruitment efforts to the detriment of U.S. workers and did not address recruitment violations that had been uncovered in the past. Specifically, the organization objected to the elimination of the standard for positive recruitment based on comparable efforts of other employers and the H–2A applicant employer as found in the current regulation at § 655.105(a). This organization was also concerned about the elimination of the current provision requiring that ''[w]hen it is the prevailing practice in the area of employment and for the occupation for

non-H–2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H–2A agricultural employers and shall provide an override which is no less than that being provided by non-H–2A agricultural employers.'' 20 CFR 655.103(f). The organization made several recommendations for revisions regarding recruitment, including preserving the burden on the employer (under Departmental review) to identify and positively recruit in locations with potential sources of labor, and the obligation to work with the SWA to do so; retaining current regulatory provisions requiring that employers engage in the same kind and degree of recruitment for U.S. workers as they utilize for foreign workers; and requiring adequate compensation of farm labor contractors who find U.S. workers. Additionally, it recommended preserving the role of SWAs contained in the current regulations and detailed in the internal Departmental H–2A Program Handbook.

Other commenters expressed concern that the Department's proposal to reduce the scope and type of required recruitment efforts while increasing the length of time to perform recruitment was primarily intended to streamline the program, but would not actually benefit U.S. workers. These commenters disagreed with the proposed rule's elimination of the current regulatory requirement to contact farm labor contractors, labor organizations, nonprofits and similar organizations to recruit domestic employees. If the Department seeks to revise the current recruitment practices, in the opinion of these commenters, it would be more effective to maintain or increase current recruitment standards, while giving agricultural employers additional time within which to meet their obligations; otherwise the Department is reducing opportunities for U.S. workers.

One commenter suggested that the Department bolster word-of-mouth recruitment because it is, in the commenter's opinion, the only way that U.S. workers find out about jobs in the agricultural sector and it encourages free-market competition as long as the information is accurate. This commenter believes too many H–2A employers do not provide accurate information to U.S. workers because it is in their best interests to hire H–2A workers who must stay tied to that employer for the entire agricultural season.

While the Department appreciates the concerns expressed, it believes these concerns are misplaced in light of the recruitment methods that the Department will be requiring employers to undertake under the Final Rule. The Department will continue, and in some respects expand, those core positive recruitment requirements that have a proven track-record of providing cost-effective information to U.S. workers about available job opportunities. For example, the Final Rule retains the current requirement that employers run two newspaper advertisements in the area of intended employment, but expands that requirement, as laid out more fully in § 655.102(g), by requiring that one of the advertisements be placed on a Sunday, which typically is the newspaper edition that has the highest circulation. The Department declines, however, to continue obscure and difficult-to-administer provisions requiring employers and the Department to abstractly measure the amount of ''effort'' that employers put into their domestic positive recruitment, or to determine precisely what the prevailing practice is in a given area with respect to the payment of labor contractor override fees. Provisions that call for the measurement of employer effort require the Department to make highly subjective judgments and are extremely difficult to enforce. Moreover, the Department's program experience has shown that most of the discontinued recruitment methods cited by commenters—radio ads and contacting fraternal organizations, for example—substantially add to the burden of using the program, but add little to the total amount of information about agricultural job opportunities that is made available to U.S. workers through the positive recruitment methods that are required by the Final Rule. The elimination of specific requirements to contact entities such as fraternal organizations does not mean that interested entities will be entirely deprived of information about open agricultural job opportunities. Rather, it means that interested entities should pay attention to newspaper advertisements and SWA job orders.

The Department appreciates the suggestion that it should develop methods for encouraging word-of-mouth as a recruitment tool, and that word-of-mouth is frequently a successful way for U.S. workers to learn about job opportunities. We do not believe that word-of-mouth recruitment can effectively be mandated by regulation, however. Rather, the Department anticipates that word-of-mouth communication will be instigated by the positive recruitment efforts that the Final Rule requires, particularly through the assistance of farm worker assistance and advocacy organizations, which can spread the word about available job openings.

The Department takes seriously its statutory obligation to determine whether there are sufficient numbers of U.S. workers who are able, available, willing, and qualified to perform the labor or services involved in the petition and to ensure that U.S. workers' wages and working conditions are not adversely affected by the hiring of H–2A workers. The Department believes that the positive recruitment methods it has selected for inclusion in the Final Rule—the use of newspaper advertisements, the state employment service system, contact with former workers, and recruitment in traditional or expected labor supply States—provide notice of job opportunities to the broadest group of potential applicants in an efficient and cost-effective manner, while avoiding burdening employers with requirements that have proven costly and at times difficult to administer without yielding clear benefits. The Department notes that employers stand to gain a great deal from recruiting eligible U.S. workers rather than incurring the considerable time and expense of securing foreign workers from thousands of miles away. The various provisions of these regulations, including wage, housing, and transportation requirements, ensure that it is virtually always more expensive for employers to hire H–2A workers than it is for them to hire U.S. workers outside the H–2A program. Thus, employers have significant incentives to use the positive recruitment methods prescribed by these regulations to maximum effect, and the Department is confident that these methods will adequately spread the word to U.S. workers about available job opportunities. The Department expects that many employers will also engage in additional recruitment efforts that can, in the absence of rigid and overly prescriptive regulatory requirements, be flexibly tailored to the particular circumstances of local labor markets.

(e) Section 655.102(e) Job Order

Proposed § 655.102(e) required that, prior to filing its application with the NPC, the employer place a job order, consistent with 20 CFR part 653, with the SWA serving the area of intended employment. The NPRM also required the job order to be placed at least 75 but no more than 120 days prior to the anticipated date of need.

Several commenters focused on the requirements for placement of the job order. Three commenters posited that the rule would create problems for program users by establishing requirements for acceptable job offers that are subject to the Department's discretion, while employers would have to conduct the recruitment before the terms and conditions of the employer's job offer have been reviewed and approved by the Department. According to these commenters, the rule is silent on what happens if, after the employer conducts the pre-filing recruitment, the Department does not approve the employer's job offer. Under the current program, the recruitment would be considered invalid, and the employer would be required to revise the job offer and repeat the recruitment. This situation, according to these commenters, introduces an unacceptable degree of uncertainty and risk into the process. A trade association further commented that, because there will be no prior approval of the job offer by the NPC, all SWAs would be independently interpreting and making decisions about the job offers, and believed that such a process would lead to inconsistencies among SWAs. The association was also concerned there would be inconsistency between what a local SWA employee would accept and what the CO would later find acceptable. The association recommended retaining the existing process as an option for employers.

The Department requires that the employer submit an acceptable job order (current form ETA–790) to the appropriate SWA for posting in the intrastate and interstate clearance system. The ETA–790 describes the job and terms and conditions of the job offer: the job duties and activities, the minimum qualifications required for the position (if any), any special requirements, the rate of pay (piece rate, hourly or other), any applicable productivity standards, and whether the employee is expected to supply tools and equipment. This form is submitted to the SWA for acceptance prior to the employer's beginning positive recruitment. As long as the employer's advertisements do not depart from the descriptions contained in the accepted job order, the advertisements will be deemed acceptable by the Department. Thus, employers should place advertisements after the form ETA–790 has been accepted for intrastate/interstate clearance, eliminating any chance that recruitment will later be rejected by the NPC due to problems with the job offer and corresponding advertisements.

The Department also does not anticipate significant problems in uniform decision making among SWAs. SWAs will be, as they have been for some time, the primary arbiter of whether job descriptions and job orders are acceptable. In response to comments on the subject, however, the Department has clarified in the text of the rule that employers may seek review by the NPC of a SWA rejection, in whole or in part, of a job description or job order. The regulations have also been revised to permit the NPC to direct the SWA to place the job order where the NPC determines that the applicable program requirements have been met and to provide the employer with an opportunity for review if the NPC concludes that the job order is not acceptable. This modification renders concrete what has long been the informal practice with respect to H–2A related job orders, as the NPC has worked hand-in-hand with the SWAs to ensure that job orders comply with applicable requirements. It is also implicit in the status of the SWAs as agents of the Department, assisting the Department in the fulfillment of its statutory responsibilities.

One trade association noted that the job order must be filed in compliance with part 653, and that § 653.501 requires that the employer give an assurance of available housing as part of the job offer. This commenter opined that this would be impossible to do since employers cannot guarantee the availability of housing that far in advance for purposes of using the proposed housing voucher. The Department's disposition of the proposed housing voucher, discussed below, renders this comment moot.

The same commenter noted that § 653.501(d)(6) requires that the SWA staff determine whether the housing to be provided by the employer meets all of the required standards before accepting a job order, and argued that this would be an impossible task 120 days before the actual date of need, as the proposed rule purported to allow. As explained above in the discussion of § 655.102(a), the Department has amended the timeframe for recruitment by moving the first date for advertising and placement of the job order to no more than 75 days and no fewer than 60 days prior to the date of need. Moreover, in response to the comments received, the Department has specified in the Final Rule that SWAs should place job orders into intrastate and interstate clearance prior to the completion of the housing inspections required by 20 CFR 653.501(d)(6) where necessary to meet the timeframes required by the governing statute and regulations. This will maximize the time that job orders are posted, providing better information to workers. The Final Rule further directs SWAs that have posted job orders prior to completing a housing inspection to complete the required inspections as expeditiously as possible thereafter. This provision is consistent with the current regulations, which already permit job orders to be posted prior to the completion of a housing inspection pursuant to § 654.403. If a SWA notes violations during a subsequent housing inspection, and the employer does not cure the violations after being provided a reasonable opportunity to do so, the corresponding job order may be revoked. With these amendments, the Department believes it has adequately addressed the concerns contained in this comment.

In addition, a group of farmworker organizations objected to the use of the language ''place where the work is contemplated to begin'' in describing which SWA should receive a job order when there are multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State. It believed this language would allow employers to choose where they wanted to recruit U.S. workers simply by ''contemplating'' that the work would begin in an area unlikely to have U.S. workers. The Department received other comments that supported this requirement. After considering these comments, the Department has revised the language of the provision to state that an employer can submit a job order ''to any one of the SWAs having jurisdiction over the anticipated worksites.'' The revised language affords employers some flexibility in determining where to initially send job orders, but it does not allow employers to use this flexibility to avoid recruitment obligations, as § 655.102(f) provides that the SWA that receives the job order ''will promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the job order as anticipated worksites.'' Thus, no matter where the job order is initially sent, the scope of required recruitment will be the same, covering all areas in which anticipated worksites are located.

A sentence has also been added to the Final Rule, simply as a procedural direction to the SWAs, that ''[w]here a future master application will be filed by an association of agricultural employers, the SWA will prepare a single job order in the name of the

association on behalf of all employers that will be duly named on the Application for Temporary Employment Certification.''

(f) Section 655.102(f) Intrastate/Interstate Recruitment

The proposed regulation instructs the SWA receiving an employer's job order to transmit a copy to all States listed as anticipated worksites and, if the worksite is in one State, to no fewer than three States. Each SWA receiving the order must then place the order in its intrastate clearance system and begin referral of eligible U.S. workers.

The Department received some general comments regarding the referral process for U.S. workers. One group of farmworker advocacy organizations expressed concern about the lack of referrals by SWAs to H–2A employers in the past and believed the proposed regulation would not cure this deficiency. One association of agricultural employers expressed concern regarding the ability of the SWAs to adequately handle the referral process.

The Department believes these concerns are misplaced, especially under a modernized system in which SWA responsibilities with respect to each H–2A application is reduced. A core function of the SWA system is the clearance and placement of job orders and the referral of eligible workers to the employers who placed those job orders. Past program experience demonstrates the occurrence of a sufficient number of referrals to sustain this requirement.

One SWA commented that although the NPRM states the purpose of removing the SWA is to remove duplication of effort, one important duplicative effort is retained—the requirement for sending job orders to other labor supply States and neighboring States. This agency suggested that if the job orders are uploaded to the national labor exchange program, then the transmittal of job orders to other States is unnecessarily duplicative. Other commenters recommended all agricultural job orders be posted in an automated common national job bank.

The Department acknowledges the potential benefits of a national online system for posting job offers. However, automating interstate job clearance would require regulatory reforms that the Department is currently constrained from undertaking by Congress. *See* Public Law 110–161, Division G, Title I, Section 110. There is currently no online national exchange organized under the auspices of the Department to which such jobs could be posted. The Department's former internet-based labor exchange system, America's Job Bank, was disbanded in 2007 because the private sector provides much more cost-effective and efficient job search databases than the federal government can provide. The Department, however, does not wish to impose mandatory participation in such job databases on SWAs or employers at this time. Because the Department already has an existing system in place for handling interstate job orders, and given the current legal and operational constraints of changing that system, the Department has determined that the only feasible and prudent approach at this time is to continue to require SWAs to process the interstate job orders in accordance with 20 CFR Part 653.

An association of growers/producers opposed the requirement for transmitting job orders to additional States and recommended the job orders be circulated only in the State where the job is located. This association also suggested that any out of State notifications should list only the location of the job offer and never list the employer's name.

The Department's circulation of the job order to any States that are designated by the Secretary as labor supply States is required by statute. Section 218(b)(4) of the INA prohibits the Secretary from issuing a labor certification after determining that the employer has not ''made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.'' The interstate recruitment must be conducted ''in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer.'' The Department does not have the ability to eliminate or alter the requirement absent Congressional amendment.

At the same time, the Department does not read the statutory language to require the Secretary to designate traditional or expected labor supply States with respect to all States in which H–2A applications may be filed. Rather, the Department believes that the statutory language is most reasonably read to require the Secretary to make a determination for each area (which the Secretary has elected to do on a State-by-State basis) whether, with respect to agricultural job opportunities in that area, there are other areas (which the Secretary has also elected to examine at the State-by-State level) in which ''there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.'' In other words, the Department reads the statute as contemplating that with respect to agricultural job opportunities in certain States at certain times, as a factual matter there simply will not be other States in which there are ''a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.'' Under this reading of the statute, the word ''where'' in 8 U.S.C. 1188(b)(4) essentially means ''if'': *If* the Secretary determines that the statutory criteria have been met, then she is required by the statute to designate the area of traditional or expected labor supply, but *if* the Secretary determines that the statutory criteria have not been met, then the requirement is simply inapplicable. This sensible reading of the statute comports with the realities of the agricultural sector: The pattern of seasonal migrant work has clearly changed over time, and in some cases older patterns have become well-established while others have fallen away. The changeable nature of the agricultural labor flow, which is highly dependent upon weather patterns, crop distribution, the availability of transportation, and even the price of gasoline, are all recognized under this system of flexible, fact-specific designations by the Secretary.

A group of farmworker advocacy organizations pointed out that the proposed regulations do not provide a timeframe for how long the local SWA can wait before placing the H–2A job order into interstate clearance, and only require the SWA to ''promptly transmit'' the job offer. The Department does not believe that its requirement of ''prompt'' transmission requires further clarification, however. Posting job orders is one of the core functions of the SWAs, and the Department is confident the SWAs will continue to act responsibly in promptly transmitting and posting job orders as they have in the past.

The organization was also concerned about the clarity of the instructions to be followed by SWAs for circulating job orders among other States. The proposed regulations require the SWA to transmit a copy of the open job order to all States listed in the employer's application as anticipated worksites or, if the employer's anticipated worksite is

within a single State, to no fewer than three States, including those designated as traditional or expected labor supply States. However, the organization believed the proposed regulation would be read to not require any additional job order circulation by the SWA if the employer has anticipated worksites in two States, and thus would provide less circulation of job orders and no contact of labor supply States in such situations. The Department agrees and has clarified the language of § 655.102(f)(1) by removing the phrase, ''If the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State'' to make clear that job orders with locations in more than one State must be circulated to any traditional or expected labor supply States designated by the Secretary for either of the work locations.

An attorney for an association of growers/producers suggested the H–2A process could be further improved by allowing State officials to affirm that employers need agricultural workers in their State. The Department believes it cannot implement such an affirmation process, as similar processes for determining the unavailability of U.S. workers have been found to be insufficient for the factual determination required by the Secretary. *See First Girl, Inc.* v. *Reg. Manpower Admin. DOL*, 361 F. Supp. 1339 (N.D. Ill. 1973) (availability of U.S. workers could not be determined by generic listing of available workers listed with state agency).

A public legal service firm recommended that the Department require employers to circulate all job orders in Texas, which they said is a traditional agriculture labor surplus state. If the commenter's factual assertions about labor availability in Texas are correct, the Department would expect that Texas will frequently be designated as a labor supply State. The Department is cognizant of the changeable nature of worker flows, however, and therefore does not wish to require the mandatory inclusion of one or more specific States in the designation process. It is subject to question, for example, whether significant numbers of agricultural workers in Texas would be willing to accept seasonal employment in Alaska or Hawaii. Rather, the Department will rely on annually updated information in designating labor supply States to ensure the accuracy of the assertions that farm workers are indeed available in the purported labor supply State and that recruitment there for out of State jobs would not take needed workers away from open agricultural jobs in the labor supply State. In response to these concerns, however, the Department notes it will announce, at least 120 days in advance of the Secretary's annual designation, an opportunity for the public to offer information regarding States to be designated.

Finally, a group of farmworker advocacy organizations expressed concern regarding the content of job orders placed by agricultural associations. It objected to the placement of job orders with a range of applicable wage offers with a statement that ''the rate applicable to each member can be obtained from the SWA.''

In promulgating this rule, the Department made no changes to current practice. An association is permitted to pay a different wage for each of its members, should it choose to do so, as long as that wage meets the criteria established in the regulations (now found at § 655.108). U.S. workers seeking a job opportunity from or within an association can acquire from the SWA a list of member locations and the wages associated with each so that the worker can make a fully informed decision as to which job, if any, the worker wishes to apply.

We made several minor edits that are consistent with the above discussion to the language of § 655.102(f) for purposes of clarity. Some language was also moved to other sections or deleted, again for purposes of clarity and without substantive effect. Section 655.102(f)(3), which describes the recruitment period during which employers are required to accept referrals of U.S. workers, was added to the rule for reasons described at length in the discussion of the 50 percent rule under § 655.102(b).

(g) Section 655.102(g) Newspaper Advertisements

The Department proposed that in addition to the placement of a job order with the SWA, employers be required to place three advertisements (rather than the current two) with a newspaper or other appropriate print medium. Most who commented on this suggestion believed the additional advertising would result in additional costs without any additional benefits. An association of growers/producers stated: ''Additional newspaper advertising is a very expensive alternative of recruiting workers in today's world and should not be the only method allowed.''

A trade association also questioned the expansion of the advertising requirements in the proposed regulations and commented that newspapers are not a usual or even occasional source of labor market information for farm workers. The association and other commenters referenced the National Agricultural Worker Survey (NAWS) which reported that percent of seasonal crop workers (both legal and illegal) learn about jobs from a friend or relative or already know about the existence of the job (although how such knowledge is attained was not reported). The association further commented that the proportion of workers who learn about their jobs from a ''help wanted'' ad was apparently too small even to warrant inclusion in the report. Several of these commenters suggested it would be more efficient to simply allow for posting to the SWA's job bank which is more practical, less expensive, and reaches applicants more readily.

A few employers objected to the very concept of newspaper advertising. One employer objected to having to advertise in a newspaper, commenting that newspaper advertisement is ''not only expensive, but doesn't find any hiding sheep shearers.'' Another employer objected to the increase in required newspaper advertising for U.S. workers ''when it is clear that local workers are simply not available for seasonal jobs.'' Many commenters were particularly concerned that increasing the number of ads from two to three in addition to requiring that one be placed in a Sunday edition would greatly increase employer costs. One trade association commented that it is likely that in the typical situation an employer's advertising costs would increase by three to four times under the proposed regulations, adding hundreds to thousands of dollars to the employers' application costs. That commenter did not provide data supporting this conclusion, however.

Several commenters were in favor of the proposal to increase advertising and expressed support for the additional ad in the expectation it would provide additional notice to the target population. An association of growers/producers supported the increase in advertisements from two to three, believing it would enhance the ability of an eligible U.S. worker to identify and apply for agricultural job openings before the job begins. A farmworker/community advocacy organization agreed that requiring three instead of two advertisements would be a step toward improving the recruitment of U.S. workers.

The Department appreciates that a newspaper ad frequently may not, of itself, result in significant numbers of U.S. workers applying for employment. However, such advertising has been required for decades and remains the central mechanism by which jobs are

advertised, especially to workers who may have only limited access to the Internet. The ads may not necessarily be seen by all farmworkers, but may be, and indeed are, seen by those who participate in the greater farm work community and who can pass along a description of the jobs ads through ''word-of-mouth.'' Newspaper advertising remains, along with the state employment service system network, an objective mechanism by which notice of upcoming farm work can be assessed by the Department and communicated to those who are interested.

The study referenced by many commenters suggesting that most referrals in the agricultural sector take place through word-of-mouth rather than through newspaper advertisements was actually conducted by the Department, and, as noted above, the Department acknowledges that word-of-mouth frequently results in U.S. workers learning about job opportunities. However, the Department believes it would be nearly impossible to effectively implement and enforce a word-of-mouth regulatory standard. The Department believes the combination of job orders and required newspaper advertisements are cost-effective, easily administrable, and readily enforceable, and will make job information available in ways that will result in word-of-mouth referrals.

Although it may be true that few agricultural workers themselves read such advertisements, others do read them, including farm labor advocacy organizations, community organizations, faith-based organizations, and others who seek out such opportunities on behalf of their constituents. The newspaper becomes a very visible source of information for such organizations that are in turn able to spread the word to workers. Through publication to this wide audience, the information ultimately reaches those for whom it is intended.

The Department appreciates the substantial concern raised by a number of commenters regarding the placement of multiple ads and has thus revised its proposal on the number of ads that must be placed in the area of intended employment. The Department has decided to revert from the proposed three to the existing rule's requirement for two ads. The Department is retaining its proposal, however, to require that one of the newspaper advertisements be run on a Sunday, as that is typically the newspaper edition with the broadest circulation and that is most likely to be read by job-seekers.

In response to the various comments about the proposed advertising requirements, the Department is also slightly modifying the language of § 655.102(g)(1) to provide some limited flexibility in selecting the newspaper in which the job advertisement should be run. The Final Rule clarifies that the newspaper must have a ''reasonable distribution.'' Thus, advertisements need not be placed in the New York Times, even if the New York Times is the newspaper of highest circulation in a given area, but also cannot be placed in a local newspaper with such a small distribution that it is unlikely to reach local agricultural workers. The Final Rule also clarifies that the newspaper must be ''appropriate to the occupation and the workers likely to apply for the job opportunity,'' but deletes the modifier requiring that the newspaper must be the ''most'' appropriate. This change was made out of a recognition that in many areas there are multiple newspapers with a reasonable distribution and that are likely to reach U.S. workers interested in applying for agricultural job opportunities, and that as long as these criteria are met, an employer's positive recruitment should not be invalidated. If an employer is uncertain whether a particular newspaper satisfies these criteria, it can seek guidance from the local SWA or the NPC.

The Final Rule also instructs employers not to place the required newspaper advertisements until after the job order has been accepted by the SWA for intrastate/interstate clearance; this replaces the time frame contained in the NPRM and shifts the initiation of recruitment back to the submission to and clearance by the SWA of the job order. This ensures that advertisements reflect the job requirements and conditions accepted by the SWA and minimizes the risk that employers' advertisements will later be determined to be invalid by the NPC.

One commenter suggested that a better alternative to employer-placed advertisements would be for the Department to maintain an up-to-date database listing advertisements for farming and ranching jobs and directing interested workers to contact the SWA in the States where the jobs were located. The commenter believed this approach would expand the ability of U.S. workers to select more varied jobs in a larger geographic area. The Department does not disagree; however, as noted above, amending the current job order clearance process is not an option at this time.

A private citizen commented that the SWA, not the employer, is in the best position to know which newspaper is most likely to reach U.S. workers, and that the SWA should, therefore, continue to have a role in determining where advertising is conducted. Nothing, of course, prevents an employer from consulting with the SWA regarding the most appropriate publication in which to place advertising and thus ensure compliance with the regulations, particularly in instances in which a professional, trade or ethnic publication is more appropriate than a newspaper of general circulation. In fact, a representative of a State government agency suggested the advertising requirements should be limited to local area media and trade publications where available, and that the specific publications should be agreed to by the employer and the SWA based on the potential for attracting candidates and historical experience. While we are not incorporating this suggestion for coordination into the regulation as a requirement, we note that the regulation at § 655.102(g)(1) already requires the ads to be placed in the ''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.''

(h) Section 655.102(h) Contact With Former U.S. Workers

The Department proposed that employers be required to contact by mail former U.S. workers as part of the recruitment process. A group of farmworker organizations objected to the requirement and commented: ''if DOL had intended to come up with the least effective way of contacting former employees, it could not have selected a better method than by mail.'' This organization was concerned because they claimed a majority of farm workers are not literate in English or their primary language and, therefore, might not understand the written communication and the regulation does not require the written communication to be in any language other than English. The organization also recommended contact by telephone or through crew leaders or foremen as alternative methods of contact. In response, we have modified this provision in the Final Rule to permit employers to also contact former U.S. workers through alternative effective means, and document those means in some manner (telephone bills or logs, for example).

Additionally, the organization believes many workers would be missed by the proposed mailing effort because the proposed regulation limits the requirement to contacting former

workers ''employed by the employer in the occupation at the place of employment, during the previous year'' and does not require that H–2ALCs contact a growers' former workers who did not work for the H–2ALC during the previous season. The Department declines to adopt a requirement that employers contact workers who did not work for them during the previous season, as such a requirement would be quite impractical, and the other positive recruitment requirement methods included in the Final Rule are intended to reach such workers. It is not at all clear how H–2ALCs would even gain access to the necessary contact information for former employees of other employers, and in the judgment of the Department such a requirement would be excessively burdensome.

One association of growers/producers suggested the proposed rule be modified to allow employers the ability to deny work to employees hired in previous years who demonstrated an unsatisfactory work history/ethic even if the worker was not terminated for cause. A trade association and other commenters expressed concern about former employees who were the subject of no-match letters from the Social Security Administration and requested a safe harbor or common sense exception in such situations.

The Department appreciates that employers that do not participate in the H–2A program generally are not required to rehire employees who have a poor work history. The Department also appreciates that employers frequently may allow short-term workers who prove to be poor performers to finish their job terms if it is easier and, in light of potential litigation risks, less costly than firing them. There is a countervailing concern, however, that if the Department allowed employers to reject former workers who completed their previous job term on the alleged ground that the workers were actually poor performers, it would open the door for bad actor employers to reject former workers on the basis of essentially pretextual excuses. The Department has therefore decided to address employers' concerns about poorly performing workers by creating an exception allowing employers not to contact certain poor performers, but only in the narrow circumstance where the employer provided the departing employee at the end of the employee's last job with a written explanation of the lawful, job-related reasons for which the employer intends not to contact the worker during the next employment season. The employer must retain a copy of the documentation provided to the worker for a period of 3 years, and must make the documentation available to the Department upon request. The Department will review the propriety of the employer's non-contact in such situations on a case-by-case basis. The Department believes that the insertion of this provision is responsive to the comment in that it relieves employers from the burden of being required to rehire truly poorly performing workers, while ensuring that workers who will not be recontacted are aware of the employer's intentions and reasons well in advance of the next employment season and have the opportunity to bring reasons they regard as pretextual to the Department's attention.

With respect to the comment about no-match letters, we note that employers are not required to hire a worker who cannot demonstrate legal eligibility to work. Receipt of a no-match letter may give rise to a duty on the employer's part to inquire about work eligibility, but the letter in and of itself is not sufficient legal justification to refuse to hire a U.S. worker.

One trade association expressed concern about the related requirement for documenting contact with former employees and stated, ''This requirement could reasonably be interpreted to mean that the employer must maintain a copy of its correspondence with each former employee demonstrating that it had been mailed. The only practical way to do this would be to send each letter by certified mail or some other means providing evidence of attempt to deliver. Such a requirement would be unnecessarily burdensome and costly.'' The association recommended this be simplified by requiring the employer to keep a copy of the form of the letter sent and a statement attesting to the date on which it was sent and to whom. Additionally, the association questioned what kind of documentation would demonstrate that the employee ''was non-responsive to the employer's request.'' The association suggested the employer's recruitment report should be sufficient to document which employees were responsive and requiring documentation of non-responsiveness is unreasonable.

The Department does not intend this requirement to be overly burdensome to employers and agrees that copies of form letters together with the employer's attestation that the letters were mailed to a list of former employees would be sufficient to meet the requirements of this provision. The Department also agrees that the recruitment report can be used to sufficiently document the non-responsiveness of former employees. The Department inserted language into the Final Rule clarifying the Department's expectations regarding the type of documentation that should be maintained.

(i) Section 655.102(i) Additional Positive Recruitment

(1) Designation of Traditional or Expected Labor Supply States

In the NPRM, the Department continued to impose on employers the requirement that the employer make ''positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed,'' as mandated by 8 U.S.C. 1188(b)(4). The Department proposed that each year the Secretary would make a determination with respect to each State in which employers sought to hire H–2A workers whether there are other States in which there a significant number of eligible, able and qualified workers who, if recruited, would be willing to make themselves available for work in that State. The Department also proposed to continue the current regulatory provision stating that the Secretary will not designate a State as a State of traditional or expected labor supply if that State had a significant number of local employers recruiting for U.S. workers for the same types of occupations. The Department proposed to publish an annual determination of labor supply States to enable applicable employers to conduct recruitment in those labor supply States prior to filing their application. The Department received several comments on this provision.

A group of farmworker advocacy organizations opined that the Department's proposal contravenes the H–2A statutory requirements regarding positive recruitment. The organization believes the Department's proposal will result in employers not competing with one another for migrant workers and workers not receiving job information even though a particular job in another State may offer a longer season, a higher wage, or better work environment. Another farmworker advocacy organization commented that it makes no sense in a market economy which recognizes competition as good to stop requiring employers to recruit for farmworkers in areas where other employers are seeking farmworkers. A labor organization commented that this

provision demonstrates a lack of understanding of farmworker recruitment and what it believes is an inappropriate desire to ease the recruitment obligations for growers at the expense of U.S. farmworkers. This organization recommended the current positive recruitment rules should be retained and enforced. A U.S. Senator was concerned that the NPRM would cost American workers jobs because they would not have access to information about jobs in other areas.

Employers seeking farmworkers are statutorily required to recruit out-of-State if the Secretary has determined that other States contain a significant number of workers who, if recruited, would be willing to pick up and move in order to perform the work advertised in accordance with all of its specifications. The commenters referenced above appear to believe that the Department's proposal is a new regulatory provision. That is incorrect. The current regulations at 20 CFR 655.105(a), which have been in place for 20 years, specify that Administrator, OFLC should ''attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations.'' This longstanding provision reflects two judgments on the part of the Department. First, it reflects the Department's reading that 8 U.S.C. 1188(b)(4) was intended to require out-of-State advertising only in areas with a surplus labor supply, and was not intended to deleteriously impact farmers in certain areas by instituting federal program requirements that would draw away their local workers. Second, it reflects the Department's judgment that where a ''significant'' number of local employers are already recruiting U.S. workers in a given area for the same types of occupations, there is already significant competition for workers in that area and the addition of further out-of-State advertising would likely be futile. The Department's program experience in applying this limitation over a long period of time leads it to believe that it has worked well in practice to aid program administration and avoid the imposition of unnecessary program expense. The Department notes that this limitation does not mean that out-of-state recruitment will cease in States where workers are being locally recruited, since SWAs will continue to have discretion to post job orders in those States where appropriate.

Several commenters sought more information on the methodology that would be used in making the determinations about labor supply States. A group of farmworker/community advocacy organizations voiced its concern that ''The annual survey is flawed in many respects and not designed to identify sources of labor at the time of need.'' The organization was also concerned about the timing and specificity of the survey to be used. A representative of a State Workforce Agency requested additional information about the designation of labor supply States for the logging industry in her State. A trade association commented that ''the same types of occupations'' should mean something more than merely agricultural work. An individual commenter believed that just because an employer in a State may request H–2A workers for a certain crop activity for a certain time period should not mean that State should not be considered a labor supply State for other crop activities and time periods.

The Department has addressed many of these concerns by modifying the provision to allow for notice to be published in the **Federal Register** at least 120 days before the announcement of the annual determination, allowing anyone to provide the Department with information they believe will assist the Secretary in making her determination about labor supply states. The Department will consider all timely submissions made in response to this notice. In addition to the information presented by the public, the Department expects that it will continue to consult SWAs, farmworker organizations, agricultural employers and employer associations, and other appropriate interested entities. As discussed above, the ''same types of occupations'' language in the Final Rule has been carried over from the current regulations, and the Department intends to apply the term in the same manner that it has in the past. The Department agrees that the phrase is not intended to lump all agricultural work together as the ''same type of occupation.''

(2) Required Out-of-State Advertising

The Department proposed that each employer would be required to engage in positive recruitment efforts in any State designated as a labor supply State for the State in which the employer's work would be performed. This recruitment obligation would consist of one newspaper advertisement in each designated State.

Several commenters felt the newspaper advertisement requirements were too burdensome on employers and that the additional time and expense of recruiting in traditional or expected labor supply States should be borne by the Department rather than the employer. An association of growers/producers recommended that the regulation only require SWAs to send the job orders to those States designated as labor supply States as they do now. A United States Senator recommended that after the employer has satisfied the intrastate recruitment requirements and has attested that insufficient domestic workers are available, the burden of proof that U.S. workers are unavailable should shift to the Department.

The Department does not consider a requirement to place a single out-of-state advertisement in each designated labor supply state to be unjustifiably onerous on employers and is of the opinion at this time that the potential benefit to be gained in locating eligible and available U.S. workers outweighs the costs of the advertising. This is required in the current program and the Department has received little negative feedback on the burden of such advertising. The Department does not agree that this is an expense the Department should bear, beyond the expense of the interstate agricultural clearance system that the Department already finances. The INA at sec. 218(b)(4) is clear that it is an employer who must engage in such out-of-state positive recruitment, not the Department.

Several associations of growers/producers commented that placing newspaper advertisements should be limited to no more than three States, to avoid the possibility that the Department could require recruitment in 50 States and the additional territories because the language in the companion recruitment provision for SWAs at § 655.102(f) reads ''no fewer than 3 States.'' A United States Senator also endorsed a limit on the number of States in which an employer is required to recruit and suggested the Department should provide a means of indemnifying employers from liability associated with mandatory out-of-State advertising.

The Department anticipates the number of States to be so designated will be no more than three for any one State, but that the number of States designated will vary by State. In some cases, no State or only one or two States may meet the relevant criteria. In response to these comments, the Department has added to the Final Rule language specifying that ''[a]n employer will not be required to conduct positive recruitment in more than three States designated in accordance with paragraph (i)(1) for each area of intended employment listed on the employer's application.'' This is

generally consistent with past practice concerning required out-of-State recruitment, as employers have only very rarely been required to conduct advertising in more than three States of traditional or expected labor supply. Providing this modest cap will provide employers with needed certainty regarding expected advertising costs.

A farmworker advocacy organization believed the requirement should be for three advertisements, not one, in each designated State and also recommended that the Department require that the language predominant among agricultural workers in the region be used. A representative of a State government agency commented that the proposed regulations were not clear as to how an employer's ad in another State would be handled. The individual commented that the advertising instructions indicate interested applicants should contact the SWA, but asserted that this procedure would not work well for an ad placed out of State and recommended the ads placed out of State should advise applicants to contact the employer directly. Another commenter recommended the newspaper ads in other States should direct all applicants to the SWA and the SWA should then refer them to the employer's SWA. An association of growers/producers recommended the required newspaper advertisements should contain only the job specifications and the SWA contact information.

The Department agrees that more clarity on the mechanics of out-of-state recruitment is appropriate. The Department has added language to the regulation to clarify that one advertisement is to be placed in each State identified for the area of intended employment as a traditional or expected labor supply State. The Department declines to require more than one ad in each State, which would be a significant departure from the advertising requirements under the current regulations and would add additional program expense. In response to comments, and out of recognition that employers often will not be well-versed in the characteristics of out-of-State newspapers, the Department has included language in the Final Rule specifying that its annual **Federal Register** notice will not only announce the designation of labor supply States, but will also specify the acceptable newspapers in the designated States that employers may utilize for their required out-of-State advertisements. In no case will an employer be required to place an ad in more than one newspaper in a labor supply State. In response to comments, the Final Rule has also been modified to specify that ads should refer interested employees to the SWA nearest the area in which the advertisement was placed. The SWA will then refer eligible individuals to the SWA of the employer's State. The Department believes these procedures will provide a workable advertisement-and-referral system to provide farmworkers information about available jobs and to supply needed labor to prospective users of the H–2A program.

(j) Section 655.102(j) Referrals of Verified Eligible U.S. Workers

The Department proposed to require SWAs to ''refer for employment only those individuals whom they have verified through the completion of a Form I–9 are eligible U.S. workers.'' These provisions are consistent with the Department's statutory mandate. Although the INA prohibits the referral of workers where it is known that they are unauthorized to work in the United States, this rule clarifies and spells out the Department's expectations. Based upon comments received and the Department's experience with this requirement, which has been in effect administratively since the issuance of TEGL 11–07, Change 1 on November 14, 2007, and with respect to which ETA has provided recent training webinars for SWAs, the Department believes that SWAs should be required to verify the identity and employment authorization of referred workers by completing USCIS Form I–9 in accordance with DHS regulations at 8 CFR 274a.2 and 274a.6. The NPRM, ETA's written guidance, and an opinion by the Solicitor of Labor, all of which have been shared with SWAs over the past year, explain both the rationale for the SWA verification requirement.

Comments on this subject were received from a national association representing state agencies, 12 individual SWAs, several civil rights and labor advocacy organizations, members of Congress, and numerous employer groups and individual employers. Commenters supporting the proposal generally cited the longstanding need for a reliable employment service system that is based on affirmative verification and refers only workers who are authorized to work in the U.S. Commenters opposing the proposal raised a variety of legal, programmatic, resource-related, and policy-based concerns.

Many commenters considered the employment verification requirement to be a change in policy after decades of contrary Departmental interpretation. Another argued that the requirement runs afoul of the Department's FY08 Appropriations Act, Public Law 110–161, Division G, Title I, Section 110, in which Congress prohibited ETA from finalizing or implementing any rule under the Wagner-Peyser or Trade Assistance Acts until each is reauthorized.

The Department has always required that SWAs fulfill the requirements of the INA to refer only eligible workers by verifying their employment authorization. Recent instructions by the Department (including TEGL 11–07, Change 1) have clarified the way that employment verification is required to be accomplished. To the extent that these requirements were thought by some to represent a shift in Departmental policy, they are now being clearly stated in the Department's regulations. The Department has not reviewed the H–2A regulations comprehensively since the current program's inception in 1986. After a top-to-bottom review of the program requested by the President in August 2007, the Department is revising and modifying a number of established practices based on program experience, years of feedback from stakeholders, and changing economic conditions.

As discussed in the NPRM our clarification of SWAs' obligation to affirmatively verify employment eligibility is in direct response to longstanding concerns about the reliability of SWA referrals. The referral of workers not authorized to work undermines the integrity of the H–2A program, can harm U.S. workers, and can disrupt business operations.

Many commenters argued that the requirement is inconsistent with INA provisions at 8 U.S.C. 1324a, and DHS regulations at 8 CFR 274a.6, which permit but do not require SWAs to verify employment eligibility for individuals they refer. The USCIS regulations expressly permit SWAs to verify the identity and employment authorization of workers before making referrals, and certainly do not prohibit such verification. *See* 8 CFR 274a.6. The Acting General Counsel of DHS has issued an interpretive letter stating that while the USCIS regulations do not require SWAs to verify the eligibility of workers before referring them, those regulations do not prevent other agencies with independent authority from imposing such a requirement. *See* November 6, 2007 letter from Gus P. Coldebella, DHS Acting General Counsel, to Gregory F. Jacob, Senior Advisor to the Secretary of Labor. The Department is now exercising its independent statutory authority under

the INA to require through regulation that SWAs verify employment eligibility of referrals. Further, to ensure that the regulated community has appropriate notice of the specific requirement, and to ensure a standard process for verification remains in place consistent with the procedures already approved by Congress, we have clarified in the regulatory text that states must at a minimum use the I–9 process for purposes of verification. The Department also strongly suggests (but does not require), as it did in the NPRM, that States utilize the DHS-administered E-Verify system. State agencies with procedures that do not comply with the minimum requirements of the Form I–9, however, such as verification through scanned documents transmitted over the Internet, must revise their processes to ensure that agricultural referrals are made only as a result of in-person verification.

The INA requires that employers execute a Form I–9 for all new employees. Some commenters interpreted the NPRM to shift this employer responsibility to SWAs. A subset of these commenters raised concern that removing responsibility for verification from agricultural employers alone would be unfair to other, non-agricultural employers who would still be required to complete the Form I–9 form.

This Final Rule does not govern employment eligibility verification, nor does it seek to change, for purposes of H–2A labor certification, the basic responsibility of employers under the INA. As we strongly cautioned in the NPRM, a SWA's responsibility to perform threshold, pre-referral verification exists separate from an employer's independent obligation under the Immigration Reform and Control Act of 1986 to verify the identity and employment authorization of every worker to whom it has extended a job offer. However, the governing statute does permit employers to rely on an employment verification conducted by the SWA to fulfill their statutory responsibilities. The INA—at sec. 274A(a)(5)—exempts employers from the verification requirement and provides a ''safe harbor'' from legal liability to employers, regardless of industry, who unwittingly hire an unauthorized worker where the hire is based on a SWA referral made in compliance with 8 CFR 274a.6, requiring appropriate documentation from the SWA certifying that verification has taken place. As discussed more fully below, the Department requires in this Final Rule that SWAs provide documentation meeting the requirements of sec. 274A(a)(5) of the INA and 8 CFR 274a.6 to each employer at the time the SWA refers the verified worker to the employer. Employers must retain a copy of the SWA certificate of verification just as it would retain a copy of Form I–9. Employers must still verify employment eligibility for workers who do not have a state certification that complies with all of the applicable statutory and regulatory requirements.

Some commenters were concerned that employers who hire SWA-referred workers may seek to hold SWAs responsible for referring unauthorized workers. The Department expects that any referrals a SWA makes to individual employers will comply with the requirements of Federal law, including those established in this Final Rule. For example, the preamble to the proposed rule directs SWAs to provide all referred employees with adequate documentation that verification of their employment has taken place, and clarifies that employers may invoke ''safe harbor'' protection only where the documentation complies with all statutory and regulatory requirements. We have clarified in the Final Rule the SWA's obligation to complete Form I–9 and provide evidence of such completion by providing the employer with a certification that complies with the DHS requirements for such certificate at 8 CFR 274a.6. However, employers have no obligation to hire a job applicant, whether or not referred by the SWA, who does not present the employer with appropriate documentation evidencing the applicant's work eligibility. As stated in the NPRM, an employer will not be penalized by the Department for turning away applicants who are not authorized to work. Additionally, as long as a SWA complies with the process established by DHS for State Workforce Agencies and undertakes good faith efforts to establish the employment eligibility of referred workers, it will not incur any potential liability. Although the Department certainly intends to hold SWAs responsible for complying with all program requirements, just as it has in the past, the Department is not aware of any basis under which SWAs could be held liable to third parties for failing to properly perform their employment verification responsibilities in the absence of willful or malicious conduct.

Many commenters raised a concern that these new procedures would have an unlawful, disparate impact on a protected class, or at least make states vulnerable to legal claims of disparate impact that would require the expenditure of significant resources to defend. More specifically, these commenters felt that to the extent the verification process is not applied to non-agricultural workers, it would have a disparate impact on agricultural workers, many of whom are Hispanic, and that could be perceived as unlawful discrimination on the basis of race or ethnicity. Some commenters were concerned that states would be forced to expend significant resources to defend lawsuits or, alternatively, that in order to protect against lawsuits, would be forced to apply the verification procedures to all job referrals.

The requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. The eligibility requirement is established by statute and is similar to verification requirements to gain access to other similar public benefits. *See*, e.g., Section 432, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193, 110 Stat. 2105 (employment eligibility verification requirement for most federal public benefits for needy families). As this regulation governs the H–2A foreign labor certification program, the clarification made here is limited to that program and to agricultural job referrals, but the Department proposed an analogous provision in the H–2B NPRM published on May 22, 2008, seeking to extend the same procedural employment verification requirements to that program. More generally, the clarification of the requirement in this regulation does not mean the Department's policy is limited only to agricultural referrals, as the Department's expectation is that SWAs will do what they can, including exercising their authority under 8 U.S.C. 1324a, to avoid expending public resources to refer unauthorized workers to any job opportunities, regardless of program area. The employment verification provisions included in this regulation are part of a much broader, concerted effort—one that includes regulation, written guidance, and outreach and education—to address longstanding weaknesses in the system and to strengthen the integrity of foreign labor certification activities.

Some commenters opined that the employment eligibility verification requirement presents an obstacle to employment for, and will reduce the pool of, the U.S. workers it is designed to protect. For example, these commenters stated that States are increasingly moving toward web-based employment services. The commenters believe an in-person verification requirement will require potentially

onerous visits by job seekers who they believe currently could be referred to work without ever visiting a workforce center. The commenters stated that, especially in the larger States, this will present a greater and perhaps insurmountable hurdle for a larger number of U.S. workers, who will be discouraged from travelling great distances to obtain a job referral.

In practice, an in-person verification requirement will not significantly change the operation of referrals in most States. In the Department's program experience, States often require that agricultural job applicants visit the workforce center to receive information on the terms and conditions of the job, which must be provided prior to referral. *See* 20 CFR 653.501(f) (placement of the form within local offices). While we do not disagree that an in-person verification requirement may impact the decisions of a limited number of otherwise eligible workers, at this juncture the impact is speculative and does not outweigh the significant value of verification. Moreover, it is a problem that SWAs may be able to adjust to by designating or creating additional in-person locations where eligibility can be verified. This is not a problem unique to SWAs given that workers often must travel great distances to reach a prospective employer, who then (absent a SWA certification) would be required to verify work eligibility. Although employment eligibility verification does require some amount of time and effort, Congress has determined that simple convenience must cede to the overarching goal of achieving a legal workforce and the Department has drafted its regulations accordingly.

Commenters opposing the eligibility provision uniformly complained that the verification requirement would add potentially significant workload and strain the already inadequate resources of many State Workforce Agencies. 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–2A 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. We have provided training to SWAs to meet their obligations in this context and will continue to do so.

In addition, notwithstanding funding limitations, there is a strong, longstanding need for a consistent and uniform verification requirement at the state government level. Verification is a statutory responsibility of the Department and the SWAs under the INA and the Wagner-Peyser Act, and the Department has further determined employment verification is a logical and necessary condition for the issuance of foreign labor certification grants to states. 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. 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 grant.

Commenters raised a number of concerns with the use of E-Verify, including potential system problems, delays and inaccuracies. The Department strongly encourages state agencies to use the system, which provides an additional layer of accuracy and security over and above the basic I–9 process, but it has not mandated use of E-Verify. SWAs can comply with this Final Rule without the use of E-Verify.

One commenter pointed out that the regulation does not describe the penalties to SWAs for non-compliance or delayed compliance with this requirement, or the implications for H–2A employers who may seek services from SWAs that are not in compliance with the requirement. For instance, the commenter inquired whether, if the Department were to suspend Foreign Labor Certification grant funding, employers would be required to accept referrals funded exclusively by Wagner-Peyser funding. The commenter also inquired whether the SWA in an employer's state would be required to verify the work eligibility of a worker that was referred to it by a non-compliant out-of-State SWA. As the verification requirement is implemented, the Department's guidance will evolve in response to the experience of the regulated community and our own. We do note that these problems already exist under the Department's current regulations and policies, and the Department is working through them as they arise. The problems are substantially alleviated by the fact that virtually every State and territory administering the H–2A program has already agreed to come into compliance with the employment eligibility verification requirements established by current Departmental policies, minimizing the chance that a State will need to be de-funded due to non-compliance or that non-compliant referrals will be made by out-of-State SWAs. Nevertheless, we do not discount the importance of the questions posed by the commenter, but see them as issues of implementation that should be addressed, as they arise, through appropriate guidance.

In addition, we note that the SWA may not refuse to make a referral and the employer may not refuse to accept a referral because of an E-Verify tentative nonconfirmation (TNC), unless the job seeker decides not to contest the TNC. SWAs and employers may not take any adverse action, such as delaying a referral or start date, against a job seeker or referred worker based on the fact that E-Verify may not yet have generated a final confirmation of employment eligibility.

(k) Section 655.102(k) Recruitment Report

The Department proposed requiring employers to submit an initial recruitment report with their applications and to supplement that report with a final recruitment report documenting all recruitment activities related to the job opportunity that took place subsequent to the filing of the application. The Department proposed that the initial recruitment report to be filed with the application be prepared not more than 60 days before the date of need, and that the supplemental, final report be completed within 48 hours of the date H–2A workers depart for the worksite or 3 days prior to the date of need, whichever is later. Many individuals and members of agricultural associations expressed concern that recruitment reports will not simplify the application process and will instead inflict an undue burden on employees of small farms. Some agricultural associations argued that having two recruitment reports will double the work for employers and stated that the supplemental report is not justified because of its limited utility in resolving compliance issues.

The Department disagrees that a supplemental recruitment report will have limited benefit, given the Department's intended use of supplemental reports in the event of an audit. The supplemental recruitment report will provide assurance to the Department that an employer has complied with all of its obligations with respect to the domestic workforce. Compliance throughout the program, including after filing of an application,

is necessary for the appropriate enforcement of the H–2A program and its requirements. By requiring a supplemental report, the Department is not requiring a duplicative effort but is in fact effectively requiring employers to split the current comprehensive total report (of all referrals that are required to be reported) into two smaller, more manageable reports. The Department does not believe that this splitting of the comprehensive total report will require significantly more effort on the part of employers.

Several commenters specifically mentioned the timing of the recruitment report as the biggest problem with the requirement. One farm association noted that since the initial application cannot be submitted without the recruitment report, and the recruitment report must be prepared not more than 60 days prior to the date of need, the application itself cannot be filed until 60 days ahead of time. In order to rectify this issue, the commenter believed the application itself should be required to be filed not more than 60 days prior to the date of need. Another farm association suggested that the timeline for the recruitment report be moved up to no later than 45 days before the date of need, rather than 60 days before the date of need. The Department also received comments in support of the supplemental recruitment reports.

The Department has learned through experience that if recruitment is begun no more than 45 days before the date of need, it is virtually impossible for the Department to receive an adequate recruitment report by the time it is statutorily required to make a certification determination 30 days before the date of need. As discussed above, we have in response to comments amended the timeframe for pre-filing recruitment to reflect a recruitment period closer to the date the workers are needed. In addition, in accordance with the revisions to the time frame specified in § 655.102(e) for submitting job orders, the original proposal regarding the timing of the filing of recruitment reports has been revised in the Final Rule and now provides that the initial recruitment report may not be prepared more than 50 days prior to the employer's date of need. The Final Rule also revises the proposed timing for the completion of the supplemental recruitment report, and now requires the employer to update the recruitment report within 2 business days following the last date that the employer is required to accept referrals; that is, the end of the recruitment period as specified in § 655.102(f)(3). With respect to employers who wish to file an *Application for Temporary Employment Certification* prior to 50 days before the date of need, they are welcome to do so to initiate processing of the application, but the application will not be considered to be complete, and thus eligible for a final determination, until the initial recruitment report is submitted.

Finally, the Department has made additional clarifying edits to the regulatory text. These edits are to ensure this provision comports with other sections of this Final Rule, to improve readability, and to clarify its requirements. These include the deletion of the redundant phrase ''who applied or was referred to the job opportunity'' which appeared twice in the NPRM paragraph (k)(2) (which is now (k)(1)(iii)); simplifying the reference to the contents of the supplemental recruitment report through the use of cross-references; and placing the paragraph regarding the updating of recruitment reports before the paragraph regarding document retention requirements. In addition, the Department has added a requirement that the recruitment report must contain the original number of openings advertised. This last addition will enable the Department to grant an employer a partial certification in the event it can meet part but not all of its need through the recruitment of U.S. workers.

Section 655.103 Advertising Requirements

The Department proposed detailed instructions for the content of the newspaper advertisements to be placed by employers as part of the required pre-filing recruitment in § 655.103. A few comments were received on the specific contents of the ads. Other comments regarding the rule's advertising requirements are discussed in the section of the preamble pertaining to § 655.102(g).

An association of growers/producers commented that the advertising requirements are inefficient and wasteful, particularly when ''numerous virtually identical ads are appearing at the same time.'' Another association suggested that employers be allowed to advertise jobs by simply referencing the job order placed with the SWA, and suggested that employers should not be required to include all of the detailed information contained in the proposed regulation. Another association suggested that if more than one grower is simultaneously recruiting in an area covered by only one newspaper, their ads should be combined and placed by the SWA. The association suggested that the names of the growers could all be provided in the ad, but applicants would be directed to the SWA to get additional information about the jobs and referrals to the employers.

The Department has considered but declines to adopt these suggestions at this time. The Final Rule significantly clarifies the H–2A advertising requirements. The Department believes that it has struck a careful and appropriate balance, based on its program experience, between the expense of advertising to employers and workers' need for basic job information when considering whether to pursue advertised employment opportunities.

The Final Rule contains several clarifying and conforming changes to the proposed text for § 655.103, none of which are substantive. The Final Rule also paraphrases in § 655.103 the equal treatment requirement already stated in § 655.104(a). Section 655.103 requires that an employer's recruitment ''must contain terms and conditions of employment which are not less favorable than those that will be offered to the H–2A workers.''

Section 655.104 Contents of Job Offers

(a) Section 655.104(a) Preferential Treatment of Aliens

The Department's proposed regulation stated: ''The employer's job offer shall offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers.'' A group of farmworker advocacy organizations opposed the removal of the words ''U.S. worker'' from this section of the rule. This commenter believes that the proposed wording allows employers to treat U.S. workers less favorably than H–2A workers.

While the Department does not agree that the new wording would have allowed employers to treat U.S. workers any less favorably than H–2A workers, the words ''U.S. worker'' have been reinserted.

(b) Section 655.104(b) No Less Than Minimum Offered

The NPRM proposed that the ''job duties and requirements specified in the job offer shall be consistent with the normal and accepted duties and requirements of non-H2A employers in the same or comparable occupations and crops in the area of intended employment and shall not require a combination of duties not normal to the occupation.'' Several commenters expressed concern that the proposed requirements would prove unworkable,

unadministrable, and exceedingly difficult for employers to comply with, as what is ''normal'' and ''accepted'' are substantially subjective determinations. All of the commenters who provided input on this provision suggested that the Department should not second guess an employer's business decision regarding an occupation's job duties when they are unique to that employer. These commenters believe that the Department's proposal would give the Department more discretion to deny an application than is contemplated by the statute.

The Department agrees with the basic thrust of these comments. Section 218(c)(3)(A) of the INA requires the Department, when determining whether an employer's asserted job qualifications are appropriate, to apply ''the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops.'' There is a substantial difference, however, between job duties and job qualifications; job qualifications typically describe the minimum skills and experience that an employee must have to secure a job, while job duties describe the tasks that qualified workers are expected to perform. The Department agrees that, as a general matter, employers are in a far better position than the Department to assess what job duties workers at a particular establishment in a particular area can reasonably be required to perform in an H–2A eligible position.

The Department is therefore altering this provision to conform more closely to the language of the statute, and is limiting the restriction in § 655.104(b) to job qualifications. The Department is aware that this may mean that at times a U.S. worker wishing to perform one type of job duty, such as picking asparagus, may be required by an employer to perform an additional job duty, such as harvesting tobacco, in order to secure an agricultural job. It is not at all uncommon, however, for jobs in the United States to include multiple job duties, some of which workers may view as more desirable than others. There is nothing in the statute governing the H–2A program indicating that Congress intended to require agricultural employers to allow prospective workers to selectively choose which job duties they want to perform and which job duties they do not, with regard to a particular job opportunity. In the Final Rule, this provision states that ''[e]ach job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops.''

The Department is sensitive, however, that in certain circumstances a listed job duty may act as a de facto job qualification, because the listed duty requires skills or experience that agricultural workers may not typically possess. When such circumstances arise, the Department reserves the right to treat the listed job duty as a job qualification, and to apply the ''normal'' and ''accepted'' standard that is set forth in the statute and restated in the regulations in determining whether the qualification is appropriate.

One commenter suggested that this provision should be made consistent with those in the PERM regulations at 20 CFR 656.17. The Department declines to apply the PERM standard to the H–2A program, as that standard is based on a substantially different statutory structure. The Department is confident that the revised standard for § 655.104(b) that is set forth in the Final Rule, which hews closely to the language of sec. 218(c)(3)(A) of the INA, is appropriately tailored to the H–2A program and will prove workable in practice.

(c) Section 655.104(c) Minimum Benefits

A group of farmworker advocacy organizations pointed out that proposed § 655.104 does not correlate exactly to current § 655.102(b). Specifically, in this commenter's opinion the proposed section does not require the employer to pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period as required in the current regulation. According to this commenter, under the proposed rule, H–2A workers would have only contract law as their primary enforcement tool. With proposed § 655.104(c) stating that every job offer must include the wage provisions listed in paragraphs (d) through (i) of this section but no longer requiring precisely what the current § 655.102(b)(9)(i) requires, this commenter argued that workers will be left at a disadvantage if the employer fails to specify the required wage provisions in the work contract.

The Department appreciates this commenter's analysis. However, we do not agree that the employer will no longer be bound to pay the employee the wage promised, nor that the only enforcement tool available is through contract law. Under the new program the employer's attestation required under § 655.105(g) is an enforceable program requirement. The failure of an employer to comply with any program requirement subjects the employer to the Department's enforcement regime.

A commenter pointed out the illogical consequences of rigid rules governing wages for agricultural workers. It is the commenter's contention that the Department should add a phrase at the end of § 655.104(c) that would not force employers to pay the NPC prescribed wage until the date of need and instead would allow employers to pay U.S. workers a mutually agreed upon wage between the time they recruit the workers and the date the H–2A workers are needed in order to train the U.S. worker and retain them until and throughout the period of the H–2A contract. The commenter reports that if they do not offer those U.S. workers employment immediately, they will most likely not be available when the H–2A work begins. The commenter believes that any employment prior to the date of need and prior to the date that foreign H–2A workers arrive should not be governed by the H–2A contract or its wage provisions.

The Department agrees that the H–2A required wage takes effect on the effective start date of the H–2A contract period. However, the Department does not believe that any changes to the regulatory text need to be made under this section because § 655.105(g) provides that the requirement to pay the offered wage applies only during the valid period of the approved labor certification. U.S. workers who are hired in response to H–2A recruitment and who perform work for an employer before the date of need specified in the H–2A labor certification are not required by these regulations (but may be required by contract) to be paid the H–2A wage until the period of the H–2A contract begins, without regard to the type of work performed.

A group of farmworker advocacy organizations argued that under the proposed rule, employers would no longer be required to disclose in job offers their obligation to provide housing to workers. That is incorrect. Section 655.104(c) provides that ''[e]very job offer accompanying an H–2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.'' Paragraph (d) of that section provides, in turn, that ''[t]he employer must provide housing at no cost to the worker, except for those U.S. workers who are reasonably able to return to

their permanent residence at the end of the work day.''

(d) Section 655.104(d) Housing

Section 218(c)(4) of the INA requires employers to furnish housing in accordance with specific regulations. The employer may fulfill this obligation by providing housing which meets the applicable Federal standards for temporary labor camps or providing housing which meets the local standards for rental and/or public accommodations or other substantially similar class of housing. In the absence of local standards, the rental and/or public accommodations or other substantially similar class of housing must meet State standards, and in the absence of State standards, such housing must meet Federal temporary labor camp standards. By statute, the determination of whether employer-provided housing meets the applicable standards must be made no later than 30 days before the date of need. The Department proposed three changes to the current housing requirements.

First, the Department proposed allowing employers to request housing inspections no more than 75 and no fewer than 60 days before the date of need. The Department further proposed that the NPC would, as required by statute, make determinations on H–2A applications 30 days before the employer's date of need, even if the housing referenced in the application had not yet been physically inspected by the SWA, so long as (1) the employer requested a housing inspection within the time frame specified by the regulations and (2) the SWA failed to conduct the inspection for reasons beyond the employer's control. Under the Department's proposal, SWAs would have the authority and the responsibility under such circumstances to conduct post-certification housing inspections prior to or during occupancy. If such a post-certification housing inspection identified deficiencies that the employer failed to act promptly to correct, the proposal provided that the SWA would inform the NPC of the deficiencies in writing so that the NPC could take appropriate corrective action, potentially including revocation of the labor certification. The Department proposed these changes in part to alleviate the problems SWAs currently face in trying to conduct large numbers of required housing inspections during the short 15-day window provided by the statute between the time that applications are required to be filed (45 days before the date of need) and the time that the Department is required to make a determination on the application (30 days before the date of need). The changes were also intended to avoid penalizing employers for the failure of SWAs to comply with their legal duty to meet the timeframes established by the statute.

The Department heard from a number of SWAs on the issue of timely housing inspections, many of which declared their ability to conduct housing inspections within the 15-day window. One SWA acknowledged that at times delays may occur in conducting housing inspections, but attributed those delays to incomplete or inaccurate information being provided to inspectors. This SWA suggested that providing a copy of the job order with the housing inspection request would alleviate the problem of inspectors investigating the wrong housing. Finally, an anonymous commenter tied the delays in housing inspections to a lack of funding at the state level.

The Department recognizes that many SWAs conduct housing inspections in advance of the statutory deadline of 30 days before the date of need, but cannot ignore the fact that SWA delays in conducting housing inspection have in many instances resulted in labor certification determinations being made by the Department outside of the statutorily required timeframes. This result is not acceptable to the Department or to employers seeking H–2A certification. As one employer commenter stated:

> [u]ntimely housing inspections are one of the most common reasons for delays in making labor certification determinations. Therefore, the provision in the proposed regulations for making a pre-application housing inspection, and the provision that certification will not be delayed if a timely housing inspection is not made, and that occupancy of the housing is permitted, are important improvements in the program.

While employers and employer associations favored the proposed conditional labor certifications, several commenters representing employer interests had concerns with the proposed requirement that housing inspections be requested no fewer than 60 days before the date of need. Employers stated that in some parts of the U.S., housing may still be winterized 60 days before the date of need and therefore may be unavailable for inspection, or unable to pass inspection. In certain areas, inspection agencies require that the employer rent the housing before an inspection is conducted and the earlier time frame for requesting an inspection requires employers to pay an additional month or two of rent for the housing, substantially adding to the cost of providing housing. Other growers stated that current inspection procedures prohibit the inspection of occupied housing and therefore this proposal would require that regulations be adjusted to permit inspection of occupied housing. Some said that the earlier time frame for requesting housing inspections may be before many farmers plant their crops, let alone know the dates of the harvest.

Commenters representing employer interests also included questions concerning implementation of the proposal. Many argued that employers should be provided a specific and reasonable period of time for abatement of violations found in post-determination inspections conducted by SWAs, and that employers who correct violations within the specified period should not be penalized for the violations. One employer association argued that ''the fact that employers continue to face consequences for having deficient housing will prevent any adverse effects for workers.'' Employers also questioned the proposed requirement that housing inspection requests be made in writing, and some employers recommended that the Department provide training to SWA staff on conducting housing inspections of occupied housing. Finally, one employer commented that in the state in which he operates, the state's Department of Health conducts inspections of temporary labor camps and that to require SWAs to conduct these inspections would result in confusion.

Employee advocacy organizations and state agencies expressed concern that the granting of pre-inspection labor certification determinations could potentially result in cases where housing is not inspected prior to occupancy, which in turn could result in workers being housed in substandard conditions. Several commenters objected to this proposed revision stating that pre-occupancy housing inspections are an effective incentive for employers to take corrective action, thus ensuring that workers are housed in safe and sanitary housing. Other commenters urged the Department to continue the requirement that housing be inspected before workers arrive.

A few comments from both organizations representing employer interests and from organizations representing employee interests questioned the Department's legal authority to establish a requirement that housing inspections be requested more than 45 days before the date of need, which is the earliest date that the

Department may under the statute require applications to be filed. One commenter asserted that the proposed changes contradict the Department's Wagner-Peyser regulations requiring that the housing be inspected to determine compliance with applicable housing safety and health standards before a job order can be posted (and, thus, before the housing can be occupied).

The Department has carefully considered the comments and has determined that the framework of the Department's original proposal strikes an appropriate balance between the need to ensure that housing for H–2A workers meets all applicable safety and health standards, that agricultural employers are able to secure H–2A workers in a timely manner, and that the Department complies with the statutory requirement to render a determination no fewer than 30 days before the date of need. To ensure that SWAs have adequate time to complete housing inspections before the statutory deadline of 30 days before the date of need, the Final Rule requires employers to request housing inspections no fewer than 60 days before the date of need, except when the emergency provisions contained in § 655.101(d) are used. The Department is eliminating in the Final Rule the proposed restriction on housing inspections being requested more than 75 days before date of need. Eliminating this restriction will provide SWAs additional flexibility to manage the workload of completing required inspections with respect to those cases where an employer's housing is ready for inspection well in advance of the date of need.

The INA at 8 U.S.C. 1188(c)(3)(A) expressly requires the Secretary of Labor to make a determination on an employer's application for temporary labor certification no fewer than 30 days before the employer's date of need. The INA also requires that the Secretary make a determination as to whether employer-provided housing meets the applicable housing standards by the same deadline—no fewer than 30 days before the employer's date of need. Although the Department has delegated its statutory housing inspection responsibilities to the SWAs, the statutory deadline applicable to that responsibility continues to apply. This is made explicit by § 655.104(d)(6)(iii) of the Final Rule, which states that ''[t]he SWA must make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under sec. 218(c)(3)(A) of the INA, which is 30 days before the employer's date of need.''

Some commenters read the language of sec. 218(c)(4) of the INA as prohibiting the Secretary from making a determination on an employer's application for temporary labor certification until the employer's housing has been physically inspected. The Department strongly disagrees with that interpretation. The language of sec. 218(c)(4) is not phrased as a limitation on the Secretary's duty under sec. 218(c)(3)(A) to make determinations on applications no later than 30 days before the employer's date of need. In fact, the language of sec. 218(c)(4) does not require that housing inspections be completed prior to the Secretary's certification determination, although Congress certainly could have phrased the requirement that way had it wanted to do so. Instead, the language of sec. 218(c)(4) is most naturally read as imposing a statutory duty on the Department to complete required housing inspections ''prior to the date specified in paragraph (3)(A)''—which, as noted previously, is 30 days before the employer's date of need. The provision does not specify what consequence should follow in the event that the Department fails to comply with this mandate. Presumably, however, if Congress had intended that the primary consequence of the government's failure to meet its statutory responsibility to complete housing inspections in a timely manner would be to penalize employers by releasing the Department from its independent statutory responsibility to make determinations on applications no later than 30 days before the employer's date of need—a deadline that was indisputably established to ensure that employers can secure needed H–2A workers in a timely fashion without undue delays caused by the government—it would have said so explicitly.

Of course, the Department greatly prefers that housing inspections be conducted prior to certification, as this gives the Department the strongest possible assurance that ''the employer has complied with the criteria for certification'' as required by sec. 218(c)(3)(A)(i) of the INA. To this end, the Final Rule requires that employers make requests for housing inspections no fewer than 60 days before the employer's date of need, ensuring that SWAs have adequate time to meet the statutory deadline for conducting housing inspections. Moreover, SWAs remain under an express statutory and regulatory mandate to complete housing inspections by 30 days before the employer's date of need, an obligation that the Department expects SWAs will not take lightly. The Department therefore believes that under the Final Rule, post-certification housing inspections will be the very rare exception rather than the rule.

The Department has never read sec. 218(c)(3)(A)(i), however, as requiring that the government directly observe for itself that the employer has satisfied all of the statutory criteria for certification. For example, under the current regulations a substantial portion of required recruitment takes place after a certification has been made, and SWAs typically do not conduct pre-certification inspections of rental housing or public accommodations secured by employers pursuant to sec. 218(c)(4). It is important to note that under the Final Rule employers are required to provide or secure housing that meets all applicable standards, and that a certification cannot be granted, with or without an inspection, unless the employer has attested that its housing fully complies with those standards. Sanctions and penalties may be imposed for violations of the attestation requirements and the housing standards, including revocation of a labor certification, regardless of whether a pre-certification housing inspection was conducted.

As to commenters who argued that it is unacceptable that housing might in some rare circumstances be occupied by H–2A workers before it is inspected, the Department notes that under MSPA, U.S. workers often occupy agricultural housing before it is inspected, and the Department has not seen any data indicating that this arrangement has caused harm to U.S. workers. The Department does not believe that H–2A workers will be harmed by this rule when being afforded the same level of protection that Congress has afforded to U.S. workers. Moreover, the Department believes that any chance that H–2A workers would be placed in substandard housing under the Final Rule—a possibility that can never fully be guarded against as a practical matter, and occurs on occasion even under the current rule—is minimized by the fact that a certification cannot be granted unless the employer has attested that its housing fully complies with all applicable standards. If this attestation is later shown to be false, the employer risks substantial penalties, including the possibility of a revoked labor certification and/or debarment.

The Department is not persuaded by employers' arguments for specific language allowing employers in all cases to abate housing violations

without penalties where the housing has already been occupied. Penalties for failing to meet the applicable standards help ensure compliance. As with all Department investigations to determine compliance with Federal safety and health standards for housing, however, the employer is as a matter of practice provided a reasonable opportunity to correct or abate any violations that are found. This also is true when the SWA or other state agency conducts the inspection. Time frames for abatement are directly related to the severity of the violation and its potential impact on the safety and health of the workers. Therefore, language in this regulation specifying an abatement period for the correction of housing violations is unnecessary. Current regulations at 29 CFR 501.19(b) and the Final Rule at §§ 655.117 and 655.118 address the factors considered by the Department in determining the appropriateness of penalties and sanctions. The Department will continue to ensure that the penalties assessed and sanctions imposed for violations of housing safety and health standards are appropriate to the violation.

The Department is cognizant that requiring employers to request housing inspections no fewer than 60 days before the date of need may present a challenge to some employers. However, we believe that overall this requirement will be beneficial to employers, workers and the SWAs by allowing more time for the SWAs to schedule and conduct pre-occupancy housing inspections, and more time for employers to correct any deficiencies prior to the arrival of the workers. The Department expects that SWAs will continue to work with employers on the scheduling of housing inspections and that SWAs will endeavor to minimize the expense to the SWA and maximize the benefit to the employer and workers by avoiding scheduling inspections of facilities at times that they are not winterized or otherwise unlikely to pass inspection. In response to comments about obstacles that currently exist in some jurisdictions to securing timely housing inspections, the Department has also included an instruction to SWAs in the Final Rule not to adopt rules or restrictions that would inhibit their ability to conduct inspections by 30 days before the date of need, such as requirements that rental housing already be formally leased by the employer before the SWA will conduct an inspection, or rules that occupied housing will not be inspected. It is solely the employer's responsibility, however, to ensure that the SWA has access to the housing to be inspected so that the inspection may take place. For the reasons set forth in the discussion of § 102(a) concerning the Final Rule's pre-filing recruitment requirements, the Department does not agree that the statute prohibits the Department from requiring that housing inspection requests be submitted to SWAs prior to the date that applications must be submitted to the NPC.

The Department also disagrees that the possibility that some housing inspections will take place after certification under the Final Rule violates the Wagner-Peyser regulations. The current regulations at 20 CFR 654.403 already permit job orders to be posted prior to the completion of a housing inspection. If an SWA identifies violations during a subsequent housing inspection, and the employer does not cure the violations after being provided a reasonable opportunity to do so, the corresponding job order may be revoked. Although some commenters expressed the view that the regulatory process under § 654.403 is more protective of workers because § 654.403(e) requires that the SWA ''shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this subpart,'' that provision is actually less protective of workers than the Final Rule. The Final Rule unequivocally recapitulates the statutory requirement that housing inspections be completed no later than 30 days before the employer's date of need, a date that is actually earlier than that required by the conditional access provisions set forth in § 654.403. Thus, both the Final Rule and § 654.403 contain clear mandates for pre-occupancy inspections. Significantly, however, § 654.403 does not specify any particular consequence if an SWA fails in its duty to conduct the required pre-occupancy inspection; under that provision, it is only if the SWA fulfills its duty to conduct the required inspection and finds violations that the employer's job order is removed from clearance. Thus, in specifying that the Department will adhere to its statutory obligation to make certification determinations on applications no later than 30 days before the employer's date of need even where an SWA has failed in its statutory duty to conduct the required housing inspection in a timely fashion, the Department is not depriving workers of any protections that they have under § 654.403. Both provisions fundamentally depend on SWAs to protect workers by fulfilling their responsibilities under the law—and the Department notes that in its experience, the SWAs take those responsibilities very seriously.

The Department is retaining the proposed requirement that the employer's request for housing inspections must be in writing. This requirement provides the employer with the documentation necessary to demonstrate that their request for a housing inspection was made within the required time frame.

While the Department refers to the SWAs as the entities responsible for making housing inspections related to labor certification determinations, the Department does not intend to limit the flexibility afforded SWAs in fulfilling this requirement. For example, some SWAs have agreements with other State agencies for conducting housing inspections and it is not the Department's intention to change such arrangements.

Finally, in response to concerns that SWA staff is not sufficiently trained to conduct inspections of occupied housing, the Department anticipates that there will be additional training of SWA staff on the conduct of housing inspections.

The Department's second housing-related proposal was the creation of a housing voucher as an additional option employers could use to meet the H–2A housing requirements. The Department did not explain in detail in the NPRM how such a voucher program would work, but instead requested suggestions and comment from the public about how the program should be constructed and operated. The Department's NPRM did, however, propose to include several safeguards in the voucher program to ensure that workers would be provided housing meeting the applicable safety and health standards, including requirements that the voucher could not be used in an area where the Governor of the State has certified that there is inadequate housing available in the area of intended employment. Other safeguards included the provision that the voucher could only be redeemed for cash paid by the employer to a third party, that the housing obtained with the voucher had to be within a reasonable commuting distance of the place of employment and that workers could ''pool'' their vouchers to secure housing (e.g., to secure a house instead of a motel room) but that such pooling may not result in a violation of the applicable safety and health standards. The Department also included as a safeguard the requirement that if acceptable housing could not be obtained with the voucher, the employer would be required to provide

housing meeting the applicable safety and health standards to the worker. The Department requested comments on whether such a program would adequately balance the needs of employers and workers and how such a program should operate. The Department received a number of comments from employers, employer associations, employee advocacy organizations and State agencies on the housing voucher option.

A number of comments from stakeholders representing both employer and employee interests led us to conclude that the proposal was not well understood. Several commenters stated that ''the voucher program would effectively eliminate the requirement that all housing for H–2A workers must meet health and safety standards.'' Some employer associations stated that they supported the concept of ''using vouchers to provide housing in lieu of actually providing housing'' while another commenter asserted that the housing voucher option would ''undermine Congressional intent by eliminating the requirement that employers provide non-local workers with free housing that meets the basic safety and health standards.''

While noting a few concerns with the proposal (e.g., the employer's responsibility for violations of safety and health standards at housing obtained by the voucher), employers and employer associations generally praised the Department for the much needed flexibility a voucher program would create. Some commenters opined that the use of housing vouchers would ''greatly stimulate H–2A participation'' and ''would encourage others to use legal workers.'' Other commenters stated that the H–2A current requirement to provide housing to workers is a serious impediment to program participation and that the implementation of a housing voucher option would make the H–2A program more usable and effective.

Comments from individuals and organizations representing employee interests criticized the voucher option, stating that the proposed safeguards were illusory and provided no substantive protections to workers. Virtually all criticism of the proposal, including from SWAs, misunderstood the Department's position and assumed health and safety standards would not apply to housing obtained with a voucher. Many commenters argued that the voucher idea ''ignores the reality of the situation for both U.S. and H–2A workers'' in that many farmworkers, particularly H–2A workers, do not have the resources to conduct a long-distance housing search, such as access to the Internet, knowledge of the area, and language difficulties. Several found it unreasonable to expect that a worker will travel from another country, or even across the State, for employment and be able to quickly find a motel or landlord that will accept vouchers for a short-term stay.

The comments received from SWAs on the housing voucher option were generally opposed to the proposal and also reflected a misunderstanding of the Department's proposal. One SWA cited concerns that a voucher would eliminate established standards that ensure safety and healthful conditions of housing. Another SWA argued that ''[t]he use of vouchers and the failure to cover the full cost of housing reflects an unrealistic understanding of the housing market for seasonal workers.'' Another SWA suggested that it would be impossible for the Governor to determine whether there was inadequate housing available in the area since the SWAs would not be the recipient of the labor condition applications, and therefore, would not know the number of workers in need of housing.

Some commenters criticized the Department's proposal on the grounds that many basic questions about how the voucher would function were not adequately addressed in the NPRM, including the lack of: A mechanism for determining the amount or value of the voucher; a definition of ''reasonable commuting distance;'' criteria to be used in determining whether the employer made a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment; and standards to be used in the Governor's certification of insufficient housing for migrant workers and H–2A workers in the area of intended employment. Other commenters took issue with the Department's proposal to allow workers to ''pool'' the vouchers, claiming that such pooling would result in workers overpaying for overcrowded and/or substandard housing. Several commenters questioned the Department on the rationale for not allowing the voucher to be redeemed for cash by the employee to a third party.

The requirement that employers furnish housing that meets applicable safety and health standards is a statutory requirement in the INA. The Department does not have authority to waive this statutory requirement, nor did the Department intend to do so in proposing a voucher option. In proposing a voucher option, the Department sought comment on how best to provide much needed flexibility to employers in fulfilling their obligation to furnish housing while ensuring that workers are not housed in substandard conditions. After reviewing the comments received on this proposal, the Department is persuaded that it should drop the proposal at this time because it would be extremely difficult to implement. The extent to which the Department's proposal was misunderstood by commenters on all sides also caused the Department concern that, if implemented, the proposal would result in numerous program violations and become a substantial enforcement problem. If, in the future, the Department is able to design an effective, enforceable and viable alternative, it will develop a proposal and request public comment.

We are sympathetic to the concerns of many growers and employer associations who supported the proposal and noted that the cost of providing housing is a major deterrent for many to participate in the H–2A program and that in many parts of the country, restrictive building and zoning codes can prevent growers from building housing to accommodate workers. The Department notes that many of these problems can be overcome by employers under the statute and the Final Rule by securing ''housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation.'' These options do not require employers to build and furnish their own housing. As is noted in ETA Handbook No. 398, there is nothing to preclude an employer who does not actually own housing on his/her property from renting non-commercial housing from other individuals or entities. If there are areas where rental and public accommodation options, including non-commercial housing, are not readily available, it is difficult to imagine how workers could have secured housing in those areas through the use of a voucher, such that the voucher program would not have been viable in those areas anyway.

Third, the Department proposed in the NPRM to clarify and codify additional limited flexibility under certain circumstances to make post-certification changes to housing. The Department's current policy [4] allows the employer to substitute rental or public accommodations for certified housing in the event that certified housing becomes unexpectedly unavailable for reasons

[4] Training and Employment Guidance Letter 11–07, Change 1 (November 14, 2007).

outside of the employer's control. The employer is required to notify the SWA in writing of the housing change and the qualifying reason(s) for the change, and provide evidence that the substituted housing meets the applicable safety and health standards. The SWA may inspect the substitute housing to determine compliance with applicable safety and health standards. The NPRM sought to clarify and codify this policy and included a provision for the SWA to notify the CO of any housing changes and the results of housing inspections conducted on substitute housing. Employer commenters and commenters representing employer interests universally favored the clarification in the proposal:

> The inclusion of language that permits employers to use substitute housing in the event that their approved housing becomes unavailable for reasons beyond their control will be beneficial for the obvious reason that in the rare circumstances where this occurs, an employer has a housing option without being in violation.

Commenters on behalf of employees questioned the Department's authority to propose such a change and thought the proposed change would result in workers being housed in substandard housing saying:

> [T]his change is not permitted by the statute [INA 218(c)(4)] and would encourage potentially fraudulent ''bait and switch'' tactics perpetrated by H–2A employers with respect to employer-provided housing.

Commenters also questioned which standards are the applicable standards to the substitute housing.

The Department maintains that this additional limited flexibility with respect to substitute housing is the best approach in those rare circumstances where the certified housing becomes unavailable for reasons beyond the employer's control. The Department believes that the requirements that the substitute housing be rental or other public accommodations and that the employer provide evidence that the new housing meets the applicable safety and health standards offer workers the necessary protections. Indeed, the proposal in no way lessens the applicable housing standards, as substitute housing must meet the standards that typically apply to H–2A housing of the same type. Failure to create a substitute housing provision could leave H–2A employers in the untenable position of having workers arrive at the worksite and having no permissible place to house them. Therefore, the Department has included this provision in the Final Rule. This Final Rule specifically references the applicable standards to which rental or public accommodation housing, including substitute housing, is subject.

The Department has made several modifications to this provision in the Final Rule for purposes of clarity and to conform the standard to the structure of the rest of the Final Rule. First, the proposal states that the unavailability provision would apply in ''situations in which housing certified by the SWA later becomes unavailable.'' To ensure that the full range of applicable situations is covered, the Final Rule provides that the unavailability provision applies where housing becomes unavailable ''after a request to certify housing (but before certification), or after certification of housing.'' There is no reason to exclude housing that has not yet been inspected from the scope of the provision, since the initially designated housing has become unavailable anyway. Second, the phrase ''applicable housing standards'' has been replaced in the Final Rule with ''the local, State, or Federal housing standards applicable under paragraph (d)(1)(ii) of this section,'' which is more specific. Third, the phrase ''in accordance with the requirements of paragraph (d)(1)(ii) of this section'' has been added to the end of the second sentence of the provision, and the phrase ''from the appropriate local or State agency responsible for determining compliance'' has accordingly been deleted as unnecessary; as noted in the discussion of paragraph (d)(1)(ii), that paragraph has been separately modified to reflect the evidentiary standard that is currently in place in ETA Handbook No. 398. For the same reason, the proposal's admonition that SWAs ''should make every effort to inspect the accommodations prior to occupation, but may also conduct inspections during occupation, to ensure that they meet applicable housing standards'' has been removed in the Final Rule. As current ETA Handbook No. 398 explains at page II–15, ''[i]f DOL standards are not applicable, no pre-occupancy inspections need be conducted, and the employer need only document to the RA's satisfaction that the housing complies with the local or State standards which apply to the situation.'' To the extent that some SWAs may typically inspect rental or public accommodation housing despite the fact that they are not required by these rules to do so, they should make every effort to inspect substitute housing prior to occupation.

The Department received comments on other housing-related issues for which no changes were proposed. A number of commenters noted that the text of proposed § 655.104(d)(1)(i) referred to employer-owned housing, whereas the current regulation at § 655.102(b)(1)(i) and the preamble to the proposed rule referenced employer-provided housing. The Department did not intend to change the current requirements for employer-provided housing and has corrected this inadvertent reference to ''employer-owned'' housing in the regulatory text.

A group of farmworker advocacy organizations commented that, in its view, all rental and/or public accommodations should be required by the Department, at a minimum, to meet the Federal standards for temporary labor camps. The commenter asserted that State and local standards for rental and/or public accommodation housing may in many instances be grossly inadequate, and that the application of Federal minimum standards is therefore essential. The Department does not believe, however, that it has the authority under the INA to impose such a minimum requirement. Section 218(c)(4) of the INA expressly provides that to satisfy their housing obligation employers may, at their option, either ''provide housing meeting applicable Federal standards for temporary labor camps'' or ''secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation.'' An employer that secures rental and/or public accommodations that meet all of the applicable local standards has satisfied its housing obligation under the statute. The statute provides that rental and/or public accommodation housing does not need to meet Federal temporary labor camp standards unless there are no ''applicable local or State standards.'' The Department is not at liberty to issue regulations that are inconsistent with the structure of employer housing obligations under the INA.

A few commenters urged the Department to relieve employers in certain border communities (e.g., Yuma, AZ) of the requirement to provide housing to H–2A workers from Mexico who are able to commute back to their homes across the border on a daily basis. According to one association commenter, Yuma, Arizona employers have traditionally attracted tens of thousands of seasonal workers daily, approximately half of whom reside in the U.S. while the other half choose to maintain their residences in Mexico. This association believes that requiring employers in such instances to provide housing and transportation not only hinders participation but ignores reality.

The INA at sec. 218(c)(4) requires employers to provide housing to all H–2A workers. The Department does not believe it has a legal basis upon which to permit employers to employ H–2A workers without providing those workers with housing. Of course, there is no statutory requirement that workers actually reside in the employer-provided housing. So, an H–2A worker who resides within commuting distance of a home across the border could presumably return home each night if the worker wanted to, provided the employer didn't require its workers to reside in specific housing as a condition of the work agreement. Nevertheless, the employer would be required by statute to make appropriate housing available to the worker.

Some commenters suggested that U.S. Department of Agriculture sec. 514 Farm Labor Housing Loans should be made available for the construction of housing used for H–2A workers. The Department has no authority to allocate Farm Labor Housing Loans, but has passed along the comment to the USDA.

Several commenters raised specific concerns about the attestation process as related to housing for agricultural workers. These commenters believe that the attestation process will lead to abuses in housing because there is no process in place for establishing compliance with the housing inspection request. Pursuant to the Final Rule, housing inspections are still required to be completed by SWAs. The Department believes that the extended timeframes for required pre-certification housing inspections will give the housing inspectors more time to complete inspections and should actually lead to more thorough inspections that in turn will help ensure violations are corrected.

So as not to inadvertently alter the availability of the conditional access provisions of § 654.403, which were cited favorably by some commenters, the Department has added language to § 655.104(d)(6)(i) clarifying that the required attestation ''may include an attestation that the employer is complying with the procedures set forth in § 654.403.''

Finally, the Department notes it has made several non-substantive changes to the text of § 655.104(d) to provide clarity. For example, the NPRM noted the obligation to provide housing to those workers who are not reasonably able to return to their permanent residence ''within the same day.'' The Department has amended this phrase to ''at the end of the work day'' to clarify that a work day may go beyond the same 24-hour period (for example, a late shift may not necessarily end within the same day but would still be considered part of the same work day after which an H–2A worker could not be reasonably expected to return to the home residence). For the same reason, the term ''without charge'' has been amended to read ''at no cost to the worker,'' in order to ensure clarity and understanding. The Department has also included language in § 655.104(d)(1)(ii) to clarify the kind of documentation that employers are expected to retain if they secure rental and/or public accommodations for their workers to show that the accommodations comply with the applicable legal standards. The language is taken directly from ETA Handbook No. 398, which provides at page I–26 that such documentation ''may be in the form of a certificate from the local or State Department of Health office or a statement from the manager or owner of the housing.'' In addition, non-substantive changes have been made to comport with plain English standards (for example, the use of active voice, such as the change in § 655.104(d)(6)(iii) to read ''The SWA is required by Section 218(c)(4) of the INA to make its determination''). Finally, a provision that is in the current regulation regarding charges for public housing, which was inadvertently omitted from the NPRM and whose absence was noted by several commenters, has been restored.

(e) Section 655.104(e) Workers' compensation

The NPRM proposed to continue the current requirement that the job offer must contain a statement promising that workers' compensation insurance will be provided. This is a statutory requirement. The INA at Section 218(b)(3) requires the employer to provide the Secretary with satisfactory assurances that ''if the employment for which certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.'' One commenter noted the State of Washington has an unusual Worker's Compensation statute that requires workers to contribute 50 percent of the premium unless the employer is self-insured, whereas the NPRM required the employer to provide such insurance at no cost to the worker. The intent of the workers' compensation provision in the INA is to ensure that no worker is left without insurance in those States that exclude agricultural work from coverage. In fact, Section 218(b)(3) provides that if ''employment for which the certification is sought *is not covered* by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the workers' employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment'' (emphasis added). Where the employment in question is covered by State workers' compensation law, but subject to certain rules applied by the State, the statutory provision is inapplicable. Therefore, the Department has modified language in § 655.104(e) to clarify that the employer should follow State law, but if the State excludes the type of employment for which the certification is being sought, then the employer must purchase the insurance at no cost to the worker.

Other commenters complained that the Department no longer requires submission of proof of Worker's Compensation Insurance. These commenters believe that employers circumvent this requirement by having inadequate coverage or by allowing the coverage to lapse after receiving certification, or by not buying it at all because State law does not require it. The Department is confident that the attestation-based application system will allow the Department to enforce these provisions because these attestations are made under penalty of perjury. If it is revealed during an audit that an employer fraudulently claimed to have met all program requirements, the employer would be subject to penalties, including debarment from the program.

Other changes made to the language of this provision were non-substantive, and made for purposes of clarification, or (as in the case of the recordkeeping language) to conform to changes made elsewhere in the rule.

(f) Section 655.104(f) Employer-Provided Items

The NPRM proposed to continue the current requirement that employers provide workers with ''all tools, supplies, and equipment required'' to perform the duties of the job. The NPRM allowed employers to require workers to provide tools or equipment where the employer can demonstrate such a practice was ''common'' in the area of employment.

The Department received one comment relating to its proposal, asserting that the Department should

not have deleted the current language mandating approval from the Department if employers seek to require employees to purchase any tools and equipment because it is common practice to do so. The ''common practice'' standard is not new, but has been carried over from the current regulation. Whether a common practice exists will still be a determination of fact to be decided by the Department and not by the employer. The only change in this determination is that the employer will now bear the burden of proof in the event of an audit or investigation to show that the practice claimed is common. In determining whether a practice is ''common'' in a particular area, the Department will apply a simple mathematical formula. If an employer can demonstrate that 25 percent of non-H–2A workers in the crop activity and occupation in the particular area are required to provide tools or equipment, the Department will consider the practice to be ''common.'' This simple standard will be relatively easy to administer, and will ensure that employers have fair notice of their legal obligations.

Clarifying language was also inserted referencing the requirements of sec. 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m) (FLSA), which does not permit deductions for tools or equipment primarily for the benefit of the employer that reduce an employee's wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

(g) Section 655.104(g) Meals

Section 655.104 (g) concerns the provision of meals to workers and the amount employers may charge workers for meals each day. Although the Department proposed no changes to this section, a few comments were received stating that the amount allowed to be charged/reimbursed does not reflect the true cost of the employer's providing or the worker's purchase of meals. Section 655.114 provides for annual adjustments of the previous year's allowable meal charges based upon Consumer Price Index (CPI) data. Each year the maximum charges allowed are adjusted from the charges allotted the previous year by the same percentage as the twelve-month percent change in the CPI for all Urban Consumers for Food (CPI–U for Food) between December of the year just concluded and December of the year prior to that. The Department reminds employers of their ability to petition for higher meal charges, a practice that has been continued in the Final Rule in § 655.114. The amount of the meal charge, which in the NPRM was listed in § 655.104(g), has for purposes of clarity been listed instead in § 655.114.

(h) Section 655.104(h) Transportation

Existing regulations at § 655.102(b)(5) require employers to provide or pay for workers' daily subsistence and transportation from the place from which the worker has come to the place of employment. The employer is to advance these costs to the worker when it is the prevailing practice of non-H–2A employers in the occupation and area to do so. If the employer has not advanced transportation and subsistence costs or otherwise provided or paid for these costs and the worker completes 50 percent of the work contract period, the employer is required to reimburse the worker for these costs at that time. The Department proposed no change to this requirement, but sought comments and information on the costs and benefits to employers and workers of continuing to require employers to pay for the workers' inbound and outbound (return) subsistence and transportation costs.

The Department received several comments on this requirement. Some comments from employers and employer associations advocated that employers and employees should share the costs of workers' inbound subsistence and transportation. These commenters argued that both employees and employers benefit from the H–2A employment relationship and therefore should share the costs. Others suggested that the employees should bear the full cost of their inbound subsistence and transportation, arguing that the inbound travel employment once they are in the country. Some commenters also noted that no other nonimmigrant work-related program requires employers to pay for the workers' inbound subsistence and transportation.

Comments from employee advocates urged the Department to continue the requirement that employers provide or pay for workers inbound subsistence and transportation costs, asserting that inbound subsistence and transportation costs:

> [a]re necessary for many reasons—to attract U.S. workers; to encourage employers to fully employ the workers in whom they have invested and to recruit only those workers needed; * * * and, because farmworkers wages are so low, to prevent farmworkers from becoming even more deeply indebted (and more exploitable) or from seeking low-cost transportation that is often unregulated and deadly.

While there was disagreement among commenters on the current requirement that employers pay inbound subsistence and transportation, there was agreement that employers should continue to pay for workers' outbound transportation. Employer and worker advocate commenters agreed that payment of outbound travel is a critical means to help ensure that workers depart the U.S. at the end of their H–2A contract.

Many comments addressed the timing of reimbursement to workers for inbound subsistence and transportation costs. Most commenters 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.

Comments from employers recommended continuing the Department's requirement that workers be reimbursed at the 50 percent point of the work contract, stating that the current policy appropriately balances the interests of employers and employees by creating an incentive for employees to complete at least half of the contract. Many employers urged the Department not to require immediate reimbursement to workers and that the Department:

> should explicitly state that an employer of H–2A workers does not have an obligation under the INA, the Fair Labor Standards Act (''FLSA''), or DOL regulations to reimburse a worker's in-bound transportation expense until the 50 percent point of the work contract and that if a worker's payment of inbound transportation and subsistence costs reduces his/her first week's wage below the minimum wage, such reduction does not result in a violation of the FLSA.

Employee advocates, on the other hand, pressed the Department to require employers to comply with the FLSA which, they state, requires the reimbursement of costs at the beginning of employment when those costs are for the benefit of the employer and effectively reduce the workers' weekly income below the minimum wage. Another employee advocate suggested that the Department consider requiring H–2A employers to advance to workers inbound costs and to pay referral fees to domestic labor contractors to encourage the movement of low-wage U.S. workers to labor shortage areas.

After due consideration of the comments, the Department has determined to continue the current policy of requiring employers to provide or pay for workers' inbound and outbound subsistence and transportation and the corresponding requirement for reimbursement of such inbound costs upon the worker's completion of 50 percent of the work contract period. Thus, reimbursement at the 50 percent point is all that the Final Rule requires pursuant to the Department's rulemaking authority under the INA. Moreover, 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 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–2A 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–2A worker's payment of his or her own relocation expenses constitutes a ''kick-back'' to the H–2A 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–2A employee's payment of his or her own relocation expenses to be primarily for the benefit of the H–2A 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–2A 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–2A employers to pay the relocation costs of H–2A employees. *Arriaga* misconstrued the Department's regulations and is wrongly decided.

As an initial matter, any weighing of the relative balance of benefits derived by H–2A employers and employees from inbound transportation costs must take into account the fact that H–2A workers derive very substantial benefits from their relocation. Foreign workers seeking employment under the H–2A 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–2A farmworkers travel such great distances and make such substantial sacrifices to obtain work in the United States indicates that the travel greatly benefits those employees. Many of the comments received by the Department support this conclusion.

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–2A 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 (August 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. *Gasper,* 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–2A workers are temporary guest workers change the equation. Even assuming that H–2A 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–2A 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–2A employers derive some benefit from an H–2A 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.

The Department obligated H–2A employers to pay H–2A workers' transportation costs not because it believed that the workers were entitled to such payments under the FLSA, but rather in the discharge of its responsibilities under the INA to insure the integrity of the H–2A program. The Department carefully crafted its regulation to give H–2A workers a strong incentive to complete at least 50 percent of their work contract. The practical effect of the Arriaga decision, however, is to require H–2A employers to pay for H–2A workers' inbound transportation costs without any reciprocal guarantee that the workers will continue to work for the employer after the first workweek. The Department believes that the payment of such transportation costs unattached to a reciprocal guarantee that the needed work will ultimately be performed substantially diminishes the benefit of the travel to the employer, and certainly would not allow the travel to be considered primarily for the employer's benefit.

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–2A worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H–2A employer. The Department has publicly stated that ''in enforcing the FLSA for H–2A workers, the Department's general policy is to ensure that workers receive transportation reimbursement by the time they complete 50 percent of their work contract period (or shortly thereafter) rather than insisting upon reimbursement at the first pay period.'' The Department continues to believe that this is the appropriate interpretation of the interplay between the H–2A program regulations and the FLSA in regards to transportation reimbursement. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.

The current regulation uses the phrase ''place from which the worker has departed'' to describe the beginning point from which employers are required to provide or pay for inbound transportation and subsistence, and, if the worker completes the work contract period, the ending point to which employers are required to provide or pay for outbound transportation and subsistence. This phrase has at times been interpreted by the Department to mean the worker's ''home,'' or the place from which the worker was recruited. Most recently, the phrase was addressed in ETA Training and Employment Guidance Letter No. 23–01, Change 1 (August 2, 2002): '' 'Home' is where the worker was originally recruited.'' While the Department proposed no changes to this regulatory language or interpretation, comments were received on this point. One agricultural association suggested that the Department clarify that transportation from and back to the place from which the worker came to work should be considered to require transportation from or to the site of the U.S. Consulate that issued the visa. This commenter stated:

> For the past 20 years the phrase ''from the place from which the worker has come to work for the employer to the place of employment,'' has meant payment of transportation from the location of the U.S. Consulate which issued the H–2A visa to the place of employment of the petitioning employer. Although the Department in its memoranda refers to ''place of recruitment'' its examples of how this rule works speaks only of transportation from and back to the worker's home country. There is no mention of the worker's village. This interpretation is in line with the INA and DHS regulations which do not allow a worker to enter the U.S. until that foreign worker has an H–2A visa. Thus, the worker cannot ''come to work for the employer'' until he or she has an H–2A visa. It is at the point that the worker has the H–2A visa that he or she is eligible to go to work for the employer.

The Department finds this to be a compelling argument. It is the Department's program experience that workers, particularly H–2A workers, gather in groups for processing and transfer to the U.S. The logical gathering point for these workers is at the U.S. Consulate location where the workers receive their visa. In most countries that send H–2A workers to the U.S., such processing is usually centrally located (in Monterrey, Mexico, for example, rather than in Mexico City or another Consulate location). Designating the Consulate location where the visa is issued provides the Department with an administratively consistent place from which to calculate charges and

obligations. We have therefore made corresponding changes in the regulatory text to clarify that the ''place from which the worker has departed'' for foreign workers outside of the U.S. is the appropriate U.S. Consulate or port of entry.

Finally, the Department sought to clarify that minimum safety standards required for employer provided transportation between the worker's living quarters (provided or secured by the employer pursuant to INA sec. 218(c)(4)) and the worksite are the standards contained in MSPA (29 U.S.C. 1841). The Department does not seek to apply MSPA to H–2A workers and has no authority to do so. This clarification is intended to remove any ambiguity concerning the appropriate minimum vehicle safety standards for H–2A employers and should simplify compliance for those H–2A employers that also employ MSPA workers.

Other changes to the language of the proposed provision—most significantly, the notation that an employer's return transportation obligation under § 655.104(h)(2) applies where ''the worker has no immediately subsequent H–2A employment''—are non-substantive and have been made for purposes of clarification.

(i) Section 655.104(i) Three-Fourths Guarantee

The Department chose, in the NPRM, to continue the so-called ''three-fourths guarantee,'' by which it ensures that H–2A workers are offered a certain guaranteed number of hours of work during the specified period of the contract, and that if they are not offered enough hours of work, that they are paid as though they had completed the specified minimum number of work hours. In doing so, the Department suggested some minor changes to make the guarantee easier to apply in practice.

One grower association objected to the continuation of the three-fourths guarantee. They stated that it needs to be eliminated because it is arcane, is seldom understood by the growers, and complicates the system by creating more ''red tape'' for the growers. Other commenters supported the rule, but commented on the nuances of the changes made to the rule under the NPRM. A few commenters expressed the view that the guarantee deters employers from over-recruiting, which may create an oversupply of workers and drive wages down, and also assures long-distance migrants that attractive job opportunities exist. However, some commenters also believe that the guarantee requirement results in employer abuses, such as employers misrepresenting the length of the season. They suggested the Department add language to allow workers to collect the three-fourths guarantee ''based on the average number of hours worked in a particular crop region and upon a showing of having worked through the last week in which the employer offered work to a full complement of his workforce.''

The Department believes the rule provides essential protection for both U.S. and H–2A workers, in that it ensures their commitment to a particular employer will result in real jobs that meet their reasonable expectations. The Department also believes the rule is not easy to abuse or circumvent, as it is based on a simple mathematical calculation. For those employers that might try to evade their responsibilities, the Department has enforcement measures and penalties to act as a deterrent.

Changing the three-fourths guarantee to be based on a per-crop harvest calculation using an average of hours worked rather than a contract period would make it nearly impossible to track and enforce the guarantee. To require employers to keep track of workers on a per-crop basis and allow the workers to collect money based on the three-fourths guarantee when the U.S. workers transition from one employer to another during the peak harvesting times appears patently unfair and the Department is not willing to create such an option.

Two commenters also suggested that the Department take out the reference to ''work hours'' and return the term ''workday'' because the commenters believed that the employer might otherwise submit job orders based on a ''bogus'' hourly work day or work week. The Department believes that this concern is misplaced. The new terminology proposed by the Department is no more susceptible to abuse than the old terminology is; under either phrasing, employer fraud requires submitting false calculations of work. The Department purposely added the sentence with ''work hours'' and kept the old references to ''workday'' in the NPRM to make the formula for calculation of the total amount guaranteed easier to understand and calculate. The end result is the same under either phrasing, however.

A farm bureau requested that we insert language at the end of § 655.104(i)(1) to protect employers from the costs resulting from U.S. workers who voluntarily abandon employment in the middle of the contract period and then return at the end of the contract period or from those U.S. workers who show up in the middle of the contract period. This commenter does not believe that an employer should have any liability under the three-fourths guarantee rule for such unreliable employees. The guarantee has never applied to workers who voluntarily abandon employment or who never show up for the work, provided notice of such abandonment or no-show is provided to DOL within the time frames for reporting an abandonment that are set forth in § 655.104(n). The Department has further clarified that provision in the Final Rule by defining abandonment of the job as the worker failing to report for work for 5 consecutive days.

Farmworker advocates expressed concern that the Department would not enforce this provision. The Department appreciates the concerns raised and assures the public it intends to enforce this provision fully, as it intends to implement the entire rule.

Another commenter requested clarification on what hours an employer may count toward the three-fourths guarantee when an employee voluntarily works more than the contract requires. The commenter asked for language to be inserted into § 655.104(i)(3) stating that all hours of work actually performed including voluntary work over and above the contract requirement can be counted by the employer. The Department believes that this principle was already made clear by § 655.104(i)(1), but it has added the requested language for purposes of clarification.

In proposed § 655.104(i)(4) the Department sought to reiterate the employer's obligation to provide housing and meals to workers during the entire contract period, notwithstanding the three-fourths guarantee. The proposed paragraph, while properly entitled ''Obligation to provide housing and meals,'' inadvertently discussed an obligation to provide meals and transportation. Two comments were received on this paragraph. One employer association suggested that the text of the paragraph be revised to reflect that employers are not obligated to provide housing to workers who quit or are terminated for cause. One employee advocacy organization commented that the clarification that the employer is not allowed to shut down the labor camp or the camp kitchen during the contract period is a positive change. The Department has modified the paragraph to clarify that it is the employer's obligation to provide housing and meals during the contract period that is not affected by the three-fourths guarantee,

and to clarify that employers are not obligated to provide housing to workers who voluntarily abandon employment or are terminated for cause.

Finally, in the NPRM the Department inadvertently deleted some qualifying phrases from this provision that are contained in the current regulation, and has accordingly in the Final Rule reverted to the language of the current regulation. Section 655.104(i)(3) discusses an employee's failure to work in the context of calculating whether the period of guaranteed employment has been met. The Final Rule reinserts the phrase currently in the regulations at § 655.102(b)(6)(iii) permitting an employer to count ''all hours of work actually performed (including voluntary work over 8 hours in a workday or the worker's Sabbath or Federal Holidays).'' The Final Rule also reinserts as § 655.104(i)(4) the statement found in the current regulation at § 655.102(b)(6)(iv) that an employer is not liable for payment of the three-quarters guarantee to an H–2A worker whom the CO certifies has been displaced because of the employer's compliance with its obligation under these rules, where applicable, to accept referrals of U.S. workers after its date of need.

(j) Section 655.104(j) Records

The NPRM proposed continuing the ''keeping of adequate and accurate records'' with respect to the payment of workers, making only minor modifications to the current regulation. The Department received several comments specific to the provisions of this section.

A commenter requested that the Department eliminate the requirement for employers to provide information to the worker through the worker's representative upon reasonable notice. The Department does not believe this requirement should be eliminated because it is the Department's goal to encourage the availability of information to workers. Another commenter suggested refinements to the provision, including suggesting that a ''worker's representative'' be defined and documented in some manner so as to prevent the theft of information under the guise of disclosure to worker's representatives, and also to require disclosure of records within five days instead of upon ''reasonable'' notice.

The Department agrees that it did not clarify in sufficient detail how a designated worker's representative should be identified so as to prevent unauthorized disclosure of records, and it accordingly has added language to the Final Rule stating that appropriate documentation of a designation of representative status must be provided to the employer.

Instead of changing the term ''reasonable'' notice in the Final Rule to refer to a specific number of days, however, the Department has instead decided to adopt in § 655.104(j)(2) of the Final Rule the standard for production of records that is currently found at 29 CFR 516.7 and that the WHD uses under the FLSA. The Secretary can already request most H–2A records kept pursuant to this rule under the FLSA, and having one standard will help to avoid confusion in the regulated community.

(k) Section 655.104(k) Hours and Earnings Statements

The Department did not receive any comments on this section. However, the Department made non-substantive punctuation changes to the provision in the Final Rule to reflect plain language standards.

(l) Section 655.104(l) Rates of Pay

In the NPRM, the Department proposed to require employers to pay the highest of the adverse effect wage rate, the prevailing wage rate, or the Federal, State, or local minimum wage. The Final Rule retains this requirement, with some minor non-substantive clarifications to the text of the provision; comments specific to the issue of actual rates that will be required and the timing of their application are dealt with in the discussion of § 655.108.

Because this provision discusses the use of piece rates, several commenters took the opportunity to suggest changes to how piece rates are treated within the H–2A program. Worker advocates argued for reinstitution of the pre-1986 rules regarding piece rate adjustments. Some employers argued that the Department should not attempt to regulate piece rates at all. As the NPRM did not propose changes to the now long-standing procedures for the regulation of piece rates, the Department did not adopt any of these suggested changes in the Final Rule.

The NPRM proposed a modest change to the regulation governing productivity standards. Under existing regulations, an employer who pays on a piece rate basis and utilizes a productivity standard as a condition of job retention must utilize the productivity standard in place in 1977 or the first year the employer entered the H–2A system with certain exceptions and qualifications. The NPRM proposed to simplify this provision by requiring that any productivity standard be no more than that normally required by other employers in the area.

No commenter explicitly opposed the change in the methodology by which acceptable productivity standards are determined, but several employers asked for additional flexibility to be allowed to use a productivity standard even if the majority of employers in the area do not utilize one. We believe the ''normal'' standard, which the Department will retain in the Final Rule, will provide adequate flexibility for employers while ensuring that the wages and working conditions of U.S. workers are not adversely affected by the use of productivity rates not normal in the area of intended employment. Clarifying language has been added to the provision supplying the Department's interpretation of the term ''normal'' to mean ''not unusual.'' The Department has long applied this meaning of the term ''normal'' In the H–2A context. *See, e.g.*, ETA Handbook No. 398 at II–7 (''The terms 'normal' and 'common', although difficult to quantify, for H–2A certification purposes mean situations which may be less than prevailing, but which clearly are not unusual or rare.''); *id.* at I–40 (noting that the Department will carefully examine job qualifications, which are required by statute to be ''normal'' and ''accepted,'' if the qualifications are ''unusual''). It is also 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 productivity standard. If there are no other workers in the area of intended employment that 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.

With respect to other provisions in the NPRM, some commenters argued that the Department is required by statute to use a ''prevailing'' standard with respect to all practices permitted by the regulations. These commenters argued that the use of anything less than a ''prevailing practice'' standard necessarily adversely affects U.S. workers. The Department disagrees. The Department notes that with respect to

many types of practices, it may not even be possible to determine what the ''prevailing'' practice is. For example, there may be a wide range of productivity standards used by employers in a given area, none of which is used by 50 percent of employers or with respect to 50 percent of workers. Furthermore, many practices are not readily susceptible to averaging: For example, with respect to practices regarding the frequency with which workers are paid, some employers may pay workers at the end of each week, others at the end of every two weeks, and others twice a month. If one third of employers used each method, which practice would be ''prevailing''?

The Department has examined each type of employment practice and each type of working condition that is addressed by this rule to determine what parameters or limits are necessary to ensure that U.S. workers will not be adversely affected. With respect to productivity standards, the Department has determined that a range of practices are acceptable, and that it is unlikely that U.S. workers will be adversely affected if H–2A employers use a productivity standard that is not unusual for non-H–2A employers to apply to their U.S. workers. The Department will not, however, certify applications containing unusual productivity standards that are clearly prejudicial to U.S. workers.

(m) Section 655.104(m) Frequency of Pay

The Department proposed in the NPRM to continue the requirement of the current regulation that the employer must state in the job offer the rate of frequency that the worker is to be paid, based upon prevailing practice in the area but in no event less frequently than twice a month. The Department received one comment on this provision noting that weekly or daily earnings are ''always'' the prevailing practice in agriculture, never bi-weekly, and that the Department should accordingly require weekly payment. After considering this comment, the Department has determined that it would be difficult, and not at all cost-effective, to use surveys to determine the frequency with which employers in a given area typically pay their employees. The Department has therefore decided to retain the minimum requirement that employees must be paid at least twice monthly, but has dropped the reference to the use of prevailing practices. The Department notes that this modest change affects only the frequency with which workers are paid, and not the amount to which they are entitled.

(n) Section 655.104(n) Abandonment of Employment

The NPRM included a provision stating that the employer is not required to pay the transportation and subsistence expenses of employees who abandon employment, provided the employer notifies the Department or DHS within 2 workdays of abandonment. One association of farm employers argued that this requirement was unreasonable in that the typical practice is termination 3 days beyond the abandonment or ''no show'' of the worker. An employer opined that this requirement should create an obligation on the part of the Department to help employers locate and pursue remedies against employees who voluntarily abandon employment without returning to their home country.

The Department acknowledges the need for clarification in the provision to ensure that the requirement begins to run only when the abandonment or abscondment is discovered. The Department has therefore added language to the provision clarifying that the employer must notify DOL and DHS no later than 2 workdays ''after such abandonment or abscondment occurs.'' The Department has added further clarification to ensure that employers must meet the identical standards for notification to DOL as to DHS, so that a worker is deemed to have absconded when the worker has not reported for work for a period of 5 consecutive work days without the agreement of the employer. The Department has extended this standard to a worker's failure to report at the beginning of a work contract. This is intended to clarify for the employer that the same standard of reporting applies for both agencies. The Department declines to include provisions prescribing new employer remedies against workers who abandon the job, but notes that abandonment of a job may result in a worker being ineligible to return to the H–2A program.

(o) Section 655.104(o) Contract Impossibility

The current and proposed regulations contain a provision that allows an employer to ask permission from the Department to terminate an H–2A contract if there is an extraordinary, unforeseen, catastrophic event or ''Act of God'' such as a flood or hurricane (or other severe weather event) that makes it impossible for the business to continue.

One commenter noted that the proposed regulation eliminates a current requirement that ''the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker,'' and stated that U.S. workers, in particular, would benefit from such an effort. The Department declines to adopt this suggestion, as it believes the workers themselves will be in a better position to find alternative job opportunities than an employer whose business enterprise has been substantially impacted by an Act of God. In response to this comment, the Department has, however, added language to the Final Rule specifying that the H–2A worker may choose whether the employer terminating the H–2A contract should pay to transport them ''to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2A employer (but only if the worker can provide documentation supporting such employment).'' The limitation providing that a worker who requests transportation to the next employer must provide documentation of that employment will help to ensure that H–2A workers who do not have subsequent employment inside the United States return to the country from which they came to the United States rather than remaining in the United States illegally.

To conform to similar changes made elsewhere in the rule, the Final Rule clarifies that ''for an H–2A worker coming from outside of the U.S., the place from which the worker (disregarding intervening employment) came to work for the employer is the appropriate U.S. consulate or port of entry.''

Other changes to the language of the proposed rule are non-substantive and have been made for purposes of clarifying the provision or to conform to changes made elsewhere in the Final Rule.

(p) Section 655.104(p) Deductions

The Department, in the NPRM, proposed requiring employers to make assurances in their application that they will make all deductions from the workers' paychecks that are required by law. A group of farmworker advocacy organizations asserted that the Department was skirting its responsibility under *Arriaga* by allowing ''reasonable'' deductions to be taken from a worker's paycheck without any mention of the FLSA. This commenter believes that the Department inappropriately removed clarifying language in the current regulation that

''an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA.'' This commenter opined that workers under the H–2A program are entitled to full coverage under the FLSA, and that the Department should not make regulatory changes which suggest otherwise. By eliminating this language from the rule, this commenter believes the Department would effectively undermine the rights of farm workers to be paid the minimum wage free and clear of costs imposed on them for inbound transportation and visa costs, as established by case law.

The Department does not agree with this commenter's characterization of the applicability of the FLSA to H–2A workers, including regarding inbound transportation. Nevertheless, we have returned the deleted language to the Final Rule to clarify that employers must of course comply with all statutory requirements applicable to them.

(q) Section 655.104(q) Copy of Work Contract

The NPRM contained the provision found in the current regulation specifying that a copy of the work contract must be provided to the worker no later than the date the work commences. One group of farmworker advocacy organizations pointed out that this proposed regulation does not require that the work contract be given to the employee in the employee's native language and believed that these regulations as proposed are contrary to the requirements in MSPA for domestic workers. The Department has decided to make no substantive changes to this provision. Employers seeking to hire H–2A workers, as with all employers seeking to recruit agricultural workers under the Wagner/Peyser system, must file a Form ETA 790 with the SWA. This Form provides the necessary disclosures for MSPA purposes. The form itself is bilingual. In addition, section 10(a) of the Form specifically requires that the summary of the material job specifications be completed by the employer in both English and Spanish. The changes made to the language of the provision in the Final Rule are non-substantive and were made to provide better clarity.

Section 655.105 Assurances and Obligations of H–2A Employers

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H–2A program. The Department received many comments expressing approval of the new attestation-based process, and others opposed to such a change. Still other commenters expressed general approval of the new attestation-based approach but suggested changes to the attestations and the process of submitting such attestations.

The Department received two comments regarding the substantive obligations imposed on employers through the attestations. One commenter requested that the Department add another attestation that employers will not confiscate workers' passports. Another commenter requested that the Department impose substantial penalties on employers who lure H–2A workers away from contract jobs before the termination of their contracts. This commenter believes that such a practice victimizes both the employer, who loses laborers, and the employee, who loses status under U.S. law when they prematurely terminate a contract.

The Department is not aware that the confiscation of passports is a widespread practice among agricultural employers hiring H–2A workers. However, where evidence of such practice is found, it would likely indicate the presence of other practices prohibited by the H–2A regulations, such as the withholding of pay and other program entitlements. In such situations, the Department possesses mechanisms under this Final Rule to investigate and take appropriate action against such unscrupulous employers, both through program actions including revocation and debarment and through direct enforcement with civil fines and debarment.

On the subject of changes of employment, the proposed companion regulation to the Department's NPRM, issued by USCIS at 73 FR 8230, Feb. 13, 2008, underscored that H–2A workers are free to move between H–2A certified jobs, and proposed to provide even greater mobility toward that end. The ability of workers to move to new H–2A employment when the current H–2A contract is completed is not something the Department wishes to discourage. A worker who abandons a job before its conclusion must be reported to DOL and DHS, and, depending on the reason for the abandonment, such abandonment may result in a violation of H–2A status and the consequent inability to commence employment with another employer. Such abandonment may also adversely affect a worker's future eligibility to participate in the H–2A program.

One commenter requested that we allow substitution of H–2A workers at the port of entry without having to file a new petition. An *Application for Temporary Employment Certification* is filed without the names of the foreign workers. Substitution of workers is permitted by the DHS companion rule.

(a) Section 655.105(a)

The attestation obligation set forth in § 655.105(a) in the NPRM requires the employer to assure the Department that the job opportunity is open to any U.S. worker and that the employer conducted (or will conduct) the required recruitment, and was still unsuccessful in locating qualified U.S. applicants in sufficient numbers to fill its need. This assurance was criticized by a farm bureau because it believes that it is impossible for employers to state they ''will conduct'' recruitment as required in the regulations and at the same time attest that they were unsuccessful in finding any U.S. workers. The Department has clarified this language in the Final Rule to enable employers to attest that the employer ''has been'' unsuccessful in locating U.S. workers sufficient to fill the stated need.

One group of advocacy organizations believes the Department should retain the language from the current § 655.103(c), which states: ''Rejections and terminations of U.S. workers. No U.S. worker will be rejected for *or terminated from* employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the SWA.'' (Emphasis supplied.) This commenter requests that the provision against termination should be added to the assurance found in the new § 655.105(a), specifically where it states: ''Any U.S. workers who applied for the job were rejected for only lawful, job-related reasons.''

The Department declines to add language regarding terminations at this location in the regulations. The provision at issue is an attestation by an employer regarding the hiring of U.S. workers, not their termination. The termination of U.S. workers for inappropriate reasons is already covered under the regulations by the prohibition in § 655.105(j), discussed below.

The Department added several clarifications and conforming changes to the text of the proposed provisions. First, the Department added language clarifying that the employer must attest that it will keep the job opportunity open to qualified U.S. workers ''through the recruitment period,'' which is defined at § 655.102(f)(3). Second, the Department added language clarifying that the employer must attest that it has

hired and will hire all U.S. workers who apply for the job and are not rejected for lawful, job-related reasons. Third, and relatedly, the Department added language stating that an employer must attest that ''it will retain records of all rejections as required by § 655.119.'' Other changes to the language of the provision were minor and non-substantive, and made for purposes of providing additional clarity.

(b) Section 655.105(b)

The Department proposed in the NPRM that employers be required to offer terms and conditions that are ''normal to workers similarly employed'' and ''which are not less favorable than those offered to the H–2A workers.'' One commenter believed that this standard is not sufficiently protective of the wages and working conditions of U.S. farmworkers to meet the statutory precondition that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers. According to this commenter, a practice applying to a small percentage of workers may still be considered ''normal.'' This commenter opined that this criterion violates the statute, because requiring anything less than the prevailing practices of non-H–2A employers with respect to job terms will necessarily harm U.S. workers, either by putting downward pressure on wages and conditions and/or by facilitating job offers that are meant to deter U.S. workers from applying and accepting work.

For reasons that have already been discussed above, the Department disagrees. Where the Department has identified particular terms or working conditions that have an important impact on U.S. workers—such as wages or the obligation to provide tools—it has inserted provisions addressing them directly. Not every term or condition attaching to a job, however, threatens to negatively impact the wages and working conditions of U.S. workers simply because it is not a ''prevailing'' condition. An employer may, for example, be the only employer in the area that grows a particular crop, or that requires the use of a particular tool. Such requirements generally do not threaten to adversely affect U.S. workers and are not improper for employers to impose. Moreover, as noted above, it is often very difficult, if not impossible, to determine what the ''prevailing practice'' is with respect to certain types of job terms and working conditions. Other specific provisions in the regulations safeguard against job qualifications, terms, and working conditions that are deliberately designed by employers to discourage U.S. workers from applying for job openings.

Because the Department has indicated in the Final Rule the specific standard (i.e., ''common,'' ''normal,'' ''prevailing'') that applies to each type of covered job term and working condition, the Department has deleted language from the proposed rule that might have been understood to apply a catch-all requirement to all job terms and working conditions that they be ''normal to workers similarly employed in the area of intended employment.'' Retaining this language would have resulted, in some instances, in application of different standards to the same job requirements, potentially creating substantial confusion. The deleted language might also have been misconstrued as applying to job terms and working conditions that are not elsewhere addressed in the Final Rule. The Department never intended for the deleted language to apply to such peripheral job requirements; those job terms and working conditions that the Department considers to be central to H–2A work and to preventing an adverse effect on U.S. workers—such as wages, housing, transportation, tools, and productivity requirements—have each been specifically addressed elsewhere in the Final Rule. The Final Rule retains the requirement that employers must offer job terms and working conditions that ''are not less than the minimum terms and conditions required by this subpart.'' This language ensures that employers must attest to their adherence to the standard specified in the Final Rule for each covered job term and working condition.

(c) Section 655.105(c)

The Department proposed in the NPRM to continue to require that the employer submitting an application attest that the job opportunity being offered to H–2A workers is not vacant because the former occupants are on strike or locked out in the course of a labor dispute involving a work stoppage. The language of the proposed provision has been modified in the Final Rule by reverting to the language in the current regulation at § 655.103(a), which provides that the employer must assure the Department that ''[t]he specific job opportunity for which the employer is requesting H–2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.'' The Department is reverting to the current regulatory language to clarify that the Department will evaluate whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individual case-by-case basis. As the Department's current ETA Handbook No. 398 explains at page II–23, the Department must ensure that ''the specific positions vacant because of the dispute will not be included in any otherwise positive H–2A certification determination or redetermination.''

The purpose of the strike/lock-out provision is to ensure that striking U.S. workers are not replaced with temporary foreign workers, thereby adversely affecting such workers. However, if an agricultural employer needs twenty workers, and only ten of the positions are vacant because workers are on strike, the employer should not be prohibited from hiring H–2A workers to fill the ten job openings that are not strike-related. Hiring foreign workers to fill positions of U.S. workers that are on strike is likely to adversely affect the U.S. workers, but hiring H–2A workers to fill positions that are not vacant because of a strike would not. The language of this provision in the Final Rule is also more consistent with the Department's statutory authority to withhold a labor certification where granting the certification would adversely affect the wages and working conditions of U.S. workers.

Comments regarding the NPRM's labor dispute provisions, which overlap with the contents of § 655.109(b)(4)(i) of the NPRM, are addressed in the discussion of that section below.

(d) Section 655.105(d)

The NPRM included a provision that required the employer to attest it would continue to cooperate with the SWA by accepting referrals of all eligible and qualified U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the date the H–2A workers departed or three days prior to the date of need, whichever was later. The language of the provision in the Final Rule has been modified to render it consistent with § 655.102(f)(3), which specifies that employers must continue to accept referrals until the ''end of the recruitment period'' as defined in that provision.

The only comment that the Department received on this section is discussed in greater detail under the Department's discussion of the 50 percent rule in § 655.102(b), above.

(e) Section 655.105(e)

No comments were received on § 655.105(e)(1) regarding the attestation promising to comply with all labor laws. Comments received on § 655.105(e)(2)

pertaining to the housing attestation are addressed in the discussion of §§ 655.102(e) and 655.104(d). Comments received on § 655.105(e)(3) pertaining to the workers' compensation attestation are addressed in the discussion of § 655.104(e). Finally, comments received with respect to § 655.105(e)(4) about the transportation attestation are addressed in the discussion of § 655.104(h) and the comments received in connection with § 655.105(e)(4) regarding worker protections are addressed in the discussion of the section on revocation at § 655.117. Several minor non-substantive modifications have been made to the text of the provision for purposes of clarity and to conform to changes made elsewhere in the Rule.

(f) Section 655.105(f)

Several comments were received on § 655.105(f), which as published in the NPRM required employers to notify the Department and DHS within 48 hours if an H–2A worker leaves the employer's employ prior to the end date stipulated on the labor certification. The commenters thought that 48 hours was not enough time to accomplish this especially in light of DHS' requirement that proof of notification be kept for up to one year. The commenters thought it was unfair to require the employer to comply with this requirement and incur the added expense of sending the notice by certified mail. One commenter went on to say that such notice is not needed in all cases. The commenter cited the example of an employee transferring to another employer with approval to do so by the Department and DHS and asks why the employer should still be required to provide notification in such cases. According to this commenter, notification should only be required if the H–2A worker absconds from the work site.

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. For instance, an employer would no longer be responsible for providing or paying for the subsequent transportation and subsistence expenses or the ''three-fourths guarantee'' for a worker who has separated prior to the end date stipulated on the labor certification, either through voluntary abandonment or termination for cause. There is no requirement that the notification be made by certified mail, however. A file copy of a letter sent by regular U.S. mail, with notation of the posting date, will suffice. In addition, the Department revised the notification requirement in the Final Rule to reflect that a report must be made no later than 2 workdays after the employee absconds, which, consistent with DHS, has been defined as 5 consecutive days of not reporting for work. The text of this provision has been modified accordingly.

The Department also received comments on this section relating to notification when H–2A workers leave their home country for the first place of intended employment. The Department believes those comments pertain to requirements in the DHS NPRM published February 13, 2008 rather than the Department's NPRM of the same date.

(g) Section 655.105(g) Offered Wage Assurances

Comments received pertaining to the offered wage are addressed in the response to comments on § 655.108. The Department added language to the text of this provision in the Final Rule to clarify that, as a matter of enforcement policy, the adverse effect wage rates that are in effect at the time that recruitment is initiated will remain valid for the entire period of the associated work contract. This enforcement policy will honor the settled expectations of workers and employers regarding their respective earnings and costs under an H–2A work contract and will avoid surprises that might give rise to disputes. It will also be an easy rule for the Department to administer, particularly when calculating payments due under the three-quarters guarantee. Because H–2A contracts never last more than a year, locking in wage rates for the duration of a contract in this manner will not significantly prejudice workers or employers in the event that wage rates happen to rise or fall during the middle of a work contract.

(h) Section 655.105(h) Wages Not Based on Commission

Comments pertaining to the offered wage are addressed in the response to comments on § 655.108.

(i) Section 655.105(i)

The NPRM contained an assurance requiring the employer to attest that it was offering a full-time temporary position whose qualifications are consistent with the ''normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations or crops.'' This was a continuation of current obligations.

The Department received several comments relevant to this provision. One commenter opined that the Department should scrutinize employer applications that offer U.S. workers a 30-hour work week arguing that such a requirement is not normal and is meant to dissuade U.S. workers from applying when in reality H–2A workers would work 50–60 hours a week. The commenter argues, under the new rule, it will become impossible for the Department to deny an application because the standard for what is ''normal'' is so lax.

The word ''normal'' in § 655.105(i) does not refer to the requirement that the jobs be full-time, but rather to the qualifications provision in that section. Thirty hours a week is the minimum to be considered full-time employment in the H–2A program and the Department has, as a clarification, provided that definition of full-time in this section in the Final Rule. Moreover, other provisions in these regulations (see, e.g., §§ 655.103, 655.105(b)) prohibit giving H–2A workers more favorable job terms than were advertised to U.S. workers, which include the number of hours of employment.

Another commenter noted that requirements that the job duties be normal to the occupation and not include a combination of duties not normal to the occupation has led to frequent disputes, particularly in specialty areas of agriculture. This commenter noted that there is a distinction between restrictive requirements that are clearly contrived for the purpose of disqualifying domestic workers and those directly designed to producing specialized products, utilizing unusual production techniques or otherwise seeking to distinguish their products in the marketplace.

The Department agrees that the INA was not meant to require employers to adhere to timeworn formulas for production in the H–2A or any other employment-based category, and that job duties for which there is a legitimate business reason are permissible. The requirement that job qualifications be ''normal'' and ''accepted,'' however, is statutory and cannot be altered. Section 218(c)(3)(A) of the INA requires the Department, when determining whether an employer's asserted job qualifications are appropriate, to apply ''the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops.'' For the reasons provided in the discussion of § 655.104(b) of the Final Rule above, the Department has deleted the phrase ''in that they shall not require a combination of duties not normal to the

occupation'' from the NPRM to conform to the language of the statute.

In the Final Rule, the language of this provision has been modified in one additional respect to conform to the language of § 655.104(b). The provision now states that job qualifications must not ''substantially deviate from the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations or crops.''

(j) Section 655.105(j) Layoffs

The Department in its NPRM added a new provision prohibiting employers from hiring H–2A workers if they laid off workers within a stated time frame, unless such laid-off workers were offered and rejected the H–2A positions. Two commenters saw the new provision on layoffs as unnecessary and unworkable. One commenter saw this as contrary to the section on unforeseeable events and also illogical because many employers request a contract period of ten months. This would mean that employers would be unable to lay off workers at the end of one season, because the new season begins within 60 days and the proposed 75-day requirement will not have lapsed. Another commenter suggested a change to the language in this section to include a caveat that such layoffs shall be permitted where the employer also attests that it will offer or has offered the opportunity to the laid-off U.S. worker(s) beginning on the date of need, and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

The Department agrees, in general, with the changes proposed by the commenters. We have accordingly modified the language of the provision in the Final Rule to limit the effect of the provision to 60 days on either side of an employer's date of need. This modification is also consistent with the revised timetables for recruitment in the Final Rule. This 120-day protective period will provide U.S. workers important protections during the period of time that H–2A workers are being recruited and through the beginning of the work season, which is the period of time that U.S. workers are most vulnerable to layoffs related to the hiring of H–2A workers, while avoiding most of the problems cited by the commenters. We also agree that a laid off worker must be qualified for the opportunity and that U.S. workers may only be rejected for lawful, job-related reasons, a limitation that preserves an employer's right to reject those workers it knows to be unreliable.

(k) Sections 655.105(k) and (l) Retaliation and Discharge

One commenter reasoned that the Department has weakened its own enforcement ability by eliminating the word ''discharge'' from the list of prohibited retaliatory acts against a worker who files a complaint or testifies against the employer, consults with an attorney, or asserts any rights on behalf of himself/herself or other workers.

The Department believes it has, in fact, strengthened its enforcement ability by addressing discharge separately in § 655.105(l). By making this a separate assurance, the employer acknowledges even more obviously the prohibition against discharge as retaliation.

One group of farmworker advocacy organizations commented that the NPRM's proposed language requiring employers to attest that they will not discharge any person ''for the sole reason'' that they engaged in protected activity under § 655.105(k) would substantially weaken the anti-retaliation language in the current regulations. The Department agrees with this commenter that a ''sole reason'' standard would impose an inappropriately high burden on retaliation claimants. A retaliation claimant should only be required to prove that protected activity was a contributing factor to the discharge. Thus, the Department has modified the language of § 655.105(l) to require employers to attest that they will not discharge any person ''because of'' protected activity under § 655.105(k).

Section 655.104(k)(4) provides that an employer may not retaliate against an employee who has consulted with an employee of a legal assistance program. This provision does not, however, provide employees license to aid or abet trespassing on an employer's property, including by persons offering advocacy or legal assistance. No matter how laudable the intent of those offering advocacy or legal services, an employee does not have the legal right to grant others access to the private property of an employer without the employer's permission. A farm owner is entitled to discipline employees who actively aid and abet those who engage in illegal activity such as trespassing. Absent any evidence of a workers' actively aiding or abetting such activity, however, an employer's adverse action against an employee in response to that employee meeting with a representative of an advocacy or legal services organization, particularly on the worker's own time and not on the employer's property, would be viewed as retaliation.

Several minor non-substantive modifications were made to the text of the provision for purposes of clarity and style.

(l) Section 655.105(m) Timeliness of Fee Payment

The Department received one comment on this section and has addressed it in the comments on § 655.118 on debarment, below.

(m) Section 655.105(n) Notification of Departure Requirements

The Department did not receive any comments on this provision. For purposes of simplicity, and to avoid any potential conflict with DHS's regulations, the phrase ''another employer and that employer has already filed and received a certified *Application for Temporary Employment Certification* and has filed that certification in support of a petition to employ that worker with DHS'' has been deleted from the Final Rule and replaced with the terms ''another subsequent employer.'' This change is non-substantive; subsequent employers still cannot legally employ H–2A workers without an approved labor certification.

(n) Section 655.105(o) and New Section 655.105(p) Prohibition on Cost-Shifting

The Department included in the NPRM a provision prohibiting employers from shifting costs for activities related to obtaining labor certification to the worker and further requiring the employer to contractually forbid its agents from accepting money from the H–2A worker for hiring him or her. The Department received several comments in relation to this provision.

A State Workforce Agency expressed concern that this prohibition will create another disincentive for U.S. employers to use the program because it gives the impression that workers will be able to request reimbursement from the employer for any monies paid to a recruiter. The Department notes in response that the H–2A rule does not require the employer to reimburse the H–2A worker for any recruitment-related fees he or she may pay. Rather, with an exception discussed below, the rule requires the employer to contractually forbid any foreign recruiters it hires from charging the H–2A worker any fees in order to be hired or considered for employment. This may mean that employers are required to pay foreign recruiters more than they do today for the services that they render, but the Department considers this a necessary step toward preventing

the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers.

One group of farmworker advocacy organizations believes this rule does not go far enough to protect workers from exploitation by recruiters. The commenter specifically suggested that DOL should require employers to attest that they are ''directly paying the entire recruiting/processing fee charged to any foreign labor contractor whom they engage to perform international recruitment of H–2A workers.'' Employers are permitted to pay fees to recruiters for their recruiting services, and indeed the Department expects that they will have to do so, as it is unlikely that recruiters will work for free. The Department sees little value, however, in an over-complicated and over-prescriptive rule allowing foreign recruiters to charge H–2A workers recruiting fees, but then requiring the employer to pay the fee directly. Moreover, this rule represents the Department's first effort to regulate in this area under the H–2A program and we decline to go further, at this time. We will consider further actions if experience dictates that they are necessary, if specific actions are identified that would be effective, and if those actions are within the Department's enforcement authority, taking into account limits on the Department's territorial jurisdiction.

Several farmers commented that they need agents to find H–2A workers because they are unable to travel to different countries to find employees, interview them, and help them process all the necessary paperwork to obtain their visas. Employer commenters believe that an H–2A worker receives a substantial benefit from the job, including more money than he or she is able to earn in his or her home country. Therefore, workers should also bear some of the financial responsibility for the opportunity in the form of paying for the services that enable that worker to find his or her way through the bureaucratic maze both in the worker's country and the U.S. Consulate. According to these commenters, many of these workers would never be able to apply for H–2A visas without help because they do not have passports from their own countries and they may not have the required computer and internet access for applying to the U.S. Consulate for the visa.

While the Department does not disagree that this provision will result in an additional expense for employers, the Department is adamant that recruitment of the foreign worker is an expense to be borne by the employer and not by the foreign worker. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported. The Department is concerned that workers who have heavily indebted themselves to secure a place in the H–2A program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions resembling those 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. To ensure that employers do not attempt to use surrogates to attempt to extract recruitment fees from H–2A workers, the Final Rule has been modified to specify that employers must attest that they and their ''agents'' have not sought or received payment of any kind for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs.

The Department notes, however, that it is only prohibiting employers and their recruiter agents from shifting to workers the cost of recruiting for open job opportunities. This rule does not prevent a person or entity (which could be a ''facilitator'' under the DHS Final Rule) from charging workers reasonable fees for rendering assistance in applying for or securing services related to passports, visas, or transportation, so long as such fees are not made a condition of access to the job opportunity by the recruiter, employer, or facilitator. The Department will, however, monitor such activities to the extent possible to ensure that any such charges are not ''de facto'' recruitment fees charged for access to the H–2A program. In addition, government processing fees and document preparation fees related to securing a passport and visa to prepare for travel to the United States are the responsibility of the worker and the employer is not required to pay those fees. We note that the DHS Final H–2A Rule also precludes the approval of an H–2A petition, and provides for possible revocation of an already approved H–2A petition, if the employer knows or has reason to know that the worker has paid, or has agreed to pay fees to a recruiter or facilitator as a condition of gaining access to the H–2A program. Many employer advocates noted that there is no definition of ''recruiter'' and it is unclear whether ''facilitators'' who help the H–2A workers apply for visas are included in this prohibition. This is a concern to employers because DHS, in its companion H–2A proposed regulation, requires disclosure of payments to ''facilitators,'' whether by the alien or the employer. The Department, on the other hand, forbids employers and their agents from receiving remuneration from the H–2A worker for access to job opportunities and further requires the employer to contractually forbid its agents from accepting money from the H–2A worker for hiring him or her. To allay any confusion, we note that our own proposed regulation was intended to prohibit foreign labor contractors or recruiters, with whom an employer in the U.S. contracts, from soliciting or requiring payments from prospective H–2A workers to secure job opportunities in the U.S. The Department believes that this is consistent with the DHS position of disclosure, which is presumably intended to deter such payments. The Department has not defined ''recruiter'' as we believe this term is well understood by the regulated community. Many commenters believe that the new rule prohibits the use of foreign recruiters. It does not. It requires employers to contractually forbid foreign recruiters from receiving payments directly or indirectly from the foreign worker. Employers who would be unable to find workers without recruiters are not prohibited from hiring such recruiters. When they do, they must make it abundantly clear that the recruiter and its agents are not to receive remuneration from the alien recruited in exchange for access to a job opportunity. As noted above, reasonable payments from workers in exchange for rendering assistance in applying for or securing services related to passports, visas, or transportation is not prohibited by this rule.

Some commenters opined that the Department does not have the authority to regulate cost-shifting abroad. 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, and therefore, as a condition to lawful H–2A employment within the U.S., the commitment that the employer is contractually forbidding 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 in exchange for access to job opportunities. As stated above, we will examine program experience in this area and will consider further actions as experience dictates.

One commenter suggested that we certify recruiting agencies to ensure against exploitation of workers whereas two other commenters thought we should make employers attest that the fee employees paid to foreign recruiters was reasonable or did not go above a reasonable market-based ceiling set by the Department. The Department simply does not have the infrastructure or expertise to assess on a country-by-country basis what a reasonable fee would be. The prophylactic rule adopted by the Department guards against worker exploitation in a manner that is enforceable. If a U.S. employer cannot find foreign workers without the help of a recruiter, then the U.S. employer must bear the cost of such recruitment efforts.

One commenter requested that we provide clarification on several terms used in this section. The first is ''received payment * * * as an incentive or inducement to file * * *.'' The second is ''* * * from the employee or any other party, except when work to be performed by the H–2A worker * * * will benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer.'' For reasons discussed below, we have removed this language from the Final Rule to provide greater clarity to the provision's effect.

Some commenters expressed concern that the rule passed on too many costs in recruitment to the employer. One commenter estimated that the recruitment cost to each employer would be $1,000 per H–2A worker. We believe these estimates were not supported by data and note that employers can collaborate with respect to recruitment to defray costs.

A farmworker advocate argued that new labor contractors are often undercapitalized and can barely meet their payroll obligations. The commenter claimed that labor contractors' primary source of income is from the foreign recruiters who give them payments from the recruitment fees paid by the aliens. It is precisely this type of activity that the employer assurances are meant to prevent, for all of the reasons previously mentioned.

In addition, and based upon the comments received, the Department has revised the provision on cost-shifting to provide for greater clarity. As mentioned above, the Department has added language to the Final Rule clarifying that the provision only applies to payments by employees. This rendered the language providing an exemption for certain payments to employers by third-parties unnecessary, and it has accordingly been deleted to avoid confusion. We have also eliminated the qualifying language stating that the provision applied to payments made as an ''incentive and inducement to filing,'' again for purposes of simplification and clarity. By simplifying the provision to prohibit employers from seeking or receiving payment for any activity related to the recruitment of H–2A workers, the Department hopes to achieve consistent and enforceable compliance.

In the Final Rule the Department has separated the provision on cost-shifting into two sections, again to achieve clarity regarding the use of foreign contractors. The Rule's new § 655.105(p) now contains the language that requires the employer to contractually forbid any foreign labor contractor whom they engage from seeking or receiving payments from prospective employees in exchange for access to job opportunities. In this manner the Department hopes to achieve clear and consistent compliance with the prohibitions contained in the Rule. To make the provision on cost-shifting by recruiters consistent with DHS's Final Rule, we have added clarifying language stating that the prohibition does not apply where ''provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A).'' This language clarifies that the prohibition does not apply to worker expenses such as the cost of transportation and passport, visa, and inspection fees, except where such shifting of expenses to the worker is expressly forbidden by law.

Paragraph (p) from the NPRM has now been redesignated as paragraph (q). The Department did not receive any comments specifically addressing this provision. Several minor non-substantive modifications have been made to the text of the provision for purposes of clarity and to conform to changes made elsewhere in the Rule. We have deleted what was paragraph (q) in the NPRM, an assurance on housing vouchers, because, for the reasons given in the discussion of § 655.104(d), we have decided not to implement housing vouchers.

Section 655.106 Assurances and Obligations of Farm Labor Contractors

(a) General Comments

As discussed earlier, the definition of *Farm Labor Contractor* in the Proposed Rule has been rewritten and is for purposes of H–2A now an *H–2A Labor Contractor (H–2ALC).* The Farm Labor Contractor definition in the NPRM was borrowed from MSPA and the Department has determined that definition causes confusion when applied to the H–2A program. A fundamental distinction between these two terms is the requirement that an H–2A Labor Contractor must employ the workers. This distinction addresses the concerns of commenters who mistakenly believed that agents and attorneys would have to register as Farm Labor Contractors (FLC) as a requirement of the H–2A program. In order for a person or entity under H–2A to meet the definition of an H–2ALC, that person or entity would have to employ the workers who are subject to Section 218 of the INA.

Other commenters believed that the definition of farm labor contractor also includes the activities of the foreign recruiters and obligates the employers to take on liabilities for the acts of the foreign recruiters because the definition of FLC in the NPRM was taken directly from the MSPA. The definition of an H–2ALC is no longer taken directly from MSPA.

While the Department cannot reach the conduct of foreign recruiters abroad, it can regulate the conduct of U.S. employers participating in the foreign labor certification process who do business with these recruiters. The Department cannot by regulation impose strict liability on employers for labor contractors' activities abroad, but the Department, as a condition for an employer to obtain approval of a temporary labor certification application, can require the employer to contractually forbid foreign recruiters that an employer uses as its agent from seeking or receiving payments from prospective employees, as discussed in the discussion of § 655.105(o) and (p), addressing the prohibition on cost shifting.

There was considerable comment about the lack of a provision in the NPRM addressing ''override fees,'' which is essentially the commission paid by employers to labor contractors for their services. One commenter elaborated on this point by explaining that employers in an area where labor contractors with U.S. workers are well established could bypass the labor contractor by hiring H–2A workers

directly and thus not have to pay an override fee.

Labor contractors operate in the free market system, both in hiring workers and in providing contract labor services, and do not require any special government provisions to ensure they are paid for the services they provide. Whether an employer chooses to utilize a farm labor contractor or hire workers directly is a decision to be made by the employer based on what best suits his business needs. Labor contractors typically enter into contracts with fixed site employers in advance of the season. The Department does not seek to regulate private transactions between employers and labor contractors with regard to the appropriate price of contract services. Employers are required to advertise before they can apply for H–2A workers, and both H–2ALCs and the U.S. workers employed by the H–2ALCs will have an opportunity to take the advertised jobs at the wage rates and subject to the terms and working conditions required by the Department. The Department is confident that the required wage rates, job terms, and working conditions are sufficient to prevent any adverse effect on U.S. workers.

One group of farmworker advocacy organizations complained that the Department has eliminated all requirements that employers contact and recruit through established FLCs (now H–2ALCs). This commenter believes that the elimination of this requirement allows growers to bypass H–2ALCs in favor of filing H–2A applications. The Department disagrees. As previously mentioned, employers are required to spread information about job opportunities in a variety of ways, and there is nothing that would prevent an H–2ALC from responding to such advertisements by offering its services.

Many commenters advocated the removal of labor contractors from the H–2A program. The use of labor contractors to supply workers, however, is a reality in the agricultural industry, and reflects the substantial need for a flexible labor supply in a sector characterized by many different crops requiring different work at different times, all of which are subject to seasons, weather, and market conditions. To forbid labor contractors from utilizing the H–2A program would only encourage them to operate outside the system and potentially use undocumented workers to fill their ranks. Labor contractors desiring to hire H–2A workers must apply for a labor certification, recruit for U.S. workers, and attest to the terms and conditions of H–2A employment, just like any other employer desiring to hire H–2A workers, and must also list the sites where work will occur.

One group of farmworker advocacy organizations commented that H–2ALCs, under the new rule, are not required to have a physical presence in the U.S. This commenter points out that even under the current system, which does require physical locations in the U.S., there is still room for deception by H–2ALCs. The commenter misreads the rule. The definition of an H–2ALC in the Final Rule requires H–2ALCs to meet the definition of an ''employer,'' and the definition of employer requires a place of business in the United States.

(b) Description of H–2ALC obligations

The Department's review of comments regarding the obligations of labor contractors under the proposed rule persuaded the Department that these obligations were poorly understood. To provide a clearer description of those obligations, and to avoid confusion on the part of employers, SWAs, workers, and worker advocates alike, the Final Rule has collected, consolidated, and refined the NPRM's description of H–2ALC pre-filing recruiting obligations. The Final Rule therefore splits proposed § 655.106 into two separate parts. Section 655.106(a) of the Final Rule consolidates, refines, and explains H–2ALCs' recruitment obligations under the H–2A program. Section 655.106(b) of the Final Rule contains all of the provisions proposed in the NPRM that impose additional obligations on H–2ALCs that do not apply to other types of H–2A employers.

Although the language of § 655.106(a) of the Final Rule is new, the substantive obligations it imposes on H–2ALCs are derived from the basic requirements that apply to other H–2A employers under the NPRM. The fact that H–2ALCs do not stay at one fixed location but travel from one worksite to another over the course of a season, and the fact that they frequently rely on the fixed site employers with whom they contract to provide housing and transportation to their workers, makes it operationally problematic to shoehorn H–2ALCs into the exact same recruitment framework that applies to fixed site employers. New § 655.106(a) refines for H–2ALCs the core recruitment requirements that apply to all other H–2A employers, including requirements that job orders be submitted to SWAs, that referrals of qualified U.S. workers be accepted during the recruitment period, that positive recruitment be conducted in advance of H–2A workers performing work in a given area of intended employment, that workers from the previous season be contacted and offered employment before H–2A workers can be hired, and that housing inspections be conducted in a timely manner.

New § 655.106(a)(1) acknowledges that, because of the itinerant nature of H–2ALCs, their job orders ''may contain work locations in multiple areas of intended employment.'' As with other employers with multiple work locations, H–2ALCs may submit job orders ''to any one of the SWAs having jurisdiction over the anticipated work areas.'' The SWA receiving the job order is responsible for circulating the job order to ''all States listed in the application as anticipated worksites, as well as those States, if any, designated by the Secretary as traditional or expected labor supply States for each area in which the employer's work is to be performed.'' The provision further clarifies how long SWAs receiving multiple-area job orders should keep the job orders posted, and specifies that they ''may make referrals for job opportunities in any area of intended employment that is still in an active recruitment period.''

New § 655.106(a)(2) clarifies that H–2ALCs with multiple work locations in multiple areas of intended employment are required to conduct separate positive recruitment, following all of the normal rules specified in § 655.102(g)–(i), but are not required to conduct separate positive recruitment for each work location within a single area of intended employment. Instead, positive recruitment within each area of intended employment is required to ''list the name and location of each fixed-site agricultural business to which the H–2A Labor Contractor expects to provide H–2A workers, the expected beginning and end dates when the H–2A Labor Contractor will be providing workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site.'' Positive recruitment for each area of intended employment, including positive recruitment in any designated labor supply states associated with each area of intended employment, must, in accordance with the standard rule under these regulations, be conducted no more than 75 and no fewer than 60 days before the listed arrival date applicable to that area of intended employment.

New § 655.106(a)(3) specifies that H–2ALC recruitment, including both positive recruitment and job orders, may require that workers applying for jobs in any given area of intended employment ''complete the remainder of the H–

2ALC's itinerary.'' H–2ALCs are by nature itinerant, and the work that they offer is thus itinerant as well. Workers applying for labor contractor jobs cannot expect to selectively choose which work locations they are willing to work at, unless the H–2ALC permits them to do so. Certainly, U.S. workers applying to work for farm labor contractors that are not H–2ALCs have no ability to selectively choose which portion of a job offer they want to accept and which they will reject.

Without this rule, H–2ALCs would at times be placed in impossibly difficult hiring situations. For example, an H–2ALC might enter into contracts to serve work locations in three different areas of intended employment, requiring twenty workers in each area. If the H–2ALC is unable to recruit any U.S. workers in the first and third areas of intended employment, but finds ten U.S. workers in the second area of intended employment who are willing to complete its itinerary, then the H–2ALC should be allowed to hire ten H–2A workers for the duration of its itinerary, and ten H–2A workers for the dates of need applicable to the first area of intended employment (or, if these ten H–2A workers were initially hired with the expectation that they would complete the itinerary, the H–2ALC would be permitted to release them at the time its subsequent positive recruitment for the second area of intended employment resulted in the hiring of ten additional U.S. workers), ensuring that the H–2ALC would at all times have the twenty workers needed to fulfill its contracts. If, however, the ten U.S. worker applicants for jobs in the second area of intended employment were not willing to complete the H–2ALC's itinerary, and if these regulations nevertheless required the H–2ALC to hire those workers, the H–2ALC would be forced to choose between releasing ten of its H–2A workers at the time it hired the ten U.S. workers since only twenty workers were needed in the second area of intended employment. As a result, the H–2ALC would be left with only ten workers total to fulfill its contracts when it got to the third area of intended employment, or, to avoid this consequence, would have to keep all thirty workers on its payrolls during its work in the second area of intended employment, thereby incurring the significant additional cost of paying ten unnecessary workers. The Department declines to force H–2ALCs to make that unnatural choice, which would place them at a competitive disadvantage vis-à-vis farm labor contractors that hire all U.S. workers and that are thus free to require prospective workers to complete their remaining itinerary.

The Department considered, as an alternative, requiring H–2ALCs to file a separate application for work to be performed in each separate area of intended employment, but rejected the idea for several reasons. First, it is far more administratively convenient for both the Department and the employer if all of the employer's seasonal work for the year with the same initial date of need is included in a single application. Filing multiple applications in such a situation is needlessly duplicative, wasting valuable time and resources. In theory, an H–2ALC could be conceived of as having a separate date of need for each new work site or for each new area of intended employment, but the reality of labor contract work is that the responsibilities of workers to the labor contractor employer, as well as their associated job duties, continue from work location to work location and do not re-start with each new work site. Second, the ''single application'' method will maximize recruitment of U.S. workers through posted job orders, since the SWAs for all the areas of intended employment will refer workers for jobs opportunities in all of the other areas of intended employment. Third and finally, the ''single application'' method will better manage the expectations of incoming H–2A workers, who will know at the outset whether the H–2ALC expects to employ them for the entire season, or rather only for a more limited duration.

H–2ALCs are free to file separate applications for separate areas of intended employment where it makes sense for them to do so. Indeed, they may be required to file separate applications where, for example, they need extra workers with a different date of need to report for work in areas of intended employment that they will reach later in the season. For purposes of administrative convenience, however, and to comport with the realities of the nature of the underlying job positions, the Department will permit single applications to be filed by H–2ALCs covering extended itineraries.

New § 655.106(a)(4) provides that H–2ALCs that hire U.S. workers part-way through the season, whether through referrals or some other form of recruitment, may discharge a like number of H–2A workers and, in accordance with § 655.104(i)(4), are released from the three-quarters guarantee with respect to those workers.

New § 655.106(a)(5) explains the rules that apply to an H–2ALC's amendment of its application under § 655.107(d)(3). Because H–2ALCs are itinerant and because the timing of agricultural work is difficult to predict with precision, H–2ALCs may often need to amend their applications mid-season to include additional work locations or additional areas of intended employment. Amendments will be readily permitted, but special responsibilities attach to such amendments for H–2ALCs. Where an amendment adds a new area of intended employment, or where an amendment adds a new work site in an already-listed area of employment and the job duties at the new work site(s) are substantially different from those already listed, additional recruitment will be required. Because amendments of H–2ALC applications may often need to be made at the last minute to take into account changing weather conditions, the required additional recruitment may be completed on an expedited schedule. Housing inspections of any new housing arrangements that have not yet been inspected must also be secured in a timely fashion.

H–2ALCs are encouraged to attempt to avoid needing to make last-minute amendments to their applications by listing all reasonably probable work locations in their original application and job order. In doing so, H–2ALCs are reminded that the ''reasonably probable'' standard should be closely adhered to—purely speculative employment should not be listed on an application. While U.S. workers benefit from seeing in an advertisement or job order a list of all the locations that the H–2ALC is reasonably likely to service, information that is intentionally misleading detracts from the ability of U.S workers to make intelligent decisions about whether to apply. The Department assumes that H–2ALCs will be deterred from listing purely speculative work sites on their applications by the three-quarters guarantee and by the requirement that H–2ALCs secure written statements from fixed-site employers regarding housing and transportation if the H–2ALC will not be providing the required housing and transportation itself.

New § 655.106(a)(6) reiterates the obligation of SWAs to complete required housing inspections ''no later than 30 days prior to the commencement of employment in each area of intended employment in the itinerary of an H–2ALC.''

New § 655.106(a)(7) provides that H–2ALCs must contact all U.S. workers that worked for the H–2ALC during the previous season, and must advise each such worker ''that a separate job opportunity exists for each area of

intended employment that is covered by the application.'' A worker who applies for a job opportunity in an area of intended employment may be required to complete the remainder of the itinerary.

The additional obligations that the Department proposed in the NPRM to impose on H–2ALC employers have been consolidated in new § 655.106(b). Each provision is discussed separately below.

(c) Proposed Sections 655.106(a) and (b), New Sections 655.106(b)(1) and (2) Provide MSPA Farm Labor Contractor Certificate of Registration Number and Identify Authorized Activities

One commenter opined that MSPA is not explicitly included in the rule even though it is mentioned throughout. This commenter believes that legal services groups that file lawsuits under these regulations will be able to include claims based on MSPA as well. This commenter believes there are enough protections in the H–2A rule without including MSPA.

While references to certain specific provisions of MSPA have been included in the H–2A regulations, such language is not intended to apply MSPA to H–2A workers or employers. The provisions of H–2A and MSPA operate independently from one another and the inclusion of terms used in MSPA does not provide a legal basis upon which to hold H–2A employers to MSPA standards. Nothing in this rule expands the scope of MSPA or increases liabilities under it.

Some clarifying, non-substantive modifications have been made to the language of these provisions in the Final Rule, and a statutory citation to MSPA has been added.

(d) Proposed Section 655.106(c), New Section 655.106(b)(3) Disclosure of All Locations

One agricultural employer association asserted that it is not reasonable to require H–2ALCs to disclose all customers, clients, dates, and services, and that providing evidence that the customers and clients of H–2ALCs are established business operations should be sufficient because the proposed requirement would otherwise subject the labor contractor to disclosure of its clientele should an FOIA request be made, and also because a labor contractor should not have to know all of the locations so far in advance and should have the flexibility to change plans. The disclosure requirement is contained in the current regulations and has been for many years. The Department requires such information not for the purpose of forcing a labor contractor to disclose its clientele, but to ensure that the labor contractor has real employment opportunities available for the prospective worker. A good-faith compilation of the roster of clients and dates of arrangements with each is integral to ensure there is work available requiring the use of H–2A workers. It is also essential to ensure that recruiting is properly performed and that U.S. workers are given access to all job opportunities. With respect to the commenter's concerns about disclosure, if the list of clientele is properly considered confidential business information under FOIA, it would be exempt from disclosure.

One commenter suggested that wording should be added to allow labor contractors to add or change out growers during the season by informing the Department. These comments have been addressed in the discussion of § 655.106(a)(5), pertaining to the amendment of H–2ALC applications, above.

(e) Proposed Section 655.106(d), New Section 655.106(b)(4) Surety Bonds

The Department required in its NPRM that FLCs (now H–2ALCs) secure a surety bond as proof of their ability to discharge their financial obligations under the H–2A program. We received some comments opposing the surety bond requirement, and others insisting that the requirement did not go far enough.

One commenter suggested that the Department has no statutory authority to require H–2ALCs to be bonded. This commenter believes that the Department has plenty of methods available to it to weed out the abusive H–2ALCs and does not need the provision for bonding. The bonding requirement for labor contractors, who may be transient and undercapitalized, provides a basis to assure compliance with an attestation-based program. The language in the INA in Section 218(g)(2) which authorizes the Secretary to take such action as may be necessary to assure employer compliance with the terms and conditions of the Act provides the authority for the bonding requirement.

Another commenter believes that the surety bond required is woefully inadequate to guarantee H–2ALC compliance with program requirements, and that it only applies to those cases that come before the Administrator of the Wage and Hour Division (herein referred to as Administrator/WHD) and not to civil actions filed in state or Federal court. Another commenter believes that all H–2A employers should be required to post a bond.

The Department believes that the procurement of a surety bond will show that an H–2ALC is serious about doing business legitimately, and that a surety bond gives the Department leverage over the employer so that if the employer fails in performing its obligations, the bond will be available for the government to recover unpaid wages. The surety bond is simply a device to ensure the Department has reasonable assurance that the labor contractor will adhere to its program obligations; the labor contractor's ability to retain its interest in the bond depends entirely upon its adherence to performance obligations. The commenter is correct that the surety bond applies only to those cases that come before the Administrator/WHD. We have no authority to require it for actions beyond the Department's jurisdiction.

One agricultural employer association states that the bonding requirement is unrealistic because underwriters will not provide the bonds to anyone but the largest labor contractors. This in effect will eliminate smaller labor contractors from the program. This commenter proposes that this requirement be eliminated or in the alternative that the discretion of the Administrator/WHD to increase the bond requirements should be limited to the use of reasonable and objective criteria.

There is no evidence that only large labor contractors will be able to obtain surety bonds. The bond is a necessary compliance mechanism to ensure compliance with program obligations, namely the assurance of payment of the wages of H–2A workers covered by Section 218 of the INA. The Department can adjust bonds as necessary through notice and comment rulemaking to balance the requirement against the financial constraints faced by smaller employers.

(f) Proposed Section 655.106(e), New Section 655.106(b)(5) Positive Recruitment in Each Fixed-Site Location of Services

In § 655.106(e) of the NPRM, the Department proposed to impose additional recruitment obligations on FLCs (now H–2ALCs). One commenter, a large agricultural employer association, believes that the positive recruitment requirements should be the same as they are for non-H–2ALCs who have several fixed-site locations. The Department believes that the recruitment standards for H–2ALCs in the Final Rule spring from the same principles that apply to fixed-site employers, but that some modification was necessary because of the level of mobility of H–2ALCs. To ensure that

U.S. workers are provided notice of all available job opportunities, H–2ALCs are expected to recruit in all areas in which employment will take place, rather than just the area where the work will begin or the greatest concentration of work will take place. The modified recruitment obligations of H–2ALCs under the Final Rule are examined at greater length in the discussion of new § 655.106(a) above.

(g) Proposed Section 106(f), New Section 106(b)(6) Housing and Transportation

The NPRM required a labor contractor to attest that it has obtained written assurances from fixed-site providers of housing and transportation that such housing and transportation complies with the applicable standards. One agricultural employer association observed that housing and transportation provided by H–2ALCs should be required to meet the same standards as the housing provided by any other H–2A employer. The Department agrees that H–2ALCs are to be held to the same standards, but disagrees that an H–2ALC can simply attest, without more, that housing it has not secured itself meets all of the applicable standards. Because many H–2ALC s rely upon the activities of others in meeting their own obligations, the Department requires the contractor to obtain written assurances so that the contractor can, in turn, fully attest to the conditions required to employ H–2A workers. The Department also deleted the reference to H–2A workers in this section to conform to § 655.104(d) and to clarify the issue raised by commenters on § 655.104(d) regarding the need to have housing meet local, State, and Federal standards and guidelines for all agricultural workers, not just H–2A workers. Other minor, non-substantive modifications have been made to the language of this provision to conform to other provisions of the Final Rule.

Section 655.107 Processing of Applications

The Department promulgated in its proposed rule the general parameters for the submission and processing of applications. Section 655.107 of the NPRM laid out the process by which the Department intends to review applications and included provision for the modification of deficient applications as well as the amendment of pending and approved applications. Several commenters expressed concern with this section, specifically in the area of deficient applications. These specific areas of concern are addressed below.

As a general matter, one employer suggested that § 655.107 should include a provision that the Department will have an adequately staffed information service to answer employer questions and help employers comply with the process. The Department appreciates the need for such services, particularly among first-time program users. However, existing program resources are limited and the funding of such a specialized information service does not appear possible at this time. The Department is committed to conducting briefings for users of the program to acquaint them with the terms and processes of the regulation prior to its implementation. The Department is also examining other ways to make program information and instructions available to users on an ongoing basis, particularly through its Web site.

(a) Proposed Sections 655.107(a)(1) and (a)(2) Review Criteria

The Department, in describing the review process for each application, stated in the NPRM that each application ''will be substantively reviewed for compliance with the criteria for certification'' and further defined criteria for certification to ''include, but not be limited to, the nature of the employer's need for the agricultural services or labor to be performed is temporary; all assurances and obligations outlined in § 655.105 in this part; compliance with the timeliness requirements as outlined in § 655.102 of this part; and a lack of errors in completing the application prior to submission, which would make the application otherwise non-certifiable.'' A major trade association of agricultural employers believed this language contained ambiguous phrases, particularly ''include but not be limited to'' and ''errors * * * which would make the application otherwise non-certifiable'' and, as a result, the phrase ''criteria for certification'' was largely undefined. A farmworker/community advocacy organization commented the language incorporates no actual determination of whether the application complies with the statutory requirements for labor certification unlike the current regulations, which require a determination at the outset as to whether an application is ''acceptable for consideration'' based on compliance with the adverse effect and timeliness criteria. This organization maintains that the lack of substantive review in processing attestation-based applications violates the statute. The Department has previously addressed that argument in the discussion of § 655.101, which has now been rewritten to address many of these concerns. To avoid the possibility that vague and ambiguous terminology in the provision could cause confusion, however, proposed § 655.107(a)(1) and (a)(2) have been combined in the Final Rule, and the applicable criteria for certification have been listed through cross-references. Furthermore, to avoid confusion regarding the timing requirements set forth in the NPRM, § 655.107(a)(2) of the Final Rule specifies that when the Department issues a notice or a request requiring a response by an employer, it will use means normally assuring next-day delivery, which may include e-mail and fax. It further specifies that an employer's response to such a notice or request will be considered to be filed with the Department on the date that it is sent to the Department, which may be established, for example, by a postmark.

The trade association also pointed out that, although the language related to the nature of the employer's need included ''temporary,'' it did not also include ''seasonal.'' In addition, the association suggested the phrase ''assurances and obligations related to the recruitment of U.S. workers'' in proposed § 655.107(a)(3) [new § 655.107(b)] be clarified and recommended that if the language is intended to be construed broadly, the Department should include all of the required assurances and obligations to make this clear.

The Department, as mentioned above, agrees this section of the NPRM was confusing and has accordingly clarified the regulatory text. The new § 655.107 references the general criteria for certification that ensures the application will be evaluated for whether the employer has ''established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; made all the assurances and met all the obligations required by § 655.105, and/or, if an H–2ALC by § 655.106; complied with the timeliness requirements in § 655.102; and complied with the recruitment obligations required by § 655.102 and § 655.103.'' By referencing back to these sections rather than enumerating the assurances and obligations in this provision, the Department both provides a clear frame of reference for the evaluation of obligations and also puts employers on notice of the review process.

New language has been inserted in § 655.107(a) in the Final Rule stating that ''[a]pplications requesting that zero job opportunities be certified for H–2A employment because the employer has been able to recruit a sufficient number

of U.S. workers must comply with other requirements for H–2A applications and must be supported by a recruitment report, in which case the application will be denied.'' The reasons for the insertion of this new language are explained below in the discussion of § 655.110(e) of the Final Rule.

(b) Proposed Section 655.107(a)(3), New Section 655.107(b) Notice of Deficiencies

Several minor, non-substantive modifications were made to the language of the proposed provision for purposes of clarity and to conform it to changes made elsewhere in the Final Rule. One significant clarification was also added at § 655.107(b)(2)(iv) of the Final Rule to specifically address the handling of applications initially rejected for failure to comply with the Final Rule's recruitment obligations. Some employer and trade association commenters noted that the structure of the processing procedures in the NPRM would have required an employer whose application was rejected for failing to recruit properly to begin the entire pre-filing recruitment sequence over again. As a result, approval of the re-filed application would have been substantially delayed by the minimum period specified that positive recruitment must be conducted in advance of the date of need (75 days in the NPRM, 60 days in the Final Rule).

Recruitment is an essential part of the H–2A program, and is necessary for the Department to be able to certify that no qualified U.S. workers are able, willing, and available for the job opportunity, and that hiring H–2A workers would not adversely affect the wages and working conditions of U.S. workers similarly employed. Although the positive recruitment requirements will not be waived, the Department will allow re-recruitment to be conducted on an expedited schedule so that employers can secure H–2A workers in a timely fashion where no U.S. workers are available. Even with an expedited schedule, however, failure to properly recruit will inevitably delay approval of an application to at least some extent, and the Department encourages employers to be mindful of all of the recruitment requirements specified in the Final Rule.

(c) Proposed Section 655.107(a)(5), New Section 655.107(c) Modifications

The proposed regulations retain the process for issuance of a Notice of Deficiency by the CO and the submission of a modified application by the employer. However, under the current regulations, applications are received, modified if required, and accepted prior to the employer's recruitment efforts. Under the proposed rule, recruitment will be conducted prior to submission of the application.

A major trade association requested clarification on the effect a modification will have on the validity of the recruitment effort and recommended the regulations state that if an application is ultimately accepted, even after modification, any required modifications to the application will not invalidate any recruitment conducted based on the application as originally submitted. A professional association recommended that if an initial application contains a deficiency related to recruitment, the CO could require remedial recruitment efforts to be completed prior to the final determination and the remedial recruitment efforts and the date of need extended to accommodate the required recruitment efforts. This association believed such a process would be better than the issuance of a denial, which would require the employer to begin the process, including the pre-filing recruitment, over again and, therefore, be unable to complete the process in time to meet the employer's actual date of need. As discussed above, the Department has clarified the effect of deficient recruitment in § 655.107(b)(2)(iv) of the Final Rule. This revised procedure will allow modified applications to move forward after the application originally submitted is found to have deficient recruitment.

The NPRM proposed to revise the current timeframe for an employer to submit a modification to the application from 5 calendar days to 5 business days, and this change was supported by a major trade association. However, the association commented that 5 business days still is not sufficient time for an employer to decide whether to modify the application or submit a request for an expedited administrative judicial review. The association requested the timeframe for requesting an expedited review should be extended to 7 business days. The Department has decided to retain the requirement for submission of either a modification or a request for administrative review within 5 business days, as proposed, which will allow the Department to meet the timeframes for review that are established by statute. The Department believes that due to the time-sensitive nature of the H–2A program, the majority of employers also prefer a speedy timeline that ensures disputes and deficiencies are resolved as quickly as possible.

The Department also deleted the word ''amendment'' from the regulatory text in this section to prevent confusion. Modifications and amendments are, in fact, different actions under this Rule and amendments are described in § 655.107(d).

(d) Proposed Section 655.107(a)(6), New Section 655.107(d) Amendments

The Department did not propose to change the requirements from the current regulation for amendments to an application seeking additional workers. An association of growers/producers requested that the requirement in proposed § 655.107(a)(6)(i) limiting the increase in the number of workers to not more than 20 percent (or 50 percent for employers of fewer than 10 workers) be changed to allow employers of fewer than 10 workers to increase the number of workers in their initial application by up to 10 workers. A State government agency noted its agreement with retaining the current limitations.

The Department has decided to retain the provisions from the NPRM regarding the number of workers that may be requested through amendments. Our experience indicates these limits are necessary to discourage employers from requesting a lower number of workers than actually needed and subsequently submitting an amendment to increase the number. Moreover, the exception for employers of 10 or fewer H–2A workers has not been changed, as interest in such a change was not widespread.

In the NPRM the Department included new provisions relating to amendments to reflect the shift to an attestation-based process. A group of farmworker advocacy organizations commented that they believed the new language is weaker than the language in the current regulations. The organization objected to the deletion of language making explicit that labor certifications are subject to the conditions and assurances made during the application process and recommended this language be included. The Department did not deem this change necessary, as it is already clear from the text and structure of the Final Rule. The organization also recommended the language prohibiting changes to the benefits, wages, and working conditions as contained in the current regulation should be included in the new rule. The Department believes the language in the Final Rule specifying that in deciding whether to accept an amendment, the CO must ''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'' fulfills

this function. An amendment to effect a non-trivial increase in the offered wages, for example, would likely render the job more attractive to U.S. workers, and such an amendment would not be approved without new recruitment being conducted. However, the Final Rule clarifies that amendments should be approved by the CO ''if the CO determines the proposed amendment(s) are justified by a business reason and will not prevent the CO from making the labor certification determination required under § 655.109.''

Finally, the organization believed that the provision in proposed § 655.107(a)(6) (now § 655.107(d)(2)), which allows minor changes in the period of employment, and also requires an assurance that U.S. workers will be provided with housing and subsistence costs under certain circumstances when the season is delayed, does not go far enough because it does not address problems that H–2A workers might encounter related to housing, subsistence, lost work opportunities, and an employer's failure to meet its obligation under the three-fourths rule. The Department does not agree with this characterization. Both the DOL and DHS Final Rules allow for minor modifications in the period of employment that do not change any of the employer's responsibilities with respect to its workers. All of an employer's obligations, attested to in the original application, apply to any amendment thereto.

A sentence was added to the Final Rule clarifying that the CO will transmit accepted amendments to SWAs, where necessary, so that posted job orders can be modified. A further sentence was added clarifying that the Department will review proposed amendments as quickly as possible, ''taking into account revised dates of need for work locations associated with the amendment.''

(e) Proposed Section 655.107(a)(7), New Section 655.107(e) Appeal Procedures

Some minor, non-substantive changes were made to the language of this provision in the Final Rule for purposes of clarity and consistency. The language has also been modified to specify that ''the denial of a requested amendment under paragraph (d) of this section'' and ''a notice of denial issued under § 655.109(e)'' do not constitute final agency action, and may be appealed pursuant to the procedures set forth in § 655.115.

Section 655.108—Offered Wage Rate

A number of commenters questioned the continued need for an adverse effect wage rate (AEWR). An association of growers commented that ''there is no valid basis for setting an adverse effect wage rate, separate and distinct from the prevailing wage for the occupation in the area of intended employment, and requiring the payment of such a wage if it is higher than the prevailing wage.'' An association of growers commented that ''DOL's discussion in the preamble to the proposed regulation makes the case against an AEWR.'' Another grower's association doubts the Department's assertion ''in the preamble that the wages and working conditions of agricultural workers are depressed by the presence of a high proportion of illegal aliens.'' This organization further asserts that field and livestock workers' average wages have increased at a faster rate than those for non-farm workers. Other comments focused on an apparent inconsistency between the H–2A program and other temporary worker programs, none of which requires an AEWR in addition to a prevailing wage.

Congress did not mandate the creation of an adverse effect wage rate for the H–2A program. Rather, Congress provided in sec. 218(a)(1)(B) of the INA that before an employer is permitted to hire an H–2A worker, the Secretary of Labor must certify that the hiring of the H–2A worker ''will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' This language is identical to the general labor certification language in sec. 212(a)(5)(A)(i) of the INA, which provides that ''[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined'' that hiring that alien ''will not adversely affect the wages and working conditions of workers in the United States similarly employed.''

For most of its temporary and permanent foreign worker programs, the Department applies the assumption that U.S. workers in the same occupation will be adequately protected from having their wages adversely affected by the hiring of foreign workers so long as the workers are paid prevailing wage rates. Congress itself has applied this assumption by statute with respect to the granting of labor certifications under the H–1B program. See Sections 212(n)(1)(A) and 212(p) of the INA. For historical reasons, however, the Department established special ''adverse effect'' wage rates for the H–2A program. The Department comprehensively recounted the history of adverse effect wage rates in its last major rulemaking on the H–2A program in 1989. 54 FR 28037, 28039–28041 (July 5, 1989).

Adverse effect wage rates were established for the first time in 1961 pursuant to an agreement with Mexico, which provided that the wages offered under the Bracero program could be no less than an adverse effect wage rate determined by the Secretary of Labor. The H–2 program, which is the predecessor to the H–2A program, was initially created in 1952. H–2 workers were initially required to be paid only prevailing wage rates. Adverse effect wage rates were extended to the H–2 program for the first time, however, in 1963, as the Bracero program was being phased out. Two circumstances motivated the creation of these wage rates. First, the federal minimum wage had not yet been extended to agricultural workers. Second, concerns were raised that large numbers of foreign workers, many of whom were undocumented, had depressed wage rates in the agricultural sector. 54 FR 28041.

Between 1963 and 1989, the Department applied a variety of methodologies to determine how adverse effect wage rates should be set. It is clear that the Department has always been motivated in setting adverse effect wage rates to counteract the potential impact on the wages of U.S. workers of the large numbers of foreign workers, particularly undocumented workers, in the agricultural sector. *Id.* The Department's comprehensive 1989 study of adverse effect wage rates came to several important conclusions, however. First, none of the methodologies employed by the Department ''ever has purported to add an enhancement'' to wage rates calculated by the United States Department of Agriculture (USDA). 54 FR 28040. Second, although some adverse effect wage rates did exceed the wage rates set by the USDA, that was ''an unintended result of the application of the various methodologies used in the 1960s'' and ''cannot in any way be viewed as a measurement of the quantum of adverse effect.'' *Id.* Indeed, the Department concluded that some of its past methodologies for calculating adverse effect wage rates ''led to AEWRs which were higher than Statewide agricultural earning in some states and lower in others,'' a result that the Department labeled ''erratic.'' 54 FR 28041.

The Department stated in 1989 that the adverse effect wage rate ''is a 'method of avoiding wage deflation.' '' 54 FR 28045, citing *Williams* v. *Usery*, 531 F.2d 305, 306 (5th Cir. 1976). Thus, the Department performed a comprehensive study of the then-existing literature on agricultural wages

to determine whether wage depression in fact existed in the agricultural sector, and if so, what its likely sources were. The Department concluded that ''there is a tendency for illegal alien workers to adversely affect wage rates.'' 54 FR 28041. The Department relied in part on a General Accounting Office report finding that ''illegal aliens do, in some cases, exert downward pressure on wages and working conditions with low-wage low-skilled jobs in certain labor markets.'' 54 FR 28042, quoting General Accounting Office, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (GAO/PEMD–88–13BR) (March 1988). The Department also relied on a study published by the National Commission for Employment Policy, which found that ''[u]ndocumented workers do displace some native-born U.S. workers and do lower wages and working conditions in some occupations and geographical areas.'' 54 FR 28042, quoting National Commission for Employment Policy, *Illegal Immigrants and Refugees—Their Economic Adaptation and Impact on Local U.S. Labor Markets: A Review of the Literature* (October 1986). The Department also relied on a study conducted by Dr. Phillip L. Martin, Professor of Agricultural Economics, University of California at Davis, who concluded that ''[t]he removal of illegal alien workers should raise farm wages.'' 54 FR 28043, *quoting* Dr. Phillip L. Martin, *IRCA and the U.S. Farm Labor Market* (February 1988).

There were, however, countervailing findings indicating that any adverse effects on agricultural wages caused by illegal alien workers at that time were ''minor and localized.'' 54 FR 28041. The Department noted that ''the only wage depression shown in agricultural employment in the GAO report appeared in two limited, localized studies of San Diego County, California, pole tomatoes and Ventura County, California, citrus,'' and that ''GAO itself noted that these studies were probably atypical.'' 54 FR 28042. The National Council for Employment Policy study found that ''[t]he evidence regarding the labor market impact of undocumented entrants is mixed and somewhat inconclusive.'' *Id., quoting Illegal Immigrants and Refugees, supra.* And Dr. Martin noted that ''the evidence of these possible wage-depressing effects of illegals is sparse.'' 54 FR 28043, *quoting* Martin, *supra.*

The Department thus drew three significant conclusions in the 1989 rulemaking. First, ''DOL views the data and literature as inconclusive on the issue of adverse effect or wage depression from the presence of illegal alien workers on the USDA data series.'' 54 FR 28043. Second, ''[t]o the extent that there is some anecdotal evidence of wage depression from these sources, the evidence also suggests that the adverse effects are highly localized and concentrated in specific areas and crop activities.'' *Id.* Third, an ''explicit enhancement'' to agricultural wages can only be justified ''if the extent of the depression can be measured.'' *Id.*

In 1989, the Department decided that, taking all of these considerations into account, ''setting the AEWR at the level of average agricultural wages, as determined by the USDA survey, is the correct approach.'' 54 FR 28043. The Department noted that the ''new methodology ties AEWRs directly to the average wage, as opposed to the old methodology which resulted in AEWRS substantially higher than agricultural earnings in many States, and lower for some States.'' 54 FR 28038. The Department found that the use of an average wage rate as the adverse effect wage rate was particularly appropriate because ''AEWRs, if set too high, might be a disincentive to the use of H–2A and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens.'' 54 FR 28044.

Having determined to use average agricultural wage rates to set the H–2A program's adverse effect wage rates, the Department chose the USDA survey to measure average agricultural wage rates for two main reasons. First, the Department found that at that time the USDA survey of farm and livestock workers ''presents the best available data on hourly wages in the agricultural sector.'' 54 FR 28041. The Department noted in this regard that ''all crops and activities now covered by the H–2A program will be included in the survey data and the peak work periods also will be covered.'' *Id.* Second, although the Department had found that evidence concerning wage depression in the agricultural sector caused by undocumented workers was inconclusive, ''[t]o the extent the wage depression does exist on a concentrated local basis, the average agricultural wage does not appear to be significantly affected by wage depression. Further, none of the studies reviewed by DOL here quantifies or measured any wage depression that might exist in the USDA series.'' 54 FR 28043. Thus, although ''the evidence is not conclusive on the existence of past adverse effect,'' any adverse effect ''which might have occurred may not be reflected in the USDA data series.'' *Id.*

The Department's decisions to use average agricultural wage rates to set the H–2A program's wage rates, and to use the USDA survey to measure average agricultural wage rates, were challenged but were upheld by the DC Circuit. *AFL-CIO* v. *Dole,* 923 F.2d 182 (DC Cir. 1991). The Court noted that there is no ''statutory requirement to adjust for past wage depression,'' and that in determining appropriate wage rates there is a ''range of reasonable methodological choices open to the Department.'' *Id.* at 187. The Court further noted that the Department had expressed that one of its objectives in adopting the new wage methodology was to avoid impeding ''IRCA's goal of replacing illegal aliens with documented foreign workers.'' *Id.* at 186. Where ''the data is inconclusive,'' the Department merely needs to ''identify the considerations it found persuasive in making its decision'' as to what methodology to apply. *Id.* at 187.

(a) Retaining the Adverse Effect Wage Rate

Many commenters who opposed retaining the adverse effect wage rate seemed to believe that the AEWR is intended to be an enhanced wage rate, and that its existence must be predicated on the existence of wage depression in the agricultural sector. Both of those views were squarely rejected by the Department in the 1989 rulemaking, when the Department expressly declined to adopt any form of enhancement to the average agricultural hourly wage rate, and when it retained the adverse effect wage rate despite its finding that evidence of generalized wage depression in the agricultural sector was inconclusive.

The Department is retaining the concept of the adverse effect wage rate, despite the fact that is adopting a methodology that will actually set AEWRs at prevailing wage rates, for three reasons. First, by definition, the adverse effect wage rate is the wage rate at which the wages of U.S. workers will not be adversely affected. The Department is firmly committed to the principle that the wage rates required by the H–2A program should ensure that the wages of U.S. workers will not be adversely affected by the hiring of H–2A workers, and therefore declines to jettison the ''adverse effect wage rate'' concept. Second, as is explained further below, the Department was guided in its choice of methodologies for determining prevailing wage rates, and in its ultimate selection of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey, by its commitment to selecting the methodology that will best prevent an adverse effect on the wages of U.S.

workers. Thus, the adverse effect concept will continue to exert an important influence on the wage rates actually supplied by the H–2A program. Finally, § 655.108(a) of the Final Rule requires employers to pay ''the highest of the AEWR in effect at the time recruitment for a position is begun, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.'' The ''prevailing hourly wage rate'' referred to in this provision is defined to mean ''the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys.'' A similar formulation is used under the current rule. Retaining the phrase ''adverse effect wage rate'' to describe the wage level that is determined by the Department to be prevailing in accordance with Federal wage surveys will retain this traditional State/Federal distinction and avoid the confusion that might result from calling two different wage levels both the ''prevailing'' wage rate.

(b) Evidence of Wage Depression at the National Level

In 1989, the Department concluded that evidence of wage depression in the agricultural sector was inconclusive. 54 FR 28043. The Department noted that some studies had identified wage depression in specific agricultural labor markets, but labeled that evidence ''anecdotal.'' *Id.* The Department further noted that even this anecdotal evidence of wage depression was ''highly localized and concentrated in specific areas and crop activities.'' *Id.*

Evidence developed during the last 20 years has not added any additional clarity on the issue of wage depression. Some experts continue to claim that undocumented workers cause wage depression. *See, e.g.*, Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails,* 2007 U.Chic.Leg. For. 193, 215 (2007) (''[T]his has almost certainly contributed to the depression of wages and working conditions for U.S. workers.''). One comment submitted by a group of farmworker advocacy organizations acknowledged that the impact of undocumented workers on wages at a broad national level ''is under dispute,'' but asserted that wage depression is clearly evident in the agricultural sector. This commenter did not provide any wage data supporting this assertion, however. Rather, the commenter relied on data indicating that undocumented workers are more prevalent in the agricultural sector than they are in most other sectors of the labor force. In fact, none of the comments that were submitted to the Department and none of the studies that the Department reviewed in response to those comments provided a methodology that would allow for the quantification of any agricultural wage depression that might exist.

On the other hand, many experts assert that evidence indicating that undocumented workers cause wage depression remains mixed. For example, Jeffrey S. Passel of the Pew Hispanic Center recently stated that ''I don't know if there's anything in the data that clearly points one way or the other. At one level, it's a lot of people: 11.5 million to 12 million. But it's about one in 20 workers, so it's not a huge share of the labor market.'' *The Immigration Debate: Its Impact on Wages, Workers, and Employers,* in Knowledge@Wharton at p. 4 (May 17, 2006). Bernard Anderson, who served as Assistant Secretary for the Employment Standards Administration during the Clinton Administration, has opined that with respect to the question of ''what impact there is on wages, economic status and employment for American workers * * * you get a clear divide in the economic literature. The evidence produced by economists who have studied this question is mixed.'' *Id. See also several studies on the effects of immigration generally: Robert D. Emerson, Agricultural Labor Markets and Immigration* at p. 57 (Choices, 1st Quarter 2007) (''While some economists suggest that increased immigration has reduced wage rates for native-born, unskilled workers * * * most have found negative wage effects of increased immigration extremely difficult to demonstrate once all appropriate adjustments are made.''); Pia Orrenius, *The Impact of Immigration,* Commentary, The Wall Street Journal (April 25, 2006) (''[M]ost studies find immigrants have little effect on average wages.''); Gianmarco I.P. Ottaviao and Giovannit Peri, *Rethinking the Gains from Immigration: Theory and Evidence from the U.S.* at 28 (August 2005) (''It turns out empirically and theoretically that immigration, as we have known it during the nineties, had a sizeable beneficial effect on wages of U.S born workers.''). Several grower and employer groups commented that they do not believe there is reliable evidence of wage depression in the agricultural sector. They did not, however, provide any data or analysis of existing studies to support this assertion.

The assertion of one group of farmworker advocacy organizations that the unusually high concentration of undocumented workers in the agricultural sector must necessarily result in a particularly depressive effect on the wages in that sector does not appear to be borne out by the facts. A study analyzing changes in the median weekly earnings for selected occupations between 1988 and 1999 found that median weekly earnings for ''farm occupations, except managerial'' had increased 21 percent between 1988 and 1993, and 20 percent between 1994 and 1999, while median earnings for ''farm workers'' increased 22 percent between 1988 and 1993, and 20 percent between 1994 and 1999. This compared favorably to increases in the median weekly earnings for all workers, which increased 20 percent between 1988 and 1993, and 18 percent between 1994 and 1999, as well as to workers in many other specific low-wage occupational categories (cooks: 17 percent and 19 percent; butchers: 13 percent and 22 percent; laundry and dry cleaning operators: 17 percent and 16 percent; sewing machine operators, 17 percent and 19 percent). *See* Philip Martin, *Guest Workers: New Solution, New Problem?* at Table A3–4 (Pew Hispanic Center Study, March 21, 2002). Although the Department assumes that it is true that undocumented workers are more prevalent in the agricultural sector than they are in many other sectors, the available data does not support the notion that they have had a disproportionately depressive impact on wages in the agricultural sector.

In sum, after considering the comments received on the subject of wage depression, and after reviewing relevant literature in an attempt to identify empirical support for the assertions made in those comments, the Department reaffirms its conclusion in the 1989 rulemaking that evidence of wage depression in the agricultural sector is inconclusive.

(c) Evidence of Wage Depression at the Local Level

In the 1989 rulemaking, the Department found that ''[t]o the extent that there is some anecdotal evidence of wage depression * * *, the evidence also suggests that the adverse effects are highly localized and concentrated in specific areas and crop activities.'' The Department did not find that there was in fact wage depression in local markets, specific areas, or specific crop activities, but rather noted that the anecdotal evidence of wage depression that existed at that time was confined to those settings. The relevant facts concerning concentrations of illegal workers in specific local markets and crop activities have changed substantially in the intervening 20 years, however.

A group of farmworker advocacy organizations commented that ''[t]imes have changed since 1987.'' This group stated that undocumented workers in the agricultural sector are now ''spread throughout the nation.'' This group noted that ''undocumented workers now dominate in the agricultural sector'' and ''constitute a majority of the farmworkers in the United States.'' This group argued that the factual change in the prevalence of undocumented workers in the agricultural sector is so significant that ''DOL may not legally ignore [it].'' It further provided an impressive compilation of statistics from a variety of studies showing that undocumented workers are now pervasive in the agricultural sector, rather than a sparse or localized phenomenon. Specifically, the studies cited found that ''[i]n California, where 35 percent of the nation's farmworkers are employed, 57 percent of farmworkers were undocumented as of 2003–05,'' that in Florida, ''50 percent of farmworkers were unauthorized immigrants [in 2004] and the percentage was increasing,'' that ''[m]ore than 60 percent of agricultural workers in Washington are believed to be undocumented,'' that ''in New York State approximately 70 percent of farmworkers are undocumented,'' and that ''45 percent of the Mountain region's farmworkers report they were working illegally in the U.S.''

A variety of experts have similarly concluded that the presence of undocumented workers in the United States is now a widespread phenomenon rather than a localized one. A 2005 study by the Pew Hispanic Center found that ''since the mid-1990s, the most rapid growth in the immigrant population in general and the unauthorized population in particular has taken place in new settlement areas where the foreign-born had previously been a relatively small presence.'' Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics* at p. 11 (Pew Hispanic Center, June 14, 2005). ''The geographic diversification of the unauthorized population since 1990 is very evident * * *.'' *Id.* at p. 13. A 2006 study by the Department of Homeland Security reached a similar conclusion. *See* Michael Hoefer, Nancy Rytina, and Christopher Campbell, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006* at p. 4 (Office of Immigration Statistics, August 2007) (''Growing geographic dispersion of the unauthorized immigrant population is reflected by an increase in the share of the population living in all other states.''). In many respects the growing dispersion of unauthorized workers is unsurprising, as the number of unauthorized workers in the United States has dramatically increased from an estimated 2.5 million in the late 1980s to an estimated 12 million or more today. *See* Passel, *Unauthorized Migrants: Numbers and Characteristics* at p. 10, *supra*; Hoefer et al. at p. 1, *supra*.

Recent literature also suggests that, even if there are some areas in the agricultural sector in which particularly high concentrations of illegal immigrants remain, such concentrations may not adversely affect U.S. workers. Jeffrey S. Passel of the Pew Hispanic Center has noted that high concentrations of illegal workers in particular markets are generally correlated with lower local unemployment rates for native workers:

> The presence of illegals is not associated with higher unemployment among natives and it seems to me you would have to see that kind of thing for there to be true displacement in any sense. Geographically, it tends to be the reverse: Places with large numbers of illegals tend to have lower unemployment than places without illegals.

The Immigration Debate: Its Impact on Wages, Workers, and Employers, in Knowledge@Wharton at pp. 4–5 (May 17, 2006). And David Card concluded in a study analyzing the effects of immigration generally (rather the effects of unauthorized immigration in particular) on U.S. workers that ''[a]lthough immigration has a strong effect on relative supplies of different skill groups, local labor market outcomes of low skilled [U.S.] natives are not much affected by the relative supply shocks.'' David Card, *Is the New Immigration Really So Bad?*, National Bureau of Economic Research (August 2005).

The Department concludes that there is no conclusive evidence one way or the other regarding the existence of wage depression in localized agricultural labor markets. There is strong evidence that there has been a seismic shift in the demographics of the agricultural labor market in the United States since the Department's last rulemaking in 1989, and that undocumented workers have in the intervening years come to dominate that market throughout the United States. In light of the pervasive presence of undocumented workers in the agricultural sector today, it is substantially less likely than it was in 1989 that wage depression could uniquely be found in highly localized agricultural labor markets and specific crop activities. Moreover, even if pockets of unusually high concentrations of illegal workers continue to exist in some places in the agricultural sector, the evidence concerning the effect high concentrations of illegal workers have on the wages of U.S. workers itself remains equivocal.

(d) Inability To Measure Wage Depression

None of the commenters and none of the literature reviewed by the Department suggested a reliable methodology for measuring any wage depression that may exist in the agricultural sector. Indeed, one group of farmworker advocacy organizations submitted an analysis prepared by a PhD economist from the University of California, Berkeley, that concluded that ''[g]iven the extremely large share of illegal immigrants working in agriculture, it is unknowable, absent them, how many U.S. workers would be willing to and at what price work in the agricultural sector.'' As the Department explained in 1989, ''an explicit enhancement could only be justified if alien agricultural employment has depressed average agricultural earnings, and if the extent of the depression can be measured at the aggregate level.'' 54 FR 28043. With no conclusive evidence showing that wage depression exists in the agricultural sector, and with no reliable methodology to measure any wage depression that does exist, the Department declines to adopt an adverse effect wage rate that is deliberately set above market rates.

(e) The Impact of Undocumented Workers vs. Guest Workers on U.S. Worker Wages

To the extent that wage depression may exist in the agricultural sector, the evidence does not indicate that it has been caused by the H–2A program. Rather, all of the information available to the Department strongly indicates that the presence of large numbers of illegal, undocumented workers in the agricultural sector poses a much greater potential threat to the wages of U.S. workers than guest workers do.

The Department has reviewed anew the studies that it relied on in 1989 when it issued the last rule governing the adverse effect wage rate. Virtually all of those studies focused on the effect that undocumented alien workers have on the wages of U.S. workers. *See, e.g.*, National Commission for Employment Policy, *supra* (''Undocumented workers do displace some native-born U.S. workers and do lower wages and working conditions in some occupations and geographical areas.''); Martin, *IRCA*

and the U.S. Farm Labor Market, supra (''[t]he removal of illegal alien workers should raise farm wages.''). Indeed, the GAO study that was relied upon by the Department examined the impact of undocumented workers not just on the wages of U.S. citizen workers, but on all legal workers in the United States with low-wage, low-skilled jobs, including guest workers. *See Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (GAO/PEMD–88–13BR) (March 1988) (''illegal aliens do, in some cases, exert downward pressure on wages and working conditions with low-wage low-skilled jobs in certain labor markets.'').

Other sources also support the notion that any threat that foreign workers may pose to the wages and working conditions of U.S. workers is primarily caused by direct competition from a large undocumented workforce within the United States. Illegal aliens may be willing to work for illegally low wages that are paid off the books, and may be reluctant to report an employer's violations of the labor and employment laws. A group of farmworker advocacy organizations submitted an analysis prepared by a PhD economist from the University of California, Berkeley, which stated that:

> There are other reasons that employers in the U.S. hire undocumented workers over U.S. workers. Undocumented workers—afraid of deportation—are perceived to be less demanding in terms of non-pecuniary benefits and are less likely to form unions or make demands from employers, as well as accept pay below legal standards.

Senators from both political parties remarked upon this phenomenon during the recent immigration debates in Congress.[5] As Senator Kennedy stated in May 2007,

> [W]e have, unfortunately, employers who—are prepared to exploit the current condition of undocumented workers in this country—potentially, close to 12 [and] ½ million are undocumented. Because they are undocumented, employers can have them in these kinds of conditions. If they don't like it, they tell them they will be reported to the immigration service and be deported. That is what is happening today.[6]

The U.S. Supreme Court has also noted the threat that undocumented workers pose to the wages and working conditions of U.S. workers. *See Sure-Tan* v. *NLRB,* 467 U.S. 883, 892 (1984) (''acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *'').

A group of farmworker advocacy organizations suggested that guest worker programs may also threaten the wages and working conditions of U.S. workers. These organizations primarily cited studies finding that between 1950 and 1964, the period of time during which the Bracero Program was operating, real wages for agricultural workers remained flat. Even if these studies are correct about the impact of the Bracero Program, however, the Department does not consider the Bracero Program to be representative of the impact of guest worker programs generally. The Bracero Program was notorious for rampant employer abuses and lack of government enforcement. *See, e.g.,* Alma M. Garcia, *The Mexican Americans* at pp. 30–33 (2002). If employers are regularly able to get away with violating program requirements and paying sub-standard wages, such rogue activity may of course have a depressive effect on overall wage rates. H–2A program enforcement, however, is more rigorous than Bracero Program enforcement was, and is substantially aided by watchdog farmworker advocacy organizations that help to ensure that workers hired through the H–2A program are paid properly.

The commenter cited only one other supposed example of wage depression caused by the H–2A program: The Florida sugar cane industry. The commenter noted that the sugar cane harvest in Florida was mechanized in the early 1990s, and that the industry therefore no longer uses substantial numbers of H–2A workers. The commenter asserted, however, that in the late 1980s and early 1990s, while H–2A workers were still being used, their presence depressed the wages of U.S. workers. As support for this proposition, the commenter cited statistics indicating that sugar cane producers that hired only U.S. workers paid their employees substantially more per hour than producers that hired H–2A workers. The Department does not consider this to be evidence of wage depression; if anything, the wage gap between U.S. workers and H–2A workers shows that the AEWR paid to H–2A sugar cane workers did not function as the maximum hourly rate that U.S. workers in the area could make. Rather, U.S. workers were able to secure jobs that paid substantially higher wages than H–2A workers. Economically speaking, that result is not at all surprising; employers generally should be willing to pay U.S. workers higher wages than the required wage rate for H–2A workers, since H–2A workers impose a number of additional costs on employers, including housing, transportation, and application fees, that make them relatively more expensive to employers than U.S. workers.

Whatever effect guest workers may have on the wages of U.S. workers, however, there appears to be virtually unanimous agreement among the experts and commenters that undocumented workers have a greater impact and pose a greater threat. Indeed, the very same group of farmworker advocacy organizations that argued that guest worker programs have a depressive effect on wages submitted a PhD economist's analysis concluding that ''the H–2A program and the AEWR are severely undermined by the employment of hundreds of thousands of undocumented immigrant workers.'' The economist further opined that ''[f]irst and foremost, it is in the best interest of U.S. domestic and H–2A workers to mitigate the effects that such a large share of illegal workers has on wages and employment conditions in the agricultural industry.'' *See also* Peter Cappelli, *The Immigration Debate: Its Impact on Wages, Workers, and Employers,* in Knowledge@Wharton at p. 3 (May 17, 2006) (''While it is true that low-skill workers who enter the United States legally also exert downward pressure on wages, there is a significant difference between them and their undocumented counterparts.''). Of course, guest worker programs could, in the abstract, pose a significant threat to the wages of U.S. workers, if, for example, the required wage rate was set substantially below the prevailing market rates, or if enforcement of the required wage rates was so lax that substantially below-market wages were regularly paid. There is no indication, however, that those conditions currently exist in the H–2A program, nor does the Department have any intention of allowing them to occur under the Final Rule.

Thus, the Department concludes that while evidence of wage depression in the agricultural sector remains inconclusive, it is quite clear that the most likely source of any wage depression that does exist is the hundreds of thousands of undocumented workers in the agricultural labor market.

(f) The Department's Decision To Use More Precise Adverse Effect Wage Rates

Although evidence of actual wage depression in the agricultural sector is equivocal, the Department believes it is appropriate to select a wage-

[5] *See e.g.,* 152 Cong. Rec. S9773 (2006) (statement of Senator Dianne Feinstein); 153 Cong. Rec. S441–S442 (2007) (statement of Senator Larry Craig); and 153 Cong. Rec. S6590 (2007) (statement of Senator Edward Kennedy).

[6] 153 Cong. Rec. S6590 (2007).

determination methodology that will help to prophylactically guard against wage depression. As the Department noted in the NPRM, one of the most significant actions it can take to protect the wages and working conditions of U.S. workers is to render the H–2A program sufficiently functional that agricultural employers will hire H–2A workers, with all their accompanying legal protections, rather than hiring undocumented workers. The Department has concluded that this can best be achieved by setting adverse effect wage rates that (1) are not below the prevailing wages being earned by U.S. workers and (2) are not so far above local market rates that they encourage employers to hire undocumented workers instead. Achieving these objectives requires setting AEWRs that appropriately reflect market realities and labor costs.

There are currently not nearly enough U.S. workers in the agricultural sector to perform all of the agricultural work that needs to be performed. When agricultural employers cannot find U.S. workers, they must of necessity turn to some other labor source. The H–2A program was created by Congress to be the alternate source of choice for agricultural labor. The program is clearly failing to fill the role envisioned for it, however, as approximately ten times more undocumented workers than H–2A workers are employed in the agricultural sector today. Agricultural employers may or may not realize that specific individuals they are hiring are in the United States illegally, but undocumented workers have clearly become the agricultural sector's alternate labor market of choice. The Department believes that the current methodology for determining adverse effect wage rates, which is not keyed to actual local labor market conditions, may be partly responsible for the program's failure.

It is obvious that an AEWR that is set too low is likely to harm U.S. workers. It is no secret that foreign workers may be willing to work for wages that are lower, and often substantially lower, than wages that are typically paid to U.S. workers. Allowing foreign workers to work at substandard wages would likely harm U.S. agricultural workers by causing them to be displaced or by forcing them to accept lower wages to secure jobs. As will be discussed later, there is reason to believe that in some geographic areas and for some occupations, current AEWRs are set artificially low, resulting in an adverse effect on U.S. workers similarly employed. *See* Gerald Mayer, *Temporary Farm Labor: The H–2A Program and the U.S. Department of Labor's Proposed Changes in the Adverse Effect Wage Rate* (''CRS Report'') at 8 (CRS Report for Congress, November 6, 2008) (''Currently, the AEWR applies equally to all crop workers, livestock workers, and farm equipment operators in a region or state. However, within a region or state, [market] wages for the same occupation may vary because of differences in the cost of living or in the relative supply of or demand for workers.'').

Conversely, an AEWR that is artificially set too high can also result in harm to U.S. workers. If the AEWR is set so high that it does not reflect actual local labor market conditions, many agricultural employers may be priced out of participating in the H–2A program. When employers cannot find U.S. workers, and also cannot afford H–2A workers because they are required to pay them above-market wage rates, some will inevitably end up hiring undocumented workers instead.

The resulting influx of undocumented foreign workers into the agricultural sector threatens to erode the earnings and employment opportunities of U.S. workers in agricultural occupations. U.S. workers may have a difficult time fairly competing against undocumented workers, who may accept work at below-market wages, are viewed by employers as less troublesome and less likely to assert their rights, and are cheaper to employ than H–2A workers because they do not require the additional payment of H–2A program costs such as transportation and housing. Although the threat of legal sanctions and attendant risks of work disruption will constrain some employers from knowingly employing undocumented workers,[7] the greater the gap between the true market rate for farm labor and the total cost to employers of H–2A workers, including artificially inflated wage rates plus all other attendant H–2A program costs, the greater the likelihood that employers will forego using the H–2A program and will instead risk hiring undocumented foreign labor. The undocumented foreign workers whose hiring is incentivized when AEWRs are artificially set too high lack the legally enforced protections and benefits that the H–2A program provides, further threatening to degrade U.S. workers' working conditions.

The Department was concerned about precisely this phenomenon in the 1989 rulemaking. The Department presciently observed that ''AEWRs, if set too high, might be a disincentive to the use of H–2A and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens.'' 54 FR 28044. The Department's choice of the USDA average agricultural wage to set AEWRs at the time was predicated on the assumption ''that IRCA will achieve its states purpose of removing illegal aliens from the labor force. * * * Agricultural employers who have employed illegal alien workers in the past then must fill their labor needs with U.S. workers * * * or with H–2A workers.'' *Id.* IRCA did not, of course, succeed in eradicating the employment of illegal aliens in the agricultural sector, a fact that the Department must now take into account in determining what wage-setting methodology is most appropriate.

As noted above, there is demand for hundreds of thousands of agricultural workers beyond what the domestic labor market is able to supply. If any wage depression does currently exist in the agricultural sector, the presence of a large number of undocumented workers is the most likely cause. Replacing the hundreds of thousands of undocumented agricultural workers currently employed in the U.S. either with U.S. workers or with H–2A program workers who are paid a legally required wage would substantially help to protect U.S. workers from adverse effects caused by the undocumented work force. For this reason, the Department believes that it should select a methodology for setting adverse effect wage rates that is as precise and refined as possible.

A group of farmworker advocacy organizations commented that rather than adopt a wage-setting methodology that may reduce required wage rates in some areas, the government should get rid of undocumented workers by more vigorously enforcing the immigration laws. Primary enforcement responsibility in these areas is entrusted to DHS and the Department of Justice. The Department notes, however, that during the last several years the federal government has in fact embarked upon unprecedented efforts to enforce the immigration laws, both at the border and in the interior. In fact, this rulemaking effort is part of a comprehensive 26-point immigration reform plan that was announced by the present Administration in August 2007.

[7] Some commenters noted that the Department's discussion of this point in the NPRM preamble appeared to suggest that the Department believed agricultural employers intentionally set out to hire illegal workers. The Department did not intend to suggest such motives. As noted above, many illegal workers in the U.S. possess documentation indicating they are legally authorized to work and all employers (not just those in agriculture) are required by current law to accept at face value documentation that appears valid.

See Fact Sheet: Improving Border Security and Immigration Within Existing Law, http://www.whitehouse.gov/news/releases/2007/08/20070810.html (August 10, 2007). This rulemaking is designed to work in tandem with those enforcement efforts. The Department does not believe that it is necessary to choose between a functional H–2A program and effective immigration enforcement; we can and should have both, as having both will maximize protections for U.S. workers.

The same commenter argued that if agricultural employers substantially hiked their wage rates, U.S. workers would re-enter the agricultural labor market to secure the higher wages, thus substantially reducing the need to resort to foreign labor in the agricultural sector. Although the Department assumes that substantially higher agricultural wages would indeed induce some reentry by U.S. workers into the agricultural labor market, the commenter did not provide any data suggesting what level of wage increases would be required to make such a re-entry phenomenon substantial, or whether agricultural employers could remain competitive if required to pay those wages. As the Department noted in 1989, there is an upper ceiling to how much U.S. agricultural employers can even theoretically afford to pay in labor costs, as they must ultimately compete not only with other U.S. producers, but also ''with foreign imports.'' 54 FR 28044. The Department believes that it is also relevant that U.S. workers have steadily left the agricultural sector over the last two decades, despite the fact that agricultural wages have increased during that time, suggesting that factors other than wages may be causing many U.S. workers to view agricultural jobs as undesirable.

Finally, the same commenter argued that the Department's rationale effectively calls for a continuous lowering of agricultural wage rates, because in this commenter's view (1) the Department's real objective is to lower wage rates and (2) the only way to actually replace undocumented workers with H–2A workers is to set adverse effect wage rates at the level of wages that undocumented workers are willing to accept. As an initial matter, the commenter misunderstands the Department's objective. The Department seeks to ensure that AEWRs are precisely tailored to the conditions of specific agricultural occupations in specific labor markets. Although it is true that the Department's preamble analysis in both the NPRM and the Final Rule explains in detail how artificially high AEWRs can hurt U.S. workers, that does not reflect any belief on the part of the Department that all AEWRs are currently artificially high and that they therefore should all be lowered. In fact, the Department's preamble analysis also explains how AEWRs that are set too low hurt U.S. workers. The Department seeks to avoid both effects by adopting a more precise methodology. Because the USDA survey that is currently used is an average wage rate that is set across broad, typically multi-state regions, the actual wages of individual labor markets within the USDA regions are necessarily in some instances above, and in some instances below, the USDA average. In fact, the statistics provided by this commenter show that even according to the commenter's calculations, the average BLS OES wage for crop workers is higher than the average USDA wage for field workers in several States, including three of the ten biggest H–2A using States (Louisiana, New York, and Virginia). A recent report of the Congressional Research found that even OES Level I wages are higher than the current AEWR for some occupations in some geographic areas. CRS Report *at 13–17*.

The Department also rejects the notion that the only way to replace undocumented workers with U.S. workers and H–2A workers is to lower AEWRs to the levels that undocumented workers are willing to accept. That might be true if agricultural employers viewed U.S. workers, H–2A workers, and undocumented workers as completely fungible, but they do not. Many employer and grower association commenters emphatically stated that they want to comply with the law, and that in fact they would generally prefer to hire U.S. workers over H–2A workers or undocumented workers if U.S. workers were available. Moreover, agricultural employers who even unknowingly hire undocumented workers risk losing their labor force part way through the season due to an immigration raid, and those who knowingly hire undocumented workers risk criminal penalties. These risks are particularly pronounced today because of the government's recent highly publicized increased worksite immigration enforcement efforts. For all of these reasons, agricultural employers are generally willing to pay substantially more to hire a U.S. worker or an H–2A worker than they are to hire an undocumented worker. This observation is borne out by actual data showing that undocumented workers typically make less than U.S. workers and H–2A workers do.

After reviewing the comments received, the Department continues to believe that precise tailoring of H–2A wages to local labor market conditions is the most critical factor in preventing an adverse effect on the wages of U.S. workers. For example, a single national AEWR applicable to all agricultural jobs in all geographic locations would prove to be below market rates in some areas and above market rates in other areas. If the AEWR in any given area does not reflect market wages, it will either harm U.S. workers directly by artificially lowering wages, or it will harm U.S. workers indirectly by providing an incentive for employers to hire undocumented workers. AEWRs covering large multi-state regions suffer from similar flaws. In an agricultural sector where prevailing labor conditions make the need for precision in AEWR determinations paramount, it is essential that a methodology be adopted that allows for as great a degree of geographic refinement as possible. Improving the geographic precision of the AEWR is essential to ensuring that the AEWR meets its statutory objective.

The Department is aware that its rationale for establishing precise, localized wage rates is quite different than the rationale that motivated it in 1989 to establish aggregated, regional wage rates.[8] That decision was reached under very different factual circumstances, however. In 1989, the Department found that there was no conclusive evidence of generalized wage depression in the agricultural sector, but noted that there was some anecdotal evidence suggesting that wages in particular local labor markets might be depressed. The Department chose at that time to use USDA data to set AEWRs largely because it believed that USDA's aggregation of wage data at broad regional levels would immunize the survey from the effects of any localized wage depression that might exist. 54 FR 28043. As discussed above, however, undocumented workers are substantially more dispersed throughout the agricultural sector today than they were in 1989. Not only are undocumented workers no longer confined to particularized local labor markets, but recent studies have also called into question whether the concentration of undocumented workers in particular labor markets actually causes localized wage depression.

In light of these developments, the one key advantage the Department believed in 1989 was afforded by the USDA survey's broadly aggregated data—its ability to avoid localized wage

[8] The Department's underlying motivation—to protect the wages and working conditions of U.S. workers—remains the same.

depression effects—has been substantially diminished. On the other hand, the fact that undocumented workers have come to dominate the agricultural labor force in the intervening years has rendered the imprecision of USDA wage data vis-à-vis local labor market conditions a substantial drawback that may sometimes actually encourage employers to hire undocumented workers. In fact, the Department expressed concern in the 1989 rulemaking that precisely this phenomenon might develop, stating that ''AEWRs, if set too high, might be a disincentive to the use of H–2A workers and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens.'' 54 FR 28044. Many commenters argued that the large numbers of undocumented workers in the agricultural sector adversely affects U.S. workers. After weighing all of these considerations, the Department has determined that under the present factual circumstances, the advantages of tailoring AEWRs to better reflect the actual wages earned by specific occupational categories in specific local labor markets outweigh the potential disadvantages.

(g) The Department's Decision To Use the Occupational Employment Statistics Survey

Having determined that the Department can best safeguard the wages and working conditions of U.S. workers from adverse effect by encouraging employers to replace undocumented workers with either U.S. workers or H–2A workers, and having further determined that tailoring AEWRs to local labor market conditions is the best way to foster this replacement process, the Department made two independent decisions. First, the Department decided to use the BLS OES survey to set AEWRs, rather than the USDA Farm Labor Survey (FLS). Second, the Department decided to attain further precision in setting AEWRs by breaking the OES wage rates down into four different skill levels, rather than using a single average OES wage rate for each agricultural occupation. While the Department viewed the ability to break OES data into four separate skill levels as an advantage of that survey, its decision to use the OES survey to set AEWRs was not dependent on this feature.

The FLS and the OES survey are the leading candidates among agricultural wage surveys potentially available to the Department to set AEWRs. Neither survey is perfect. In fact, both surveys have significant shortcomings. On balance, however, the Department has concluded that in light of the current prevalence of undocumented workers in the agricultural labor market, AEWRs derived from OES survey data will be more reflective of actual market wages than FLS data, and thus will best protect the wages and working conditions of U.S. workers from adverse effects.

The present methodology for settings AEWRs, which was established by the 1989 final rule, calculates regional AEWRs based on the previous year's annual combined average hourly wage rate for field and livestock workers in each of 15 multi-state regions and 3 stand-alone States, as compiled by the USDA quarterly FLS Reports. The aggregation of a widely diverse national agricultural landscape into just 15 regions (and 3 stand-alone states) results in extremely broad generalizations that fail to account for specific market conditions at the local level. Wage data collected at each individual State and even substate level would be more appropriate for purposes of computing an accurate, sub-regional AEWR that reflects local market conditions. Indeed, market-based wage survey data at the State or substate level is the standard for calculating comparison wages in other temporary worker programs administered by the Department, including the H–2B program that is the non-agricultural counterpart of H–2A and the H–1B specialty occupation worker program.[9]

The Department's reliance on USDA FLS data creates several problems for functional program administration. The USDA quarterly FLS does not provide refined wage data by occupations or geographic locale. Additionally, the USDA FLS does not account at all for different skill levels required by agriculture occupations. Moreover, the wage levels reported in the USDA FLS are skewed by the inclusion of wages that are paid to many agricultural occupations that are not typically filled by H–2A workers, such as inspectors, animal breeding technicians, and trained animal handlers.

The accuracy of AEWRs based on the USDA FLS is further diminished because the FLS is not based on reported hourly wage rates. Instead, USDA's FLS asks employers to report total gross wages and total hours worked for all hired workers for the two reference weeks of the survey. Based on this limited information, the survey constructs annual average wages for the broad general categories of field workers and livestock workers. The AEWR is then calculated by combining the average of the annual wage for field workers and the average annual wage for livestock workers into one annual wage rate covering both of those general occupational categories. The survey thus determines the hourly AEWR based not on reported hourly wages, but rather on the basis of the numerator (total gross wages for the combined occupations) and denominator (total hours for the combined occupations) derived from the information supplied by employers.

Moreover, the USDA FLS is administered and funded through USDA, giving the Department no direct control over its design and implementation. USDA could terminate the survey at any time and leave the Department without the basic data, problematic as it is, used to calculate the AEWR. In fact, USDA announced that it would suspend the survey in February 2007 due to budget constraints. Ultimately, USDA resumed the survey in May 2007. The possibility that USDA may suspend the survey at some point in the future adds a measure of instability and uncertainty for AEWR determinations in future years. USDA's control over the survey also prevents the Department from making improvements to it that could help to correct its shortcomings and set more market-reflective AEWRs.

In 1989, the Department determined that the USDA survey was the best available ''barometer'' for measuring farm wages on a nationwide basis. In the succeeding years, however, the Department has gained vast knowledge and experience in applying wage data that simply did not exist in 1989. The OES wage survey is among the largest on-going statistical survey programs of the Federal Government. The OES program surveys approximately 200,000 establishments every 6 months, and over 3 years collects the full sample of 1.2 million establishments. The OES program collects occupational employment and wage data in every State in the U.S. and the data are published annually. The OES wage data is already utilized by the Department for determining comparison wages in other temporary worker programs and has proven to be an accurate, statistically valid, and successful wage reference. In 1989, when the Department established the current AEWR methodology, the OES program was not well developed and thus was not an effective alternative for the USDA Labor Survey. In the intervening nearly 20 years the OES program has in several respects

[9] Calculation of the applicable wage by a SWA using the OES survey is, in fact, a ''safe harbor'' providing presumption of correctness in the H–1B labor condition application. 20 CFR 655.731(a)(2)(ii)(A)(3).

surpassed the USDA Labor Survey as a source for agricultural wage data.

Farm labor comprises a number of occupations and skills, and both the demand for and supply of farm workers with a particular skill or experience level varies significantly across geographic areas. The farm labor market is not a monolithic entity, but rather is a matrix of markets across a spectrum of occupations, skill or experience levels, and local areas. Effectively protecting U.S. workers from unfair competition by undocumented workers by setting an AEWR that is neither too high nor too low requires that the AEWR be specifically tailored to the local labor markets, and must take into account such factors as specific occupation, skill or experience, and geographic location. The Department thus strongly values the geographic and occupational precision of the OES estimates as well as the ability to establish four wage-level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty within a given occupation. These features are unique to the OES survey, and it is in part for this reason that the survey is also used in other foreign worker programs administered by the Department, including the H–1B and H–2B programs.

The Department acknowledges that OES agricultural wage data is far from perfect. Perhaps most significantly, as several opposed commenters pointed out, ''BLS OES data do not include wages paid by farms.'' Rather, ''[t]he OES focuses on establishments that support farm production, rather than engage in farm production, and many of these establishments are farm labor contractors.'' These commenters argued that ''[t]he employees of such non-farm establishments constitute a minority of the overall agricultural labor supply and are not representative of the farm labor supply.'' They argued that this effect is exacerbated by the fact that ''BLS OES results are obtained by using the results of a separate BLS survey, the National Compensation Survey (NCS),'' which ''does not survey any agricultural establishments.''

The Department is confident in the quality of the agricultural workers wage estimates calculated using the OES survey, even with its lack of direct coverage of agricultural establishments. As noted by one major farm association, ''the OES's agricultural wage information is based on data collected from farm labor suppliers, individuals who specialize in finding, pricing, and placing agricultural workers with local farm employers.'' Indeed, workers provided by farm labor suppliers are for most agriculture employers the closest substitute for H–2A workers; both represent an alternate labor source to which an agricultural employer can turn if it is unable to locate a sufficient numbers of U.S. workers through its own direct recruiting efforts.

Moreover, as one group of farmworker advocacy organizations noted, the USDA FLS shows that ''[a]gricultural service employees on farms and ranches made up * * * about 30 percent of hired workers.'' Such workers appear to be spread across virtually all geographical areas and crop activities, and 30 percent is certainly a statistically valid sample size. Nonetheless, the Department recognizes that it is reasonable to consider the survey's nonfarm scope to be a shortcoming, and the Department will work with BLS to expand the coverage of the OES to include agricultural establishments, in keeping with recommendations from various commenters, including such disparate entities as growers' associations and state workforce agencies. One significant advantage of the BLS OES is that because it is within the control of the Department, it can be refined and improved over time with the specific needs of the H–2A program in mind.

One opposed commenter argued that the high concentration of FLCs in the OES survey data will necessarily lead to depressed AEWRs, because FLCs employ disproportionately high concentrations of undocumented workers and typically pay their employees low wages. If this assertion was true, one would expect that average OES wage rates for crop workers would always be below, and in many cases substantially below, the average FLS wage rates. The data presented by this commenter, however, show that this is not the case. According to that data, the average OES crop worker wage rates in many States (although not in a majority of States) are actually higher than average FLS field worker wage rates, including Idaho (12.16 percent higher), Louisiana (13.3 percent higher), New York (6.73 percent higher), Washington (5.78 percent), and Virginia (5.45 percent higher). Louisiana, New York, and Virginia are all in the top ten States among H–2A users. Unsurprisingly, because OES data is more refined than FLS data, it produces wage rates that are higher than FLS wage rates in some places, and lower than FLS wage rates in other places. For example, a recent CRS Report found that FLS data ''may overestimate the wages of crop workers and underestimate the wages of livestock workers and farm equipment operators.'' CRS Report at 16. Because the OES survey disaggregates this wage data, it would be expected that moving from the FLS to the OES survey for the calculation of AEWRs would result in crop worker wage rates going down in some places, and livestock and farm equipment operator wages going up in some places. In fact, this is precisely the effect that the CRS Report concluded was likely to occur. *Id.* at 15–17.

The data simply does not support the picture painted by the commenter of an OES survey producing wage rates that are uniformly low and severely depressed. Although the Department assumes that it is true that the wages paid to unauthorized workers are reflected in some OES data, *see* CRS Report at 18 (''In labor markets with a large concentration of unauthorized farmworkers, wage data from the OES survey may, to some extent, reflect the wages paid to unauthorized workers.''), that is undoubtedly true of FLS data as well. The PhD economist's analysis submitted by one commenter, for example, found that ''[a] second limitation regarding the FLS is that undocumented workers are no doubt in the survey and their wage is used in the calculation of AEWRs.'' This does not provide a sound basis for choosing between the two surveys.

Some commenters questioned the statistical reliability of OES wage estimates for detailed geographic areas, noting that more detailed areas have reduced samples and high relative standard errors. The Department's Foreign Labor Certification Data Center takes data quality into account when updating its Online Wage Library and adjusts the geographic areas used to derive wage estimates as needed to ensure data reliability. A ''GeoLevel'' variable indicates the kind of adjustment, if any, that has been made:

> If the data used to calculate the wage estimate came from the actual metropolitan statistical area (MSA) or balance of state (BOS) area the GeoLevel code will equal ''1.''
>
> If there were no releasable estimates for the desired area then the wages are for the area indicated plus its contiguous areas. This is signified by a GeoLevel ''2.''
>
> If there were no releasable estimates for the area, or for the area plus contiguous areas the wage is calculated from statewide data, indicated by a GeoLevel equaling ''3.''
>
> Finally, if there is no releasable estimate for the state, the national average is used. This is indicated by GeoLevel ''4.''

The application of these statistically sound methodologies takes into account the fact that wage data in some local labor markets is limited, and provides the best wage rate approximations available. No wage survey is perfect. The OES accounts for those places

where data is limited by borrowing aggregate data to produce the best local wage rate approximation possible. The OES surely is not always precisely correct as to the going wage rates for every occupation in every geographic locale, but its statistically sound methodology will on the whole produce wage rates that are far more refined and accurate than the broad, region-based FLS.

One commenter considered the Department's criticism of the multi-state nature of the USDA surveys to be misplaced: ''[w]hile agricultural labor markets for seasonal, labor-intensive crops have a local component, an interstate character to these markets emerges in the presence of migratory workers that move from State-to-State and crop-to-crop.'' The commenter went on to note that ''Broad regional wage standards are appropriate in this context, where more localized rates might unfairly disadvantage workers employed in areas with only a small number of potential employers, who can collude to keep wages low.'' Even if the commenter's view about an interstate market for wages of migratory workers were correct, however, the current structure of the AEWR offers no support for the argument that the USDA survey should be retained. The FLS's regional divisions bear virtually no resemblance to any traditional interstate agricultural markets or traditional migratory work patterns or flows. Wage estimates from the OES are well suited to capture substate wage differences such that the Department may tailor H–2A certification decisions and required wage rates to reflect local labor market conditions.

A group of farmworker advocacy organizations criticized the Department for failing to provide a better explanation of how AEWRs will be calculated using OES data. The calculation of OES wage rates is no great mystery, as OES wage rates are currently used for both the H–1B and H–2B programs. A recent CRS report explains how wage rates are determined using FLS and OES survey data. *See* CRS Report at 3–10. The underlying statistical methodologies for determining OES wage rates are, of course, quite complex. Nevertheless, the Department will attempt to distill the process for determining wage rates using both the FLS and the OES survey here:

The FLS surveys between 11,000 and 13,000 farms and ranches each quarter on multiple subjects, including the number of hired farm workers, the gross wages paid to workers, and their total hours worked. Only farms and ranches with value of sales of $1,000 or more are within the scope of the survey. ''Hired farm workers'' are defined as ''anyone, other than an agricultural service worker, who was paid for at least one hour of agricultural work on a farm or ranch.'' The survey seeks data on four types of hired workers: field workers, livestock workers, supervisors, and other workers.

USDA, through the National Association of State Departments of Agriculture, uses four collection methods for the FLS: mail, CATI (computer-assisted telephone interviews), personal visits (for larger operations), and online (only about 2 percent of respondents). The FLS sample is distributed across the entire country; however, the geographic detail covers just 15 multi-state regions and 3 stand alone states and thus is much more limited than the OES survey. The table below lists the sample size by region.

QUARTERLY FARM LABOR SAMPLE SIZE, BY REGION, 2008–09 [1] (OCTOBER, JANUARY, AND APRIL) [2]

Region	Sample
Northeast I	570
Northeast II	498
Appalachian I	546
Appalachian II	654
Southeast	588
Florida	604
Lake	846
Corn Belt I	840
Corn Belt II	672
Delta	534
Northern Plains	846
Southern Plains	960
Mountain I	354
Mountain II	309
Mountain III	263
Pacific	526
California	1,329
Hawaii	404
U.S.	11,343

[1] Includes Ag Services for CA and FL

[2] July sample is approximately 13,000 at U.S. level.

Source: National Agricultural Statistics Service, USDA.

USDA calculates and publishes average wage rates for four categories of workers each quarter. Wage rates are not calculated and published for supervisors or other workers, but just for field workers, livestock workers, field and livestock workers combined, and total hired workers. Within the FLS, the ''wage rates,'' or average hourly wage, by category are defined as the ratio of gross wages to total hours worked. To the extent workers receive overtime or other types of incentive pay, the average wage rate would exceed the workers actual wage rate. Because the ratio of gross pay to hours worked may be greater than a workers' actual wage rate, other statistics agencies, such as BLS, refer to the ratio as ''average hourly earnings,'' and not as hourly wages or wage rate.

The FLS-derived wage rate estimate for the four categories is published quarterly, and annual averages are published as well. With wage information on just two agricultural occupation categories, the FLS has very little occupational detail relative to OES. The FLS also calculates average wage rates in two other categories by combining the average wages of other types of workers. The Department uses the regional annual average for the category ''field and livestock workers combined'' as the annual AEWR for each state within a given geographic region.

In contrast, the OES survey directly collects a wage rate (within given intervals) by occupations defined by the Office of Management and Budget's (OMB) occupational classification system, the Standard Occupational Classification (SOC) system code. Specifically, ''wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous-duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. Excluded is back pay, jury duty pay, overtime pay, severance pay, shift differentials, nonproduction bonuses, employer cost for supplementary benefits, and tuition reimbursements.''

The OES survey collects occupational employment and wage data by means of a matrix in which employers report the number of employees in an occupation and in a given wage range. The wage intervals used for the May 2007 estimates are as follows:

Interval	Hourly wages	Annual wages
Range A	Under $7.50	Under $15,600
Range B	$7.50 to $9.49	$15,600 to $19,759
Range C	$9.50 to $11.99	$19,760 to $24,959

Interval	Hourly wages	Annual wages
Range D	$12.00 to $15.24	$24,960 to $31,719
Range E	$15.25 to $19.24	$31,720 to $40,039
Range F	$19.25 to $24.49	$40,040 to $50,959
Range G	$24.50 to $30.99	$50,960 to $64,479
Range H	$31.00 to $39.24	$64,480 to $81,639
Range I	$39.25 to $49.74	$81,640 to $103,749
Range J	$49.75 to $63.24	$103,480 to $131,559
Range K	$63.25 to $79.99	$131,560 to $166,399
Range L	$80.00 and over	$166,400 and over

The mean hourly wage rate for all workers in any given wage interval cannot be computed using grouped data collected by the OES survey. Instead, the mean hourly wage rate for each of the 12 intervals is calculated using data from BLS's National Compensation Survey (NCS). Although smaller than the OES survey in terms of sample size, the NCS program, unlike OES, collects individual wage data.

Once the mean hourly wage rates for the 12 intervals are determined, the mean hourly wage rate for a given occupation is calculated. It is defined as:

Total weighted wages that all workers in the occupation earn in an hour/ total weighted survey employment of the occupation.

Because the OES wage data are collected in intervals (grouped), it does not capture the exact wage of each worker. Therefore, some components of the wage variance are approximated using factors developed from NCS data. A Taylor Series Linearization technique is used to develop a variance estimator appropriate for OES mean wage estimates. The primary component of the mean wage variance, which accounts for the variability of the observed OES sample data, is estimated using the standard estimator of variance for a ratio estimate. Within each wage interval, there are also three types of variance estimated from the NCS. They represent the variability of the wage value imputed to each worker; the variability of wages across establishments; and the variability of wages within establishments. In short, the estimates of OES relative standard errors for wages take into account the sampling error associated with OES components of the wage estimator and also error associated with the NCS components of the estimator that are used for the mean wages for each interval.

The Department hopes this explanation helps.

Some commenters critiqued the OES survey as not being as timely as the FLS. A group of farmworker advocacy organizations claims that ''OES is out of date and harms U.S. workers.'' It is true that the lag between the survey reference period and data publication can be greater for OES than for FLS. But such lag simply reflects the greater scope of the OES survey, which collects detailed employment and wage data from approximately 200,000 establishments every six months. The rolling three-year sample used in OES reduces year-to-year volatility in the wage estimates, and as a result, it is highly unlikely that the one-year period between the reference period and data publication would result in substantively different wage estimates if the lag were reduced.

One commenter considered it problematic that the OES reference months are May and November, which they said ''may not be the best approach if one is interested in farm workers.'' This commenter's presumption appears to be that farm workers on payrolls in some other unspecified months may have higher wages than those during the OES reference months. The Department did not identify any evidence, however, to support this hypothesis. The criticism could be equally applied to the reference months used in the USDA FLS. Available data indicates that virtually all workers are paid a constant minimum hourly rate during their tenure and are not paid different rates in different months. Estimates from the FLS do not show a clear cyclical pattern in wage rates, suggesting that there is little seasonal variation at an aggregate level.

The Department has considered these comments and re-examined the wage surveys. Taking into account the pros and cons of both surveys, the Department concludes that the advantages to the OES survey make it the best data source available for determining applicable wages in the H–2A program. In fact, a recent CRS Report found that the Department's proposal to use the OES survey to calculate AEWRs would likely have precisely the effect the Department intends it to. The report concluded that ''[u]nder the proposed rule, the AEWR should more closely reflect the wages of farmworkers in local labor markets.'' CRS Report at 18. Furthermore, in those local labor markets where AEWRs are currently above true market rates, and the Final Rule's new wage-setting methodology therefore results in lower AEWRs, ''the rule should create an incentive for employers to hire more H–2A, as opposed to unauthorized, workers.'' *Id.* at 13. While the full impact of the new wage-setting methodology cannot be forecast with precision, *id.* at 18, the Department on the whole believes that these predicted changes will better protect the wages and working conditions of U.S. workers.

Therefore, the Final Rule adopts the NPRM's proposal to institute an alternative methodology for determining the AEWR that will more accurately measure market-based wages by occupation, skill level, and geographic location. A more accurate and refined AEWR methodology will produce an AEWR that more closely approximates actual market conditions, which will, in turn, help protect the wages and working conditions of U.S. workers. Under the Final Rule, the Department will utilize the BLS OES data instead of USDA FLS data.

(h) The Department's Decision To Set Wages for Four Skill Levels

Independent of its decision to use the OES survey to set AEWRs, the Department has decided to take advantage of the OES data feature that allows wage levels for each occupational category in each geographic locale to be set at four skill levels. The Department made this decision for a variety of legal and policy reasons.

First, the Department believes that it is required by statute to supply wages at the four separate skill levels. Section 212(p)(4) of the INA states that ''[w]here the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.'' Although this provision was enacted in the context of H–1B

reform, it is the only paragraph in Section 212(p) that does not reference any specific immigration programs to which it applies, and there is no legislative history indicating that it was meant to apply only to the H–1B program. Although OES data is being used in this particular instance to set AEWRs, the provision on its face still seems to apply, since the OES is ''a governmental survey to determine the prevailing wage,'' and since the Department has decided to set AEWRs at prevailing wage rates. Thus, the Department believes that it is bound by Section 212(p)(4) to offer four wage levels.

Second, even if the Department were not legally required by Section 212(p)(4), the provision does represent a congressionally approved method for setting prevailing wage rates. The Department uses four wage levels both in the H–1B program, which is limited to skilled workers, and the H–2B program, which primarily serves low-skilled jobs. The Department is thus familiar with the administration of a four-level wage system, and believes that its use in these other programs has proved successful.

Finally, the use of four wage levels that are roughly tied to skills and experience will add further precision to the AEWRs, thus serving the Department's above-discussed objectives. Although the four wage levels are determined arithmetically rather than by surveying the actual skill levels of workers, the resulting wage rates reflect the Department's experience that within occupational categories, workers that are more skilled and more experienced tend to earn higher wages than those that are less skilled and less experienced. This is apparently Congress's experience as well, as it has expressly approved the use of four wage levels when setting prevailing wages.

The CRS Report on the Department's proposal, for example, found that the Level I wage for agricultural equipment operators is above the current AEWR in many areas, and that the Level III and Level IV wages for agricultural equipment operators were generally much higher. CRS Report at 17. The Department believes that more highly skilled and experienced agricultural equipment operators generally are paid higher wages than novice ones, and the wage scale that will be used by the Department thus seems fully appropriate. Indeed, if the Department failed to set higher adverse effect wage rates jobs requiring greater skills and experience, U.S. workers capable of performing such jobs might find their ''true market'' wages undercut by employers' ability to fill the jobs with H–2A workers making merely average wages.

A group of farmworker advocacy organizations, as well as many other commenters, argued that allowing employers to pay wage rates that are below the average for an occupational category will necessarily adversely affect U.S. workers. The purpose of the four-tier wage system, however, is to generate the best approximation possible of the actual prevailing wage rate for jobs requiring various levels of experience or skill. When the required wage rates are accurate, they do not represent a below-average wage rate, but rather represent the wage rate that is prevailing for that particular kind of job. Using a single average wage rate for all jobs performed within a particular occupational category ignores the fact that certain jobs require higher levels of experience and skill, and may adversely affect U.S. workers who are capable of performing such jobs. It is also worth noting that Congress has directed that, when determining prevailing wage rates, the Department should ''provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.'' Although this Final Rule is actually changing the methodology for determining adverse effect wage rates, the Department's determination to set AEWRs at locally prevailing wage rates makes it fully appropriate to borrow Congress's prescribed prevailing wage rate methodology.

The same commenter objected that the ''proposed methodology for the wage levels is purely an arithmetical formula'' and ''does not relate to skills or experience in agriculture.'' It is true, as the Department has already noted, that the skills-based wage levels are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula. Congress has explicitly endorsed the use of such an arithmetic approach, however: ''Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the last level.'' INA sec. 212(p)(4). No methodology for determining prevailing wage rates will be perfect, but this methodology is currently used in both the H–1B and the H–2B programs. Moreover, the recent CRS Report that studied the Department's proposal in detail did not conclude that use of the congressionally created arithmetic formula is particularly problematic.

The same commenter argued that the use of four wage levels would be too complicated for the Department to administer. This comment ignores the fact that the Department already administers a four wage level system for the H–1B and H–2B programs.

For purposes of clarity, and in response to comments questioning the application of a four-tiered wage system, the Department has inserted text into the Final Rule specifying how the four H–2A wage levels will be applied. The inserted language is substantially similar to existing provisions establishing the four skill levels for the H–1B and H–2B programs, which most commenters assumed would apply. The four skill levels will afford the Department and employers using the H–2A program the same opportunity that is available under other similar programs administered by the Department to more closely associate the level of skill required for the job opportunity. This skill level precision complements the geographic and occupational specificity of the OES wage estimates. The Department considers the lack of such precision to be a shortcoming of the current AEWR.

There also appeared to be some confusion among some of the commenters who believe the NPRM language allows an employer to choose the level and the wage survey and propose its ''offered wage rate'' to the NPC for approval. That is not the case. After reviewing the employer's request for a wage rate, including job description and skill level, the Department will compare the AEWR, state and federal minimum wage, and piece rate to determine the highest wage applicable to the job opportunity described in the employer's request. The Department will assign the appropriate wage (the offered wage rate) to the employer's job opportunity and that wage must be utilized in recruiting for the position.

(i) Other Considerations Affecting the Department's Decision

Although the changes in wage rates that will result from the Department's decision presumably will make local AEWRs more reflective of actual local labor market conditions, to counteract the potential for wage reductions in some areas, the Department has decided to retain in the Final Rule the NPRM's proposal to use the future (effective July 24, 2009) FLSA minimum wage of $7.25 as the floor for any OES-derived AEWR. This basic wage floor will provide a fundamental protection to both foreign temporary workers and U.S. workers that will ensure that AEWRs cannot be

lower than the new federal minimum wage even though that wage will not be legally required until 2009.

Moreover, even in those instances where the use of OES data may result in lower AEWRs for H–2A workers in the short term as compared to the current AEWR methodology, the Department is confident that the wages and working conditions of U.S. workers will be protected because the total costs of hiring H–2A workers are higher than the hourly AEWR alone reflects, and employers focus not only on wages when making hiring decisions, but on a workers' total cost.[10] The program requirement that employers pay for H–2A workers' transportation and lodging, as well as the administrative expense of filing H–2A applications with several different Government agencies, add substantial additional costs to the employment of H–2A workers. The additional costs beyond wages associated with utilization of foreign labor under the H–2A program are an important consideration that provides significant protection for U.S. workers.[11] It is expected that U.S. workers in similar occupations, with similar skills and working in the same locality, would likely be able to command higher hourly wages than H–2A workers and at least equivalent benefits because the additional cost considerations associated with utilization of the H–2A program provide an economic incentive for employers to seek out and hire U.S. workers instead of H–2A workers.[12] And of course, U.S. workers also have the protection of the rule requiring agricultural employers to first attempt to recruit U.S. workers before they can employ H–2A workers.[13]

A group of farmworker advocacy organizations commented that many employers use piece rates abusively and in a manner that undermines the AEWR. Of course, as the commenter acknowledges, piece rates cannot in and of themselves lead to the payment of sub-standard wages, since § 655.104(l)(2)(i) requires an employer to supplement a piece-rate worker's effective hourly rate of pay to the level of the applicable AEWR if the pay would otherwise be less. This commenter argued that many employers avoid the obligation to supplement by deliberately underreporting the number of hours worked by piece-rate workers during a pay period. Such fraud is already clearly prohibited by the Final Rule, however. The commenter also argued that piece rates are abusive because they ''induce workers to higher levels of productivity'' by providing ''the opportunity to earn more than the worker would earn on an hourly rate.'' The Department does not consider the opportunity to earn average hourly wages that are higher than the AEWR through more industrious work to be abusive; it is an opportunity to earn higher pay, nothing more.[14] If the worker fails to earn enough under the offered piece rate to meet the applicable AEWR, the worker is not penalized for it; to the contrary, as mentioned previously, under such circumstances the worker's pay is required to be supplemented to the level of the AEWR. Of course, if the worker was in fact penalized by the employer in some way for failing to accomplish enough piece rate work, the penalty would effectively convert the piece rate into a productivity standard. Such productivity standards are policed through § 655.104(l)(2)(ii) and (iii) of the Final Rule, however, which require that piece rates be no less than the piece rates prevailing and that productivity standards be normal, meaning that productivity standards may not be unusual for workers performing the same activity in the area of intended employment.

For the reasons discussed above with respect to § 655.105(g) of the Final Rule, the Department has inserted language in this section specifying that employers are required to adhere for the duration of a work contract to the AEWR rate that is in effect at the time recruitment for a position is begun. Newly published AEWRs shall not apply to ongoing contracts, but only to new contracts the recruitment for which is begun after the publication of the new AEWR. The Department has also added a new § 655.108(h) specifying that employers are required to retain NPC wage determinations for a period of three years, which is consistent with the general record keeping provisions of the Final Rule. Other changes to the text of this section in the Final Rule are non-substantive and were made for purposes of clarity.

Section 655.109—Labor Certification Determinations

(a) Section 655.109(b)—Timeframes for Determination

The Department did not propose any changes to the requirement that it issue a determination on an application no later than 30 calendar days before the date of need. An individual employer suggested that certifications should be issued 60 to 90 days before the employer's date of need rather than the 30 days currently required. A State government representative suggested the CO should be required to issue the determination by the earlier of 15 days after receipt of a complete application or 30 days before the date of need to allow USCIS and the State Department more time to process a petition. A professional association suggested no more than 40 days and no less than 30 days before the date of need for issuance of the final determination. An association of growers/producers recommended the timeframes should be simplified and standardized to encourage grower participation. Specifically, it recommended the pre-filing recruitment be conducted 90 days prior to the date of need and approval occur no later than 45 days prior to the date of need.

The requirement that, if an application is timely filed, complete and approvable, or is modified to be approvable within the statutory timeframes, the Department issue a certification no later than 30 days prior to the date of need, is statutory and cannot be changed by regulation. While employers can file earlier in anticipation of their date of need, statutory limitations prevent the Department from requiring employers to file any more than 45 days before their date of need. The Department believes the adjustments made to recruitment and filing timeframes adequately address the issue of filing times. Employers are encouraged to file as early as possible and to take care that their submitted applications are complete to minimize potential delays.

[10] *See* CRS Report at 18.

[11] One commenter pointed out that H–2A workers are also relatively cheaper than U.S. workers in some respects, because employers do not have to pay Social Security or unemployment insurance taxes for H–2A workers. On the whole, however, the substantial costs to house and transport H–2A workers, together with the not insignificant costs of the application process, substantially exceeds these savings, making H–2A workers on the whole more expensive to employ than U.S. workers who are being paid the same wage rates.

[12] U.S. workers hired in response to recruitment required by the H–2A program are entitled to at least the same benefits received as those received by H–2A workers.

[13] A group of farm worker advocacy organizations argued that the AEWR becomes the effective maximum wage for U.S. workers. Available data does not support this assertion, however. Indeed, this same commenter stated that a Pennsylvania tomato farmer paid his workers $16.59 an hour on average, even though the 2008 AEWR in Pennsylvania is only $9.70.

[14] The Department notes that the same opportunity to earn average hourly rates of pay that are above the AEWR must under the Final Rule be offered to U.S. workers before it can be offered to H–2A workers.

(b) Section 655.109(b)—Criteria for Determination

The Department included a provision in the NPRM to outline the criteria upon which a determination is made. As commenters noted, however, the criteria stated in this provision were redundant of other provisions in the regulation. The Department has accordingly revised this provision to eliminate unnecessary duplication within the rule, which could have caused confusion among program applicants.

(1) Labor Disputes—§ 655.109(b)(4)(i)

Two associations of growers commented on the certification criteria in proposed § 655.109(b)(4)(i). These commenters stated that labor disputes in agricultural employment are not covered by the National Labor Relations Act and, therefore, there is no official process for determining the existence of a labor dispute. The proposed language in § 655.109(b)(4)(i) of the NPRM was intended to replicate the language in the current regulations at § 655.103(a), which examines whether the ''specific'' job opportunity for which the employer is requesting H–2A certification is vacant because ''the former occupant'' is on strike or being locked out in the course of a labor dispute. That provision was carefully crafted to bar only certification of the single job opportunity vacated by each particular worker who went on strike or was locked out, and not all jobs requested to be certified. However, proposed § 655.109(b)(4)(i) was in conflict with proposed § 655.105(c). The Department has removed the language in § 655.109 of the NPRM regarding labor disputes because of the redundancy and overlap with the labor dispute provision in § 655.105. As explained in the discussion of § 655.105(c), the Department has also reverted in § 655.105(c) to the language concerning labor disputes that is found in the current regulations. The Department believes these changes adequately address the comments on this provision.

(2) Job Opportunity—§ 655.109(b)(4)(vi)

A professional association commented that the job requirements, combinations of duties, or other factors that may make a specific application unique should be acceptable if justified by business necessity. This association asserted that nothing in the INA requires that a specific employer perform any job in exactly the same way as other employers perform the job. An association of growers/producers agreed and also pointed out that under the proposed provisions a grower using technology not yet considered normal practice could be denied H–2A workers due to its job requirements and/or combination of duties.

As is explained above in the discussion of § 655.104(b), the Department agrees that, as a general matter, employers are in a far better position than the Department to assess what job duties workers at a particular establishment in a particular area can reasonably be required to perform. The Department has therefore altered § 655.104(b) to conform more closely to the language of the statute, and has limited its application to job qualifications. Where a listed job duty serves as a de facto job qualification because the listed duty requires skills or experience that agricultural workers do not typically possess, however, the Department reserves the right under § 655.104(b) to treat the listed job duty as a job qualification, and to apply the ''normal'' and ''accepted'' standard that is set forth in the statute and recapitulated in the regulations in determining whether the qualification is appropriate. Because § 655.104(b) of the Final Rule contains the Final Rule's restrictions on job duties and job qualifications, § 655.109(b)(4)(vi) of the NPRM has been eliminated as redundant.

(3) Extrinsic Evidence

A group of farmworker advocacy organizations suggested the regulation should be clear that the CO can consider extrinsic evidence in making a final determination. The organization believed the CO should be able to deny certification to an employer who has engaged in violations of employment-related laws whether or not there has been a final finding to that effect and whether or not the employer has previously participated in the H–2A program. The commenter also suggested that if the CO has reason to doubt the accuracy of any of the attestations or assurances, the CO should have the authority to request additional information and the authority to deny the certification. In the same vein, the commenter recommended the regulations should include a process by which the CO will receive and consider supplemental information from SWAs, workers and others.

The Department does not agree that adding explicit language to provide the CO with authority to consider extrinsic evidence is necessary. The Final Rule allows for certification to be based solely on the criteria outlined in § 655.107(a). Adding a process for the provision of extrinsic evidence would create an adversary process for the granting of a benefit, with COs at a loss as to how to evaluate such evidence in the context of the application and unable to evaluate its authenticity, particularly in light of the tight statutory timeframes given to the Department to adjudicate applications. Workers who are affected by an agricultural clearance order have a complete process in 20 CFR Part 658, subpart E (incorporated by reference in § 655.116) through which to submit and obtain resolution of their complaints. Anyone having information bearing upon an H–2A employer may avail themselves of the protections contained within these regulations and all other mechanisms, such as filing a complaint with WHD. Following these procedures will ensure that the Department receives the information in a way in which it can be most useful.

(c) Section 655.109(d)—Accepting Referrals of U.S. Workers

A large association of agricultural employers suggested that the proposed regulations and the Final Determination letter should clarify that the obligation to continue to accept referrals of eligible U.S. workers continues only until the employer has accepted the number of referrals of eligible U.S. workers equal to the number job openings on the *Application for Temporary Employment Certification.* The Department agrees with this statement and has included new language to that effect in § 655.109(d). The Department has also modified the provision to conform to the Final Rule's new definition of the ''end of the recruitment period'' that is set forth in § 655.102(f)(3).

(d) Section 655.109(e)—Denial Letters

A major trade association pointed out the proposed regulation at § 655.109(e) states that if the certification is denied the Final Determination letter will state ''the reasons the application is not accepted for consideration.'' The association commented it was their presumption this language was used inadvertently but asked for clarification if its use was intentional. The Department's use of the language ''not accepted for consideration'' was, in fact, inadvertent. Section 655.109(e) has now been revised to read: ''the reasons certification is denied.'' The Final Rule also clarifies that the Department will send determination letters to employers ''by means normally assuring next-day delivery,'' which may include e-mail or fax.

(e) Sections 655.109(e), (f), and (g)—Appeal Process for Denied and Partial Certifications

The proposed regulation did not explicitly reference appeal procedures in either the Denied Certification (§ 655.109(e)) or Partial Certification (§ 655.109(f)) provisions. Although the proposed ''Administrative review and de novo hearing'' procedures (§ 655.115) do reference a decision by the CO to deny, a major trade association commented that the regulation should be clarified by specifying the appeal procedures in § 655.109. The Department appreciates this comment and has inserted text in paragraphs 655.109(e), 655.109(f), and 655.109(g) stating that the final determination letter will provide the procedures for appeal in either situation. Employers should be aware that, if a partial certification is received, only the period of need or the availability of U.S. workers are at issue and thus subject to appeal.

(f) Partial Certifications—§ 655.109(f)

The proposed regulations contained a provision at § 655.109(f) for partial certifications. The provision stated that ''the CO may, in his/her discretion, and to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H–2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise.'' Although the current regulations at § 655.106(b)(1) do not contain the phrase ''partial certification,'' they do provide that the Administrator/OFLC shall grant the temporary agricultural labor certification request ''for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available.'' A farmworker/community advocacy organization voiced its concern that the deletion of the language in the current regulation and the addition of language providing for discretionary partial certifications violates the statutory precondition for certification that the employer not have U.S. workers available to fill its job opportunities. This organization expressed the opinion that the new language would allow employers to import more foreign labor than they actually needed.

The Department has retained the provision regarding partial certifications, with one modification. The Department believes that the language describing partial certifications provides more clarity regarding the process of obtaining a certification where the Department determines that fewer workers than were originally requested in the application are required. A lack of available U.S. workers is a necessary precondition to filing an application. Allowing a partial certification covers situations where the employer recruited for a need of X workers, finds sufficient workers to meet only a part of its need, and thus still needs X workers minus the number of workers successfully recruited. An employer who finds sufficient workers to meet its entire need cannot, by statute and this pre-filing recruitment model, receive a certification. The Department retains the authority to reduce the number of positions requested in the event the information contained in the application demonstrates an availability of workers who were eligible and applied for the position. Since a partial certification is issued by subtracting the number of available workers from the total number of workers requested, the Department does not believe this provision will allow employers to import more workers than they actually need. To make it clear that the deduction of able, willing, qualified, and available U.S. workers is non-discretionary, the Department has added language to the provision stating that ''[t]he number of workers certified shall be reduced by one for each referred U.S. worker who is qualified, able, available, and willing.''

A major trade association commented that the proposed provision has no counterpart in the existing regulations and that the Department articulates no rationale for why such a provision is necessary or how it will ensure compliance. The association recommended the provision be deleted from the final regulations. The association also expressed concern that there was no due process for an employer whose application was arbitrarily changed. This association believed the CO should issue a Notice of Deficiency, require the submission of a modification and offer an appeal process.

As explained above, the ability to issue a partial certification is necessary where the Department receives an application with respect to which eligible and qualified U.S. workers have been or are subsequently successfully recruited prior to certification. A modification process is one option the Department considered to address such a situation, but given the likely time frame of filing by employers, a modification would often not be possible. In response to the comment regarding an appeal process, the Department has added language regarding appeal provisions to this provision in the Final Rule.

(g) Proposed § 655.109(g), New § 655.109(h)—Fees for Certified Applications

The Department proposed the following new fee structure: an application fee of $200 for each employer receiving a temporary agricultural labor certification plus $100 for each H–2A worker certified; an application fee of $200 for each employer-member of a joint employer association receiving a certification plus $100 for each H–2A worker certified for that employer-member; and a processing fee of $100 for any amendments accepted for processing plus $100 for each additional H–2A worker certified. The proposal did not set a cap on the amount of fees to be charged as provided in the current regulations. The Department received numerous comments about the proposed fees. Many of the commenters acknowledged that an increase was warranted but strongly objected to the amount of the increase. Several commenters requested a justification for the amount of the increase and further detail regarding the activities and related costs involved in processing since the Department stated in the preamble to the proposed rule that it was updating the fees to align with ''the reasonable costs of processing'' H–2A applications, as authorized by the INA. Also in this context, commenters questioned why the fees would increase to such an extent since the Department was proposing to improve and increase access to the H–2A program. One association of growers/producers recommended that the Department determine a more reasonable processing fee and explore adding to those revenues from another source rather than seeking to recover processing costs through processing fees. A State government agency suggested that fees should be used to fund program costs incurred by the SWA instead of being deposited in the Treasury. Another commenter asserted that under the Treaty of Guadalupe Hidalgo, the application and processing of the application for H–2A temporary workers who are Mexican citizens must be free of charge and, therefore, employers seeking to employ such nonimmigrant workers should not be charged processing fees.

A number of associations of growers/producers, a trade association, and several individual employers commented that the increased fees would add to the cost of an already

expensive program and, if the application process is to become more efficient as proposed, believed a fee increase would be counterproductive. Some commenters stated the increase in fees, when coupled with other increased costs, could drive farmers out of business or dissuade many from participating in the program at all. Another association of growers/producers suggested the fee structure should take into consideration all of the fees growers must pay and suggested a fair compromise would be to reduce the fees for farmers using H–2A workers, ask workers to pay for costs incurred in traveling to the U.S. port of entry closest to the employer, and require the employer to bear the costs from the point of entry to the farm. A trade association also commented that many growers utilize workers for a short period only and that they believed under the proposed regulations a grower's cost for 10 H–2A workers would increase to $10,000 in application fees and the total cost could rise to almost $20,000 before any revenue would be gained through harvesting of the crop.

Several commenters offered specific suggestions for setting the fee amounts. One association of growers/producers suggested that any increase in fees should be tied to the cost of inflation or the consumer price index and not related to the cost of processing. A United States Senator and others stated a doubling of the fees would be acceptable. One individual employer/farmer suggested the fees should remain at current levels. A trade association commented that fees should be based on the number of employers certified rather than the number of applications.

Many commenters specifically requested the inclusion of a cap on the amount of fees and commented that the elimination of a cap might cause participants to abandon the program.

Following consideration of all the comments, the Department has decided to retain the current fee structure rather than that proposed in the NPRM. At this time, the Department believes that it is of utmost importance to increase accessibility to the program and recognizes that the proposed increase in fees could have discouraged both potential new users and current users of the program. Accordingly, the Department has reverted to the current fee structure for both employers and for associations. Moreover, the increased fee would not have helped the program operate more efficiently at this time because the H–2A fees received by the Department are, pursuant to statute, deposited directly in the Treasury as miscellaneous receipts. Any change in that requirement would require a statutory change by Congress.

The Department may, in the future, revisit the fee structure and propose changes in the amount of the processing fees. The Department appreciates the many comments received requesting additional information on the actual costs involved in the processing of applications and finds these requests to be reasonable. Since the Department is changing the program to an attestation-based process, it does not have experience with the actual operation of the program under the new process and, therefore, agrees that it should not revise fees until cost information using the new model is available.

As noted above, the Department has decided to retain the current fee structure, which includes a limit on the fee amount to be paid by one employer. The Department agrees with the commenters and believes a cap on fees paid by an applicant is appropriate and should be included in any future proposal. The failure to include such a cap in this proposal was an oversight.

The Department also received comments on the proposed $100 processing fee for an amendment, coupled with a fee of $100 for each additional H–2A worker certified on the amendment. A trade association noted that amendments to applications can be for many reasons, including increasing the number of workers requested, adjusting the date of need, and making minor technical amendments to the application. It commented further that while it is reasonable to charge the additional certification fee for an amendment to increase the number of workers in order to avoid creating a disincentive for understating the number of workers on the original application, it is not reasonable to charge a fee for other amendments, including minor technical amendments.

The parenthetical phrase ''(except joint employer associations)'' was clarified in the Final Rule by replacing it with ''(except joint employer associations, which shall not be assessed a fee in addition to the fees assessed to the members of the association).''

In keeping with the retention of the current fee structure, no fee for amendments is included in the final regulation.

Section 655.110—Validity and Scope of Temporary Labor Certifications

Several minor, non-substantive changes were made to the language of this provision for purposes of clarity and to conform to other provisions of the Final Rule. All substantive changes to the text of this provision are addressed below.

(a) Scope of Validity—Associations—§ 655.110(c)

The Department made no changes in the proposed regulation regarding certifications provided to associations acting as joint employers. A farmworker/community advocacy organization suggested that the Department should include language currently in the H–2A Program Handbook limiting such applications (and certifications) to those involving ''virtually identical job opportunities.'' The Department declines to adopt this suggestion. The governing statute expressly provides at § 218(d)(1) of the INA for the filing of H–2A applications by associations of agricultural producers, but does not provide a ''virtually identical'' limitation. Individual employers are permitted under the current regulations to offer job opportunities with a variety of non-identical job duties, and the Department has seen no evidence that this has adversely affected U.S. workers.

Section 655.104(b) of the Final Rule limits the job qualifications that employers may impose to those that are normal and accepted qualifications required by non H–2A employers in the same or comparable occupations and crops. Where a combination of job duties or job opportunities serves as a de facto job qualification because the listed duties and opportunities require skills or experience that agricultural workers do not typically possess, the Department reserves the right under § 655.104(b) to treat the listed job duties or job opportunities as job qualifications, and to apply the ''normal'' and ''accepted'' standard that is set forth in the statute and recapitulated in the regulations. The Department believes that this framework is most consistent with the statute and will adequately protect U.S. workers from adverse effects.

(b) Redetermination of Need—Section 655.110(e)

The proposed regulations omitted the provision in current regulations allowing employers to request an expedited ''redetermination of need'' if a labor certification is denied, or a partial certification is granted, because U.S. workers are available and, subsequent to the denial or partial certification, the U.S. workers identified as available are no longer available. The Department received several comments objecting to the deletion of this provision and requesting its inclusion in

the final regulations. Two commenters pointed out the requirement in Section 218(e) of the INA mandating a new determination within 72 hours in cases of unavailability. A trade association also mentioned that Congress was sufficiently concerned about the failure of domestic workers to report that it included a heavy obligation on the Department to re-establish need. Others commented that the need for a redetermination procedure is even greater since the pre-filing recruitment efforts will put job commitments farther in advance of the dates of need and thereby increase the likelihood of U.S. workers not reporting. A trade association provided data from a farmer to illustrate the need for a process for redetermination and also described a procedure they would like implemented wherein U.S. workers referred by the SWA would be asked to sign a form indicating their intention to return for work on the date of need and to work for the duration of the contract. The goal of this process would be to not have the number of jobs certified be reduced by the total number of referrals but rather by the number of workers who signed the form.

In response to the comments, the Department has included a new section, § 655.110(e), addressing the procedures for requesting a redetermination of need. The Department appreciates the suggestion for an additional requirement for U.S. workers to sign a form stating they will report to work but has determined such a requirement does not appear likely to alleviate the problem of ''no-shows'' among the U.S. worker population the employers seek to address. The Department, therefore, did not add the requirement.

A trade association also posed a question about handling a situation where the employer obtains sufficient commitments from qualified U.S. workers for the job opportunity during the pre-filing recruitment and is precluded from filing an application but subsequently learns that some of these workers will not honor their commitments. Since no application was filed, technically, the employer in this situation would not be able to request a redetermination. The association claimed the Congress clearly did not intend to leave employers without an adequate workforce and stated it is incumbent upon the Department to accommodate employers who are in this situation.

While the Department agrees it is unlikely Congress intended that employers should be left without an adequate workforce, the Department cannot add a provision to allow an employer who does not submit an application due to the availability of able, willing and qualified U.S. workers sufficient to meet their needs, but who subsequently discovers that not all the workers will be able to honor their commitments, to request an expedited redetermination. The Department lacks such authority under the INA; Section 218(e)(2) of the INA only authorizes the Secretary to make such expedited determinations for a certification that was denied in whole or in part because of the availability of qualified workers. However, The Department will permit an employer to file an application requesting that zero job opportunities be certified for H–2A employment because the employer has been able to recruit a sufficient number of U.S. workers. Such applications must comply with other requirements for H–2A applications to be considered complete and must be supported by a recruitment report, in which case the application will be denied. Such a denial will provide no immediate benefit to the employer, but the employer will thereafter be permitted under the statute and regulations to request an emergency reconsideration of the denial should the U.S. workers fail to show up or later abscond, leaving the employer with a rejuvenated need for H–2A workers. Language to this effect has been added to § 655.107(a) of the Final Rule.

Section 655.111—Required Departure

The Department included language in the NPRM explaining the relationship between the labor certification's validity period and the foreign worker's period of stay in the U.S. and informing employers of their obligation to notify H–2A workers who begin employment with them of the worker's responsibility to register their departure if and when required by the DHS. A trade association questioned the inclusion of this section in the Department's regulations. This association commented that it has no bearing on either the issue of the availability of U.S. workers, or whether the employment of aliens will adversely affect U.S. workers, the two issues which are within the statutory purview of the Department. A professional association commented that the Department's language in the proposed § 655.111 did not allow for transit time for workers after the expiration of the labor certification and was, therefore, in conflict with the USCIS requirements which provide a specified period of time after expiration of the labor certification before departure from the country is required.

The Department believes the provision is useful, as it strikes at the heart of the relationship between the Department's findings and the entry of workers to fulfill the terms of the labor certification. This provision does not usurp any role held under the statute by another agency; it merely emphasizes for the employer its obligation to notify workers to return home at the end of their authorized period of stay. Moreover, the Department does have an interest in ensuring that H–2A workers return to their home country at the end of their authorized work period, as they would otherwise become undocumented workers inside the United States. As described in the discussion of § 655.108, undocumented workers compete with U.S. workers for agricultural job openings without any of the protections associated with the H–2A program applying, and thus are likely to have an adverse effect on the wages and working conditions of U.S. workers.

The Department does agree, however, with the comment regarding the lack of clarity in the language used in the proposed rule. The Department notes that DHS provisions (in current regulations) require the worker be given a period of 10 days of valid status beyond the validity period of the labor certification in which to depart, and has extended that time to 30 days in their recent companion H–2A rulemaking. We have revised the regulation to acknowledge this period granted by DHS, to provide greater certainty for both employer and worker.

Section 655.112—Audits and Referrals

In the NPRM, the Department proposed the initiation of post-certification audits of applications to ensure quality control, to review compliance, and to identify abusers of the program, among other goals. The Department received several comments on these audit provisions.

One commenter felt that there was no policy or legal rationale given by the Department for this new system that includes audits. The Department believes that a sufficient policy rationale for the necessity of audits was provided in the NPRM. Reviewing the documentation attached to and supporting the attestations made by an employer in the context of an H–2A application is an essential element of the shift of the program to an attestation-based certification system. The Department, to protect the basic integrity of the process of H–2A certifications, must ensure the applications are filed in accordance with the basic obligations of the

program. The Department has the authority to enforce program responsibilities with respect to those who seek its benefits, and in particular with respect to those who receive them. The audit provides reassurance to the employer, the Department, and the affected employees that all program obligations are understood and followed.

Another commenter stated that 30 days to respond to the audit request was not enough time during growing season. The Department does not believe that audit requests will be so burdensome that they cannot be complied with relatively quickly as long as the employer has retained the required documentation contemporaneously with performing the required actions, such as keeping the tear sheet of the advertising, and retaining the final recruitment report. To partially address this commenter's concern, however, language has been added to the Final Rule specifying that employers will be provided at least 14 days to comply with an audit request.

A SWA suggested that every application be audited and some SWAs suggested they should participate in audits, and should be provided funds to do so. The Department declines to delegate the audit function to the SWAs. Audits will be conducted by the Department based on the presence or absence of certain criteria, as well as on a random basis to ensure program integrity. Moreover, dispersing audit activity among SWAs, would be at odds with the re-engineering of the H–2A process. SWAs will no longer possess the underlying documentation necessary to adequately evaluate the audit factors that will be built into the new program.

One commenter stated that ''non-program'' participants should not be included in the audit process. The Department believes participation by others in the audit process would be disruptive to program operations and therefore declines to add such a provision in the Final Rule.

A farm worker advocacy organization expressed the belief that the proposed increase in audits and penalties would not adequately address concerns related to worker protections and remarked the penalties would come too late in the process to benefit U.S. workers searching for work.

The Department believes, on the contrary, that the audit process will address concerns about worker protections. The Department will audit applications based on selected criteria as well as on a random basis. Worker protections are at the root of the H–2A program and will provide many of the criteria for audits. In addition, WHD's investigative authority is an additional and comprehensive tool to address these concerns and benefit U.S. workers. U.S. workers, additionally, have at their disposal a complaint system (found in the Job Service Complaint system regulations at 20 CFR 658 *et seq.*) to address complaints arising from agricultural job orders, such as an improper failure to accept a referral. The use of all such tools will help to ensure employer compliance with the requirements of the program.

Another commenter stated that the penalties enumerated will do little to deter abuses and that the Department should consider the complementary tool of civil money penalties for lesser violations found in the audit process. The Department cannot assess civil monetary penalties without statutory authority to do so.

One commenter stated that the enumerated penalties are so severe that farmers could go out of business and that employers should therefore be informed, in detail and in advance, about the methods, criteria and scope on which these audits and potential sanctions will be based. In addition to the explanation of the audit procedures and sanctions already provided in the Rule, the Department will develop materials for employers to assist them in understanding the various aspects of the program, including audits. However, the Department cannot reveal its audit criteria, which must be kept confidential to ensure program integrity.

One commenter suggested that the Department conduct pre-audit inspections of applications and issue a notice of violations so that there is an opportunity to correct mistakes without penalty. The Department will be reviewing applications prior to certification (and thus prior to any potential audit) as part of the approval process, and intends to issue Notices of Deficiency when such correctable deficiencies are found. We cannot, however, complete full audits in the 15 day statutory window the Department is afforded to review and certify applications.

Many commenters expressed skepticism about enforcement, saying the Department's prior enforcement in the H–2A arena has not been as vigorous as they would like. One commenter also doubted the ability of adjudicators to discover fraud and did not believe that sufficient resources existed to accomplish this function.

This Rule introduces new enforcement measures, such as certification revocation, and new grounds for the Department to impose sanctions to more effectively address violations of the terms and conditions of the labor certification. Accordingly, the Department will have greater flexibility than under the current regulation to initiate and impose sanctions. Additionally, the Department has assigned dedicated resources for these enforcement and compliance activities.

Several commenters opined that the rule will not prevent international recruitment system abuses. The Department has little control over international recruitment system abuses unless U.S. employers or their agents are involved. The new rule allows the Department to sanction the U.S. parties involved in abuses.

One commenter believed that the Department should create a new division within ETA to conduct audits and report to the Secretary on the efficacy of the H–2A program. A new division is unnecessary as the audits will be undertaken in connection with OFLC program operations and, as noted above, the Department has assigned additional resources to perform the audit function.

A farm bureau offered a rewrite of § 655.112, believing that audits should only be conducted on the recruitment portion of the application and employers should be told specifically what criteria could lead to an audit. We thank the commenter for its detailed analysis of the audit requirements, but we do not agree with its premise that audits should be limited to the recruitment portion of the application. The Department has been consistent in its refusal to disclose its audit criteria in its foreign labor programs; it cannot disclose these without risking the very integrity of the programs. The Final Rule delineates more clearly which documents employers are required to retain during the document retention period, and any of these documents may be requested during an audit.

Other changes to the language of this provision are minor and non-substantive, and were made for purposes of clarity, to insert cross-references, or to conform to changes made elsewhere in the Final Rule. For example, the reference to auditing of denied applications has been deleted to reflect the decision not to require employers whose applications are denied to retain records, explained in the discussion of § 655.102(c). Similarly, the statement that an employer's obligation to comply with the Department's audit process includes ''providing documentation within the specified time period'' has been deleted as superfluous, as the consequences of

an employer's failure to comply with the audit process are now more explicitly addressed in §§ 655.117 and 655.118.

Section 655.113–H–2A Applications Involving Fraud or Willful Misrepresentation

The NPRM proposed a new § 655.113, creating a process whereby a finding of fraud or willful misrepresentation would result in termination of processing of current applications.

One commenter expressed concern that proposed § 655.113 did not go far enough to give the CO explicit authority to deny an application because of suspected fraud or factual inaccuracy. The commenter suggested that the regulation should set forth a process that allows SWAs, workers, and others to send in information and allow the CO to consider such documentation. The same commenter feared that without a definition of ''possible fraud or willful misrepresentation'' that the Department will only use a criminal standard of guilt and thereby allow many employers who engage in lesser fraud to go unsanctioned. The Department agrees and will define such terms and evidence to be used in policy guidance rather than in the rule itself. The Department declines to permit COs to deny applications based solely on suspicion of wrongdoing. Such an undefined standard fails to put program users on notice of what is expected of them. The CO must articulate the specific criteria the applicant failed to meet and which resulted in the application being denied, as explained in § 655.109(e).

Another commenter believed that it is unfair to put the full burden on the employer for employing undocumented workers if the employer has limited capacity to verify the legality of the worker documents and whether or not they are fraudulent.

The rule is not meant to and will not punish the employer for complying with the requirements in the I–9 form to verify employment eligibility. There is nothing in the Department's regulation that would impose liability on an employer for unknowingly accepting fraudulent documents that appear authentic.

The Department has added language to this provision in the Final Rule clarifying that ''[i]f a certification has been granted, a finding under [§ 655.113(b)] will be cause to revoke the certification.'' Paragraph (b) of the NPRM has been deleted in the Final Rule as unnecessary and redundant.

Section 655.114—Setting Meal Charges; Petition for Higher Meal Charges

In the NPRM, the Department outlined the procedures for employers to petition to charge more than the established amount for meals and for appealing the denial of such a petition. In the Final Rule, the Department has revised the section to more clearly address both the establishment of the annual allowable meal charge amount and the procedures for petitioning for a higher amount. One commenter noted that the allowable amount published in the NPRM was out-of-date. This commenter is correct and the Department has updated the amount in the Final Rule. Another commenter requested that the Department define ''representative pay period'' as used in § 655.114(b). The Department believes that no further definition is necessary since the term ''representative'' is commonly defined to mean ''typical.'' In addition, the header for this section has been changed to indicate both topics that are discussed.

In addition, this section has been revised for clarity in the Final Rule. The language about petitions for higher meal charges has been removed from the first sentence of paragraph (a). All material about petition for higher meal charges is found in paragraph (b). The effective date provision concerning granted petitions for higher meal charges has been separated out and provided its own paragraph in order to enable employers to more easily understand when the higher meal charge applies. The material on the procedures for appealing denied petitions has been moved from proposed paragraph (a) to a new paragraph (c). A new sentence has also been added to the end of paragraph (a) reminding employers that all deductions for meal charges under this provision must comply with the FLSA's recordkeeping requirements, which will become relevant if the deductions bring the employee's hourly wages below the federal minimum wage.

Section 655.115—Administrative Review and De Novo Hearing Before an Administrative Law Judge

The NPRM contained a provision setting out the procedure by which an employer could request a review on the record of a certification denial, including a de novo hearing. The Department received several comments on this section.

One commenter requested that copies of certified case files should be delivered to the employer within two business days. This would require the additional expense for overnight courier service, and the Department declines to adopt such a requirement. The Department also notes that an employer would be expected to already possess copies of all of the relevant documents relating to his application.

The same commenter suggested that the rule be amended to include explicit language that hearings for debarments are available and specify the procedures for them, and state that all relevant documents and other evidentiary material, including exculpatory evidence, must be provided to the employer. The Department has adopted the suggestions of the commenter but has done so outside of § 655.115. Given the severity of debarment and revocation, the short timeframes set forth in § 655.115 are neither necessary nor appropriate for these types of determinations. Accordingly, the Department has addressed the administrative appeals procedures for debarment and revocation in § 655.118 and § 655.117, respectively. Under the Final Rule, debarment decisions are stayed pending the outcome of any requested administrative hearing and subsequent appeals.

Another commenter suggested that workers and their representatives should be allowed to intervene in administrative review proceedings. The Department does not agree that determinations on labor certification applications should be turned into multiparty adversary proceedings, which would likely become unwieldy and time-consuming. Workers and their representatives may file complaints as appropriate in accordance with other provisions in the Final Rule.

One commenter suggested the rule should also specify that the removal of the requirement to answer the notice of complaint in the de novo hearing does not preclude the ALJ from requiring an answer or its equivalent as a matter of discretion or from limiting the discoverability of information. The same commenter believed the rule should specify that the Department bears the burden of proof in the proceedings, because otherwise the employer would effectively be presumed guilty and required to prove its innocence.

The Department does not believe there is any reason to add additional language to the rule, which already states that 29 CFR part 18 governs the rules of procedure. Specifically, 29 CFR 18.1(b) and 18.5(e) cover the ALJ's discretion to request an answer or require discovery. The burden of proof is governed by common law principles in which the moving party has the burden of proof. In this case, the burden

would be on the applicant to provide a complete application in the first instance, and if it is found to be incomplete by the Department's Certifying Officer, then it is the appellant/applicant's burden to prove that it submitted the requisite information. The burden does not shift to the government because it is not the government that is requesting a benefit.

To ensure an expeditious review process, the Final Rule provides that ALJs conducting de novo hearings must schedule such hearings within 5 calendar days, rather than 5 business days, at the employer's request. It further clarifies that new evidence may be introduced at such hearings. Employers will not be prejudiced by this provision, since the expedited scheduling is to be performed only at the appealing employer's request. The Final Rule further provides that ALJs must render decisions within 10 calendar days after a de novo hearing.

Section 655.116—Job Service Complaint System; Enforcement of Work Contracts

The NPRM contained the provision in the current regulations regarding complaints filed through the Job Service Complaint system. Several commenters suggested that site visits be implemented, employer and worker interviews be added, a 24/7 anonymous call-in number be created, and mediation offices (called ''work visa representational offices'' by the commenter) be created where contract disputes can be discussed between the employer and laborer. The Department declines to create such additional measures as a complaint system already exists in the Job Service complaint system found in 20 CFR Part 658, subpart E, and any similar system specific to H–2A agricultural clearance orders or applications would result in the duplication of effort and be a waste of already scarce government resources.

Some commenters believe that this rule is still too onerous, and that the audits and compliance requirements will continue to discourage farmers from using the program. The program is complex due to statutory requirements and historical practice. However, the Department has attempted, in this Final Rule, to simplify the procedures where appropriate while still ensuring program integrity and worker protection. The Department believes that this rule is significantly easier to understand and comply with than its predecessor.

One commenter stated that workers should be punished by being permanently barred from the program if they move to an unauthorized employer or overstay their visa. This is not an issue for the Department, which certifies positions as being available to be filled by H–2A workers. The Department does not control the work status of H–2A workers; that is a function performed by DHS.

Another commenter suggested that a mechanism should be created to pre-certify employers as being in compliance with program requirements and obligations prior to the issuance of the Labor Certification. This is something the Department will consider implementing at a future time, when employers have compiled an established record of compliance with program requirements.

A commenter suggested that the Department institute procedures for workers and their advocates to raise grievances or lodge complaints for Departmental review and expedited resolution. The Department again notes that the Job Service complaint system referenced in § 655.116 and detailed in 20 CFR part 658, subpart E, which handles complaints arising from employer actions, and WHD's authority under 29 CFR part 501, whose provisions include the investigation and prosecution of valid complaints, provide two effective mechanisms for resolving complaints. The commenter also requested that a graduated system of fines be created, allowing a ''learning curve'' for agricultural employers to become more familiar with the H–2A requirements. The Final Rule at 29 CFR 501.19 provides a number of factors that the WHD takes into consideration when assessing CMPs, including the type of violation committed, efforts made in good faith to comply, and the explanation of the person charged with the violation.

Section 655.117—Revocation of Approved Labor Certifications

Several minor, non-substantive changes were made to the language of this provision for purposes of clarity and to conform to other provisions of the Final Rule. All substantive changes made to the text of this provision are addressed below.

(a) Comments Opposing Revocation Because Other Penalties Sufficient

Several employers and employer associations objected to revocation of labor certifications on the grounds that other penalties for non-compliance are sufficient, citing the Department's increase in both the penalties for non-compliance and the bases upon which non-compliance can be asserted, along with the new document retention, audit process, and expanded bases for debarment. Similarly, several commenters cited the Department's existing ability to provide evidence to the DHS supporting the revocation of a petition.

We disagree that the existence of these other penalties makes revocation an unnecessary remedy. The Department's obligation to ensure program integrity is self-evident. The Department's ability to revoke an application is essential to maintaining and enhancing program integrity and a necessary companion to the flexibility of a self-attestation model. The Department should not have to rely on DHS to ensure the integrity of its programs.

(b) Revocation Too Severe a Penalty

Several employers and employer associations objected to revocation of labor certifications because of the negative impact that it would have on an employer's business. A commenter also stated that revocation could effectively result in an employer violating state law in Wyoming, which assertedly prohibits sheepherders from abandoning sheep. Given that revocation is meant to be a sanction against employers who have violated the terms and conditions of the certification or for whom the initial certification is demonstrated to have been unwarranted, it should be no surprise that the employer may face serious consequences as a result. It is in the best interest of the Department to ensure that the integrity of the H–2A labor certification program is upheld. If the granting of a labor certification was not justified, revocation of such certification is a reasonable measure for the Department to take.

(c) Interference With DHS Authority

An association of growers requested that the Department clarify the legal basis for exercising the enforcement of DHS regulations and the rationale for doing so, stating that employers should not have to face two enforcement authorities with different policy objectives enforcing the same regulations. We agree with the commenter's concern that the Department should not be enforcing DHS regulations and accordingly have deleted the reference to 8 CFR 214.2(h)(5) in § 655.117(a)(1).

(d) Grounds for Revocation

(1) Certification Not Justified—§ 655.117(a)(1)

A law firm questioned the Department's authority to revoke a labor certification application under Section 218 of the INA simply because the Department has decided to revisit the

merits of the application, stating that the Department would need authority comparable to that provided in Section 205 of the INA to do so. Additionally, one law firm interprets Section 218(e) to authorize the Department to revoke certifications only in the case of fraud or criminal misconduct. We disagree. Section 218(e) of the INA addresses the authority to revoke a certification and does not specify any limitations on the bases for which such authority may be exercised.

Nevertheless, the Department does agree that it should not revisit the merits of a labor certification determination in the absence of some form of willful misconduct on the part of the employer. Taking this concern into account, as well as the seriousness of revocation as a penalty, the Department has decided to impose a stricter standard on revocation as a penalty based upon the CO's finding that a certification was not justified. Given the immediate and devastating consequences revocation could have on an employer's business, the Department has determined that revocation based on a finding that the certification was not justified at the time it was granted is appropriate only when the employer made a willful misrepresentation on the labor certification application. In such an instance, the employer's willful misconduct has presumably contributed to the Department's initial erroneous determination, making revocation fully appropriate. Accordingly, we have removed ''based on the criteria set forth in the INA'' so that § 655.117(a)(1) now reads ''The CO finds that issuance of the Temporary Agricultural Labor Certification was not justified due to a willful misrepresentation on the application.''

(2) Violation of Terms and Conditions of Labor Certification—§ 655.117(a)(2)

An employer suggested that the employer's violation of the terms and conditions of the labor certification under § 655.117(a)(2) should be qualified with ''knowingly and willfully.'' An association of growers suggested that the revocation could only be exercised when the employer willfully misrepresents a material fact in the application. Similarly, an association of growers suggested that the Department should clarify that technical or good faith violations of the regulation should not result in an enforcement action. After reviewing these comments, the Department agrees that the standard set forth in the NPRM allowing revocation for any violation of an approved temporary agricultural labor certification was too broad. The Department has attempted to address the commenters' concerns by setting forth in greater detail the types of violations warranting revocation. Given the seriousness of revocation as a penalty, and in response to the comments, we added in this Final Rule an intent requirement (''willfully'') with respect to violations of the terms or conditions of the labor certification, and we also added the condition that the violation must be of a material term or condition. We have also listed separately in paragraphs 655.117(a)(2)(ii)—(v) other serious violations which the Department would have few other available remedies to enforce and which may not necessarily involve a willful violation of a material term or condition of the labor certification. These violations include: The failure to cooperate with a DOL investigation into the current certification; the failure to comply with one or more sanctions or remedies imposed by the ESA or one or more decisions or orders of the Secretary or a court order secured by the Secretary resulting from Department-initiated legal action (not private suits) regarding the current certification; and the failure to cure, after notification, a substantial violation of the applicable housing standards regarding the current certification.

A group of farmworker advocacy organizations suggested that the regulations should clarify that a revocation may occur where the employer does not offer the job terms required in the regulations or does not comply with the job terms required in the regulations. Assuming that the employer's actions were willful, we believe that this basis for revocation is already covered by § 655.117(a)(2), since the terms and conditions of the labor certification incorporate the employer attestations set forth in the regulations under § 655.105.

A group of farmworker advocacy organizations suggested that revocation should be utilized when an employer has an active certification and intends to bring additional workers but is unwilling or unable to provide the terms and conditions of the work promised. We believe that the grounds that the commenter cited for revocation are incorporated in § 655.117(a)(2), assuming that the employer's unwillingness or inability to provide the terms and conditions of the work promised manifests itself in the willful violation of a material term or condition of the labor certification.

A group of farmworker advocacy organizations suggested that revocation should be used if a timely audit discovers that U.S. workers had been discouraged or denied employment. Again, we interpret § 655.117(a)(2) to cover such a violation, if willful, since an employer must attest on its labor certification application that any U.S. workers who applied for the job were rejected only for lawful, job-related reasons.

A group of farm worker advocacy organizations suggested that revocation of a current job order should be allowed based on violations of prior job orders. Substantial violations of prior job orders are covered in the debarment section at § 655.118. We believe that debarment is the more appropriate remedy for substantial violations of prior job orders since a revocation is meant to address problems with the existing labor certification.

(3) Referrals From WHD—§ 655.117(a)(3)

A private citizen objected to the inclusion of a recommendation by WHD as a ground for revocation. The Department believes that WHD plays a critical role in upholding the integrity of the labor certification process by enforcing an employer's obligation to provide the wages, benefits, and working conditions required under the terms and conditions of a labor certification. Accordingly, their input in the revocation process would help to protect workers from additional violations or abuse by unscrupulous employers. However, we have clarified that the CO must actually find a violation of sufficient gravity that leads to the recommendation of revocation by WHD and that 29 CFR 501.20 sets forth the grounds under which WHD may recommend revocation, which are nearly identical to ETA's grounds for revocation provided under § 655.117(a)(2). Any WHD recommendation for revocation must be based on violations of the certification in effect at the time of the recommended revocation.

(4) Fraud or Willful Misrepresentation—§ 655.117(a)(4)

The Department has included an additional provision which sets forth the Department's authority to revoke a labor certification based on a finding of fraud or willful misrepresentation in that certification, as provided in §§ 655.112 and 655.113. Section 655.117(a)(4) provides that the Department may revoke a certification if a court or the DHS, or, as a result of an audit, the CO, determines that there was fraud or willful misrepresentation involving the application.

(e) Procedure—§ 655.117(b) and Hearing—§ 655.117(c)

An association of growers suggested that the Notice of Intent to Revoke should include the statement of factual grounds for the alleged basis for revocation. The regulation already provides that the Notice of Intent to Revoke is to contain a detailed statement of the grounds for the proposed revocation and thereby would include the factual grounds for the proposed revocation. Accordingly, we do not believe that it is necessary to change the proposed language of the provision.

One commenter suggested that employers should be able to request a hearing with respect to the Notice of Intent to Revoke. The Department does not believe that a hearing is strictly necessary in all cases, but has added language to § 655.117(a) of the Final Rule specifying that a revocation may only be made ''after notice and opportunity for a hearing (or rebuttal).'' The regulations also allow an employer to file an administrative appeal of a revocation and provides for notice of the opportunity to appeal in the CO's final decision.

While a group of farm worker advocacy organizations expressed concern that a final determination should not be required to revoke a labor certification, the Department received a number of comments from a large number of employers and employer associations objecting to revocation taking effect immediately at the end of the 14-day window for the employer to submit rebuttal evidence, if the employer fails to do so. The commenters cited due process concerns and the devastating and irreversible impact that revocation would have on farms while the matter was being adjudicated. The Department does not agree that allowing the CO's decision to become final if the employer fails to submit rebuttal evidence within 14 days constitutes a violation of due process; an employer should reasonably be able to compile a response to the CO's notice within 14 days.

To address legitimate due process concerns, however, the Department has changed the language in § 655.117(b)(3) to provide that the filing of an administrative appeal stays revocation. Accordingly, an association of growers' suggestion that the effective date of revocation should be one day after the appeal period expires so that the employer would not be required to cease employing the worker while it decides whether to appeal is no longer relevant.

Two commenters expressed concern about the Department's ability to revoke a labor certification on a very broad range of criteria and suggested that the Department provide a standard for the Department's decision to revoke when the employer submits rebuttal evidence. We understand the commenters' concern and have articulated the standard for which the Department may revoke an application when the employer submits rebuttal evidence. Specifically, the regulations have now been revised to provide that the CO must determine that the employer more likely than not meets one or more of the bases for revocation under 655.117(a) in order to revoke the application.

An association of growers suggested extending the employer's rebuttal period from 14 days to 30 days with extensions granted by the CO on a reasonable basis, and if such a request is denied unjustifiably, the denial may be a basis of, or an additional reason for, reversal by the Department. Similarly, an association of growers suggested that employers should be given 14 instead of 10 days to file an administrative appeal. We disagree with the proposal to extend the time period for rebuttal with indefinite extensions by the CO, and particularly the suggestion that the denial of such a request for an extension should be a basis for reversal of the revocation, all of which would unnecessarily delay the revocation process. We also disagree with the proposal to extend the time period for an administrative appeal. We carefully considered what time period would be appropriate for employers to rebut the notice of intent to revoke and to file an administrative appeal. We would not be issuing a notice of intent to revoke if the reason for doing so did not seriously jeopardize the integrity of the H–2A labor certification process. Accordingly, it is imperative for the Department to be able to act quickly, especially if the livelihood of the workers and an employer's ability to plan for its labor needs are at stake. The addition of at least a minimum of 20 days to the process would not only impede the efficiency of the labor certification system but also prolong the period of time for which employers would be subject to uncertainty regarding their labor needs, a concern that was as raised by a commenter. As a result, we are maintaining the proposed rule's 14-day period for rebuttal and 10-day period for filing an administrative appeal.

An association of growers also suggested that the CO should have more than 14 days to reach a final decision—that the CO should in fact have all the time that he or she believes is necessary to reach the best possible decision on the record as it is presented. While we appreciate an association of growers' concern that the Department have a sufficient amount of time to render its decision, 14 days is an adequate amount of time for the Department to consider all the facts at hand to make a decision and to ensure that the revocation proceedings move along in an expeditious manner for the reasons stated in the previous paragraph.

The Department takes very seriously the commenters' concerns about having enough time and opportunity to reach the best decision possible pertaining to revocation. As a result, as discussed in the preamble to § 655.115, given the seriousness of the revocation penalty, the Department is creating a separate appeals process for revocation which allows for greater time for deliberation at the administrative appeals level. Instead of applying the administrative appeals process at § 655.115 to revocation, as provided in the NPRM, we have lengthened the timeframes for hearings, to 15 calendar days after the ALJ's receipt of the ETA case file, and for decisions, to 20 calendar days after the hearing. This appeals process provides the right balance between ensuring that revocation occurs in a timely manner before the expiration of the labor certification, while also providing a sufficient amount of time for deliberation.

Two commenters suggested revising the regulation so that an employer be provided 14 days from the date that it receives the Notice of Intent to Revoke to provide rebuttal evidence instead of from the date of the Notice. Given that the Notice will be sent by means ensuring next day delivery, the employer will essentially have 13 days, which is a reasonable amount of time to provide rebuttal evidence. In addition, because the date the employer actually receives the Notice is virtually impossible to verify, we have decided to retain the date of the Notice as the starting point for the 14 day rebuttal period.

One commenter suggested phasing-in the Department's compliance and control measures so that employers have the opportunity to adapt to the program. We do not believe that it is necessary to phase-in such measures. Employers have received notice of, and have had an opportunity to comment on, the measures that the Department has proposed. Employers certainly have had an opportunity to plan for such changes, and we do not believe that providing any additional time for employers to adjust to the new requirements is warranted.

(f) Worker Protections

A group of farm worker advocacy organizations suggested that ETA require employers with open job orders to accept the referral of H–2A workers who are already present in the U.S. and have been affected by revocation, and that ETA should deny job orders to employers who refuse such H–2A workers. We understand the serious toll revocation of a labor certification can take on an employer's workforce—both U.S. and H–2A workers alike—and agree that certain worker protections should be triggered in the event of revocation. We do not agree that the SWAs should be in the business of using taxpayer money to make referrals of temporary foreign workers to open job opportunities. However, we have added a new provision at § 655.117(c) setting forth an employer's obligation to its H–2A workers in the event of revocation. Upon revocation, if the workers have already departed the place of recruitment, the employer will be responsible for reimbursing each worker's inbound transportation and subsistence expenses, outbound transportation expenses unless the worker accepts other H–2A work in the U.S., any payments due to the worker under the three-fourths guarantee, and any other wages, benefits, and working conditions due or owing the worker under the regulations.

(g) Beyond the Scope of the Regulation

We received several comments that were clearly beyond the scope of the revocation provision. Among them were several comments regarding issues that touch upon agencies with responsibility for H–2A issues that have nothing to do with the labor certification process or the enforcement of the obligations and assurances made by employers with respect to H–2A workers.

For example, a group of farmworker advocacy organizations suggested that the Department should establish an MOU with ICE to alert ICE upon revocation that an employer's request for workers has been denied and to heighten inspections of that employer's I–9 forms to ensure that the employer does not attempt to recruit undocumented workers to fill the positions originally designated for H–2A workers. While we understand the concern of the commenter, we do not believe that the regulation is the appropriate place to address the details of the Department's coordination and communication with DHS in the event of revocation.

Section 655.118—Debarment

(a) The Department's Debarment Authority

The Department revised § 655.118(a) of the proposed rule to more closely parallel the language in Section 218 of the INA setting forth the Department's debarment authority. The Department is also clarifying that it interprets the requirement that ''the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer during the previous two-year period substantially violated a material term or condition of the labor certification'' to mean that the Department must notify the employer of the Department's intent to debar no later than two years after the occurrence of the violation (or in the case of a pattern or practice, two years after the occurrence of the most recent violation). The Department's rationale for this interpretation is discussed in greater detail in the Debarment Proceedings (20 CFR 655.118(e)) section of this preamble.

(b) Parties Subject to Debarment—§ 655.118(a)

(1) Successors in Interest

One organization objected to the debarment of an employer's successor in interest, rather than only those entities with a substantial interest in the employer. This commenter expressed concern that because debarment can result in the dissolution of the employer's business, debarring a successor in interest would impede the sale of assets and business to others who are not complicit in the cause of debarment. The Department's primary objective in debarring successors in interest is to prevent persons or firms who were complicit in the cause of debarment from reconstituting themselves as a new entity to take over the debarred employer's business. The final regulation includes a definition of successor in which the culpability of the successor and its agents for the violations resulting in debarment must be considered. This definition will avoid harm to successors that were not culpable in the violations resulting in debarment.

(2) Attorneys and Agents

One commenter suggested that agents of employers should be debarrable as well as employers, given that the substantial violations listed in § 655.118(d) could be committed by either the employer or the employer's agent. Another commenter also expressed concern that agents could not be sanctioned even though they may commit debarrable activities. We agree that agents should be included as debarrable parties if they have committed a substantial violation. To be consistent with the Department's permanent labor certification program, we believe that substantial violations should include acts committed by attorneys of employers and, accordingly, that attorneys of employers be debarrable parties as well. Additionally, the Department would consider an attorney or agent who had knowledge of or had reason to know of the employer's substantial violation to be complicit in the employer's violation and accordingly, should also be subject to debarment.

The preamble to the NPRM expressed the Department's intention to include actions by agents and attorneys of employers as debarrable offenses, and include agents and attorneys as debarrable parties. The regulatory text, however, did not make this clear. Some commenters expressed concern that this language would render attorneys and agents strictly liable for debarrable offenses committed by their employer clients. That was never the Department's intent. To clarify the provision, the Department has broken § 655.118(a) of the NPRM into three paragraphs. New § 655.118(b) specifies that agents and attorneys may only be debarred if they ''participated in, had knowledge of, or had reason to know of, the employer's substantial violation.'' New § 655.118(c) establishes the maximum debarment period of three years, which applies to debarments of employers, attorneys, and agents.

(c) Bases for Debarment—§ 655.118(d)

(1) General Opposition

Several commenters objected to the debarment provision on the grounds that it was too severe a penalty and would discourage participation in the H–2A program. Additionally, another commenter expressed concern that overly circumscribed debarment regulations would continue to impede enforcement by the Department. As discussed in the preamble to the NPRM, the proposed changes to the debarment provision responded to the unnecessarily narrow definition of employer actions warranting debarment in the current regulation, which has hampered effective enforcement of the H–2A program, and is also an important part of the program's shift toward an attestation-based application process. We have carefully considered the comments that we received in response to the NPRM and believe that the debarment provisions in the Final Rule

will uphold the integrity of the H–2A labor certification program without unfairly punishing employers who utilize the program. We believe that ETA debarment authority and WHD's authority to recommend debarment will help to strengthen the Department's efforts to enforce the program regulations.

The Department has reorganized this provision in the Final Rule in order to provide additional clarity to program users. In the NPRM, the bases for debarment were enumerated in § 655.118(b); in the Final Rule they are enumerated in § 655.118(d). The NPRM listed several violations in proposed § 655.118(b)(1) that the Department would consider to be debarrable substantial violations if ''one or more acts of commission or omission on the part of the employer'' could be shown. For reasons discussed below, the Final Rule distinguishes between program violations that do not rise to the level of debarrable substantial violations unless ''a pattern of practice of acts of commission on the part of the employer'' can be shown, which are listed in paragraphs 655.118(d)(1)(i)–(v), and program violations that are subject to some other standard, which are listed in paragraphs 655.118(d)(2)–(6).

Failure to cooperate with a DOL investigation and failure to comply with sanctions, remedies, decisions, and orders issued by the Department were listed as debarrable offenses under § 655.118(b)(1) of the NPRM. Those provisions have been broken out separately in the Final Rule as § 655.118(d)(4) and § 655.118(d)(5), emphasizing that such violations are not subject to § 655.118(d)(1)'s ''pattern or practice'' standard. For reasons described below, a new § 655.118(d)(6) has been added to the rule allowing the Department to debar for ''[a] single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.''

(2) Standards for Debarrable Offenses—Additional Conditions and Clarification, Including Pattern and Practice

Several commenters requested greater clarification of what actions would be subject to debarment and suggested including additional qualifiers or conditions to the various grounds for debarment. Two commenters stated that the listed grounds for debarment seem to empower the Department to debar for actions that merely ''reflect'' unlawful activity, even though the actions might not actually be unlawful. These commenters requested additional clarification as to what sort of activities would result in debarment. We disagree with the commenters' characterization that the listed grounds for debarment do not require a finding that the entity to be debarred engaged in unlawful activity. Mere suspicion of a violation of the law is not sufficient to warrant debarment. Rather, an actual violation would be necessary, in accordance with Section 218 of the INA which authorizes debarment when an employer substantially violates a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. In sum, the use of the term ''reflect'' in the Final Rule to describe debarrable ''pattern or practice'' violations in § 655.118(d)(1)(ii)–(v) does not mean that the Department is not required to prove actual underlying program violations.

Several commenters suggested that the Department should require a pattern or practice of substantial violations for debarment. Of particular concern was the prospect of debarment based on the commission of one violation which they alleged would deter participation in the program. Additionally, one of these commenters noted that employers who are less sophisticated in their business practices should be spared from debarment for innocent oversights or mistakes. We agree with commenters' concerns and have qualified the acts set forth under § 655.118(d)(1) with a pattern or practice requirement. However, the Department does not have any available remedy other than debarment to penalize and deter certain program violations, and believes that these violations constitute ''substantial violations'' warranting debarment even without a pattern or practice. These acts are set forth separately in paragraphs 655.118(d)(2)–(6). These include: fraud; the failure to pay the necessary fee in a timely manner; and the failure to cooperate with a DOL investigation or interference 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 (regarding a Department-initiated lawsuit); and a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

Several commenters requested that the Department clarify and distinguish what activity is debarrable from what activity is subject to other penalties. Many of the activities that would trigger debarment also trigger other penalties. We do not think that it is necessary to draw such a distinction. Generally, a non-willful violation will not be grounds for debarment unless it is part of a pattern or practice. Debarrable offenses are clearly delineated in § 655.118(d) of the Final Rule. Program violations that are subject to other penalties are listed elsewhere in the Final Rule.

(3) ''But Not Limited to''—Proposed § 655.118(b), New § 655.118(d)

Several commenters argued that the language ''but not limited to'' in proposed § 655.118(b)'s list of the available grounds for debarment was overly broad and raised due process concerns, as there would not be sufficient notice of what additional actions would be considered substantial violations. We agree with the commenters' concerns, and given that various grounds for debarment that are specified in the Final Rule, we do not believe that the ''but not limited to'' language is necessary. Accordingly it has been deleted from the regulatory text.

(4) Significant Injury to Wages, Benefits, and Working Conditions—Proposed § 655.118(b)(1)(i), New § 655.118(d)(1)(i)

An association of growers suggested that the Department clarify that the significant injury to wages, benefits, and working conditions be explicitly linked to the employer's hiring of H–2A workers, which the association interpreted as Congress's concern in establishing the labor certification process. Thus, in the opinion of this commenter, only significant injuries to U.S. workers that would not have occurred but for the hiring of H–2A workers in the occupation would be potentially relevant. We do not read Section 218 of the INA so narrowly. A substantial violation of a material term or condition of the labor certification with respect to the employment of U.S. or non-immigrant workers encompasses more than injuries arising directly from the hiring of H–2A workers. For instance, an employer may engage in a pattern or practice of intentionally paying its workers at a rate below the minimum wage. The debarment of the employer for such a flagrant violation both of the FLSA and the terms and conditions of the labor certification would be warranted under Section 218 of the INA, despite the fact the violation was not strictly dependent on the hiring of H–2A workers.

A group of farm worker advocacy organizations suggested that the Department should have the discretion to deny a certification to an employer who has previously engaged in

violations of employment-related laws, whether or not there has been a final administrative or judicial finding of such violations and whether the employer previously employed H–2A workers or sought to do so. The standard for debarment set forth under Section 218(b)(2)(A) of the INA provides that ''[t]he employer during the previous two-year period employed H–2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.'' The commenter's suggestion that the employer only need to have engaged in a violation of employment-related laws, regardless of whether there has been a final finding of the violation or whether the employer previously employed H–2A workers clearly goes beyond the Department's statutory authority to debar. Accordingly, the Department declines to debar.

(5) Ten Percent Threshold—Proposed § 655.118(b)(1)(i), New § 655.118(d)(1)(i)

An association of growers expressed concern that under proposed § 655.118(b)(1)(i), an employer's change in the health or retirement plans or benefits offered to its employees could rise to the level of a debarrable violation, even though the employer is in full compliance with the job order. The Department does not intend to penalize employers who are in compliance with the job order. Rather, the Department intends to apply debarment to acts that are significantly injurious to benefits required to be offered to employees under the H–2A program, as opposed to all benefits, such as health and retirement plans, that an employer may offer to its employees. Accordingly, the Department has added in paragraph (d)(1)(i) of the Final Rule as a qualifier for ''benefits,'' ''required to be offered under the H–2A program.''

Several employers objected to the 10 percent threshold required for a significant injury under proposed § 655.118(b)(1)(i) because it would disproportionately affect small employers—i.e., an action taken against one employee might be enough to trigger a substantial violation against a small employer. A group of farm worker advocacy organizations objected to the figure because it might allow egregious actions to be taken against numbers of employees that don't meet the 10 percent threshold. We recognize the concerns of both the employers and worker advocates and have eliminated the 10 percent threshold and replaced it with ''a significant number.'' Thus, small employers would not be disproportionately affected by this provision. At the same time, the provision makes it possible for a substantial violation to occur even if the injury affects less than 10 percent of employees if the number of affected employees is significant.

(6) Substantial Number of U.S. Workers Similarly Employed—Proposed § 655.118(b)(1)(i), New § 655.118(d)(1)(i)

Two commenters objected to the language in proposed § 655.118(b)(1)(i) providing for debarment based on actions significantly injuring the wages, benefits, or working conditions of ''a substantial number of U.S. workers similarly employed in the area of intended employment.'' These commenters expressed concern that this language might be read to extend beyond U.S. workers potentially employable in H–2A occupations, which are the workers that the statutory ''adverse effect'' concept is supposed to protect. These commenters believed that this language might allow an employer who fully complied with all program requirements to be debarred based on a finding by an economic expert that the employment of H–2A workers depressed the wages of other employers' similarly employed workers in the area of intended employment. Another commenter also expressed concern that it would be impossible for an employer to know in advance whether its actions would be significantly injurious to such workers. We recognize these concerns. The Department's various program requirements of this Final Rule have been established to protect U.S. workers from adverse effects, and an employer that has complied with all of these program requirements should not be held responsible for any arguable adverse effects that were unforeseen by the Department. The Department has accordingly deleted the reference to ''a substantial number of U.S. workers similarly employed in the area of intended employment'' from § 655.118(d)(1)(i) of the Final Rule.

(7) Significant Failure To Offer Employment to U.S. Workers—Proposed § 655.118(b)(1)(ii), New § 655.118(d)(1)(ii)

A group of farm worker advocacy organizations expressed concern that the use of the term ''significant'' under proposed § 655.118(b)(1)(ii) limits the authority of the Administrator/OFLC to debar an employer who has taken actions injurious to workers or refused to offer jobs to U.S. workers. We believe that any violation by the employer no matter how minor or how egregious should be met with the appropriate penalty. Given the severity of debarment as a penalty for employers, however, the violations constituting the grounds for debarment must be significant. Employer sanctions for violations which do not rise to the level required for debarment are available through other penalties, including civil money penalties.

(8) Failure To Recruit U.S. Workers—Proposed § 655.118(b)(1)(iii), New § 655.118(d)(1)(iii)

An association of growers suggested that the Department clarify that a violation in the form of ''a willful failure to comply with the employer's obligations to recruit domestic workers'' be subject to the following qualifications: (1) That there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed; and (2) such failure is material—that if the employer had done what was required, qualified U.S. workers willing to do the job would have been found. If an employer complies with the recruitment requirements of the Final Rule but fails to recruit U.S. workers due to the fact that such workers are unavailable, that would not violate the regulation. Where, however, an employer has willfully failed to comply with its obligations under the Final Rule to recruit U.S. workers, it may be difficult if not impossible for the Department to prove, after the fact, that workers would have been available if the proper steps had been taken. When an employer has purposely defaulted on its responsibility to recruit U.S. workers, a substantial violation of a material term of the labor certification exists and the debarment criteria are met. The Department therefore declines to adopt this suggested change.

(9) Failure To Comply With the Audit Process—§ 655.118(d)(1)(iv)

The Department has explicitly included in § 655.118(d)(1)(iv) of the Final Rule an additional ground for debarment for a significant failure to comply with the audit process. This potential ground of debarment was expressly stated in § 655.112 of the NPRM, but was inadvertently left out of the debarment provisions.

(10) Outside Area of Intended Employment—Proposed § 655.118(b)(1)(vi), New § 655.118(d)(1)(v)

A law firm questioned how the employment of an H–2A worker outside the area of intended employment would support debarment under Section 218(b) of the INA. As discussed earlier, the statute authorizes debarment when an employer substantially violates a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. Section 655.105(b) requires the employer to attest that it is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are no less favorable than those offered to the H–2A workers and are not less than the minimum terms and conditions required under the regulations. Section 655.105(d) requires the employer to attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply for the job opportunity until the end of the recruitment period. Finally, § 655.110(b) limits the scope of validity of a certification to ''the area of intended employment.'' The area of intended employment thus plays a key role in determining the employer's particular obligations with respect to the terms and working conditions offered. An employer would not be able to abide by these attestations if it places its workers outside the area of intended employment and, accordingly, would be committing a substantial violation of a material term and condition of the labor certification with respect to the U.S. and H–2A workers alike.

An association of growers suggested that the Department apply a ''common sense'' interpretation of the regulations, particularly with respect to where a certification describes an area of intended employment which, for example, is within a 25 mile radius of a particular city, but the worker ends up working a field for a new customer that is 27 miles from that city. The Department understands the commenter's concern and expects the CO to exercise the appropriate judgment in the face of such circumstances.

(11) Incidental Work—Proposed § 655.118(b)(1)(vi), New § 655.118(d)(1)(v)

A group of farm worker advocacy organizations supported the inclusion of the employment of H–2A workers in an activity not listed in the job order as a debarrable offense because it would guard against employers that ''have shown a total disregard for the very notion of corresponding employment, and the results are unfair to similarly employed U.S. workers.'' However, several commenters expressed concern that employers whose workers would be performing work that is incidental to the activity listed in the job order could be debarred under proposed § 655.118(b)(1)(vi) for ''the employment of an H–2A worker * * * in an activity not listed in the job order.'' ''Other work typically performed on a farm that is not specifically listed on the *Application for Temporary Employment Certification* and is minor (*i.e.*, less than 20 percent of the total time worked on the job duties and activities that are listed on the *Application for Temporary Employment Certification*) and incidental to the agricultural labor or services for which the H–2A worker was sought'' is included in the definition of agricultural labor and services at § 655.100(d)(1)(vi). Accordingly, work that is incidental to the particular agricultural labor or services that are listed in the job order would be considered to be part of the activity that is listed in the job order. Contrary to the assertion of some commenters, permitting H–2A workers to engage in incidental activity places those workers in the same position as similarly situated U.S. workers who would be expected to perform incidental agricultural work in addition to any specific tasks for which they may have been hired. The Final Rule therefore notes that the employment of H–2A workers in activities ''minor and incidental to the activity/activities listed in the job order'' does not constitute a program violation.

One commenter also suggested that the regulations should provide a means to modify the job description covered by a temporary agricultural labor certification should a situation arise that requires more than minor incidental work, such as an act of nature requiring structural repairs and/or clean-up, or the temporary incapacity of a worker due to illness or injury who could do other work. The Department agrees with the commenter's concern and believes the concern is adequately addressed by the amendment procedures provided at § 655.107(d)(3) of the Final Rule.

(12) After Expiration of Job Order—Proposed § 655.118(b)(1)(vi), New § 655.118(d)(1)(v)

Although the Department did not receive any comments relating to this issue, the Department has replaced ''after the expiration of the job order and any approved extension'' in § 655.118(d)(1)(v) with ''after the period of employment specified in the job order and any approved extension'' and revised the corresponding heading for greater clarity.

(13) Fees—Proposed § 655.118(b)(2), New § 655.118(d)(2)

Several commenters noted the inclusion of acts of commission or omission that reflect the employer's failure to pay the necessary fee in a timely manner as being too severe a ground for debarment and questioned whether the inclusion of these grounds were within the Department's authority under the INA. The INA authorizes debarment for a substantial violation of a material term or condition of a labor condition application with respect to the employment of domestic or non-immigrant workers. Section 655.109(h) specifically provides that as a condition of the issuance of the labor certification, the employer must pay the processing fee in a timely manner, and § 655.105(m) provides that an employer must attest that all fees associated with processing the temporary labor certification will be processed in a timely manner. Additionally, a law firm objected to the inclusion of an employer's failure to pay the necessary fee in a timely manner because it does not comport with longstanding practice in other existing immigration procedures. However, an employer's failure to pay the necessary fee in a timely manner has been a ground for debarment under the H–2A regulations since July 1987, and the Department does not consider the absence of such a practice in other program areas to constitute a persuasive reason to eliminate it. Accordingly, the Department's retention of this ground for debarment supports the Department's longstanding practice and is necessary for the Department to administer effectively the H–2A labor certification process.

Additionally, a wool growers association was concerned that if the check arrived one day late, then the employer could be debarred under proposed § 655.118(b)(2). We do not read the provision to be that absolute and inflexible. Even though § 655.109(h)(2) provides that fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely, the language of ''timely manner'' provides the Department with some discretion so that a check that arrives on the 31st day would not automatically result in the debarment of the employer. The Department takes seriously its

responsibility to administer the H–2A program in a fair and reasonable manner.

The Department, however, has decided to add the qualifier of ''persistent and prolonged'' for the failure to pay fees in a timely manner in § 655.118(d)(2) to ensure a farmer cannot have a certification revoked for a single instance of a failure to timely pay the fee upon certification. Furthermore, the regulation now provides for the issuance of a deficiency notice to the applicant, allowing for a reasonable opportunity to pay its fees before the issuance of the Notice of Intent to Debar.

(14) Fraud and Material Misrepresentation—Proposed § 655.118(b)(3), New § 655.118(d)(3)

Although no comments were received with respect to this provision, we have simplified the language to eliminate redundant references to fraud and included fraud involving the *Application for Temporary Employment Certification* as a ground for debarment in accordance with § 655.112(d).

(15) Significant Failure To Cooperate With Investigations—Proposed § 655.118(b)(1)(v), New § 655.118(d)(4)

Several commenters objected to the inclusion of acts of commission or omission that reflect action impeding an investigation. Full cooperation with investigations to determine compliance with the terms of the labor certification application and the regulations is essential to the viability of the H–2A program. Accordingly, the labor certification application provides that the employer will cooperate fully with any investigation undertaken pursuant to statute or regulation. Impeding an investigation would therefore qualify as a substantial violation of a material term of the labor certification application.

The Department has revised the language in this provision to clarify that not only impeding an investigation but also a significant failure to cooperate with a DOL investigation would constitute a substantial violation. Accordingly, the Department has replaced ''actions impeding an investigation of an employer'' with ''[a] significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function'' and revised the heading accordingly.

(16) Civil Judgment/Court Orders—Proposed, § 655.118(b)(1)(iv), New § 655.118(d)(5)

A group of farm worker advocacy organizations suggested that an employer's failure to pay or comply with the terms of a civil judgment or court order in favor of any migrant or seasonal agricultural workers or H–2A workers should be an additional ground for debarment and that such debarment should remain indefinitely until an employer has paid all wages due and owing former workers. A group of farm worker advocacy organizations also suggested that at a minimum, the regulations should specify that an employer who has not paid assessed back wages or civil money penalties or complied with an injunction sought by the Department or paid a judgment for employment-related claims should not be permitted to receive a certification.

Several of the grounds for debarment suggested by these commenters reflecting substantial violations are already encompassed by these regulations. The three year time limit on debarment is specified in Section 218(b) of the INA; indefinite debarment is not permitted. Otherwise, the Department declines to interject any claim or remedy sought or any judgment awarded in private litigation into the labor certification process. To assure employers that the heavy sanction of debarment will not be imposed for trivial instances of non-compliance, the Department has clarified in the Final Rule that debarment is applicable only where an employer's non-compliance is ''significant.''

The Department has clarified that the failure ''to comply with one or more decisions or orders of * * * a court'' means that the order must be secured by the Secretary under Section 218 of the INA. Accordingly, the Department has replaced the reference to ''a court'' with ''a court order secured by the Secretary'' in § 655.118(d)(5).

(17) A Single Heinous Act—§ 655.118(d)(6)

As discussed earlier, a group of farm worker advocacy organizations objected to the 10 percent threshold in proposed § 655.118(b)(1)(i) because such a figure might allow egregious actions to be taken against a number of employees that don't meet the 10 percent threshold. The Department agreed and eliminated the 10 percent threshold and replaced it with ''a significant number'' under § 655.118(d)(1)(i). However, in further considering the commenter's concern, the Department decided that it was also necessary to address situations where a single egregious action would constitute a debarrable offense, yet, given the seriousness of debarment as a penalty, ensure that only the most serious violators would be subject to debarment. Accordingly, the Department has included as an additional ground for debarment a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(d) Debarment Proceedings—Proposed § 655.118(c), New § 655.118(e)

(1) Statutory Authority—Requirement for Notice and Hearing

Some commenters expressed concern that the regulations exceeded the statutory grant of authority for debarment provided to the Department under the INA. These commenters questioned whether the regulations were consistent with the statutory requirement that a determination of a violation can only be made after notice and an opportunity for hearing. We believe that the regulations as proposed were consistent with the statutory requirement for notice and an opportunity for a hearing. However, the Department has now included a Notice of Intent to Debar in the procedure to provide an additional opportunity for notice and rebuttal, which is consistent with the procedure under the Department's revocation provision at § 655.117. If the employer fails to rebut the allegations provided in the Notice of Intent to Debar, the Department will issue a Notice of Debarment. The employer may then request a hearing through the administrative appeals process. Accordingly, the regulation's debarment procedures are consistent with the statutory requirement that a determination of a violation be made after notice and an opportunity for hearing. These additional procedures provide even greater due process protections to employers facing debarment.

Additionally, several commenters questioned whether the Department was exceeding its statutory authority under the INA, given that a final determination of the violation would likely not occur until more than two years have passed since the violation. The INA provides that ''(A) the employer during the previous two-year period employed H–2A workers and the Secretary of Labor has determined, after notice and opportunity for hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. (B) No employer may be denied certification under subpart (A) for more than three years for any violation described in such subparagraph.'' 8 U.S.C. 1188(b)(2).

The statute presents three requirements for denial of a certification. First, the employer must have employed H–2A workers within ''the previous two-year period;'' second, the Secretary must determine, after notice and hearing, that a substantial violation occurred during that two-year period; and third, denial of certification based on a finding of violations may not extend for more than three years. However, the statute does not place a time limit on when the Secretary's must issue a final determination that a substantial violation occurred. While a substantial violation must have occurred within the two-year period, so long as a determination is ultimately made that a violation occurred, a certification may be denied based on that violation. The most reasonable reading of the debarment provision, giving effect to all its language, is that Congress intended the Secretary to initiate an investigation leading to debarment within two years of the alleged violation and, by referring in Section 218(b)(2)(B) of the INA to a maximum three-year period, to permit any eventual debarment action to be for up to three years. The Department's interpretation of this provision was codified in the prior regulations at 20 CFR 655.110(a) and upheld in Matter of Global Horizons Manpower, Inc. and Mordechai Orian, ALJ No. 2005–TAE–00001 (June 16, 2006).

Several farm bureaus and growers' associations suggested that employers be provided with an opportunity to be heard before the issuance of a Notice of Debarment due to the concern that parties opposed to the H–2A program would initiate investigations that are not aimed at improving working conditions but rather seek to end an employer's ability to hire H–2A workers when qualified workers are unavailable. As discussed above, the Department already provides employers with an opportunity to be heard through the rebuttal process and with an opportunity for a hearing through the appeals process, and debarment is stayed upon the administrative appeal by an employer. Having an additional level of hearings would be overly cumbersome and impede the Department's administration of the H–2A program. Based on our experience with the permanent labor certification program, after which the H–2A program's debarment provision was modeled, we have concluded that the procedures set forth in the Final Rule, which provide the employer an opportunity to present rebuttal evidence before a Notice of Debarment is issued and an opportunity to appeal a debarment decision, provide employers sufficient protection against meritless claims.

The Department has also made several minor, non-substantive modifications to the text of this provision in the Final Rule for purposes of clarity.

(2) Timing

Commenters expressed conflicting concerns over the amount of time debarment procedures would entail. Two employer associations expressed concern that because of the length of the process, an employer could face uncertainty as to its debarment status and that the employer's ability to plan for its labor needs would be adversely affected. An association of growers proposed a much more drawn-out procedure starting with a detailed notice of an intent to debar from the Department, a disclosure of the full evidentiary record by the Department, a pre-notice hearing with a minimum of 30 days (with extensions), issuance of a formal notice of debarment by the Department which should include the factual and legal grounds for the intended action, prescribe an effective date that is after the time period for filing a timely appeal, provide at least 14 days to appeal, and administrative appeal by the employer, with the proceedings to be governed by 29 CFR part 18. We have already discussed the reasons we have not included a pre-notice hearing. The Final Rule already requires a Notice of Intent to Debar and a Notice of Debarment, both of which are required to state the reason for the debarment finding, including a detailed explanation of the grounds for the debarment. We believe that the commenters raised a valid point about prescribing an effective date that is after the time period for filing a timely appeal, and we have added to the regulation the requirement that the Notice of Debarment specify that the employer have 30 days from the date the notice is issued to file an administrative appeal before debarment becomes effective. Additionally, as we discussed in the preamble to § 655.115, the Department is creating a separate appeals process for debarment which allows for greater time for deliberation at the administrative appeals level, given the seriousness of debarment as a penalty. Accordingly, we have deleted the reference to § 655.115 as governing administrative appeal rights. Under the Final Rule, a debarred party may request a hearing which would be governed by the procedures set forth at 29 CFR part 18, and administrative law judge decisions are no longer required to be issued within a set period of time. We believe that the procedures set forth in these regulations provide a middle ground between these two sets of concerns by providing 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.

(3) Review by the Administrative Review Board

Concerns by the commenters about the seriousness of debarment as a penalty has prompted the Department to include an additional level of Departmental review for debarment decisions. Accordingly, we are providing a debarred party with an opportunity to request a review of the decision of the administrative law judge with the Administrative Review Board (ARB). The procedures for ARB review are nearly identical to those provided at 29 CFR 501.42 through 501.45 for WHD. However, one major difference is that if the ARB fails to issue a final decision within 90 days from the notice granting the petition, the decision of the administrative law judge will be the final decision of the Secretary.

(4) Phasing In/Grace Period

Two commenters suggested phasing in the Department's compliance and control measures so that employers have the opportunity to adapt to the program. We have addressed this comment in the preamble discussion of § 655.117, which governs revocation of labor certifications.

(e) Debarment Involving Members of Associations—Proposed § 655.118(d), (e), and (f), New § 655.118(f), (g), and (h)

A group of farm worker advocacy organizations suggested that debarment should also apply to an association and its members' successors in interest so that associations and their principals will not be able to re-constitute themselves and continue business as usual. Because associations and/or their members operate as employers under the various scenarios addressed by the regulations in § 655.118(f), (g), and (h), the successor in interest language for employers in § 655.118(a) would also apply to associations and their members as well. Accordingly, we do not believe that it is necessary to change the language in § 655.118(f), (g), or (h).

Although the Department did not receive any other comments relating to these provisions, the Department has

decided that when a members of an associations or an association acting as a joint employer is disbarred, other members of the association who ''had knowledge of'' or ''had reason to know of'' the violation shall not be subject to debarment unless they participated in the violation. Because Section 218 of the INA requires that the employer substantially violate a material term or condition of the labor certification, an employer that merely had knowledge of, but did not actually participate in, the violation could not be debarred. The Department has never established program obligations requiring members of associations to report violations of other members or of associations that they have ''knowledge of,'' and mere knowledge of another entity's violation does not constitute a debarrable offense. Accordingly, the Department is removing the references to ''had knowledge of'' and ''had reason to know of'' from § 655.118(f) and (g). Where a member of an association both had knowledge of a violation and directly benefitted from that violation, however, the member will be considered to be complicit in the violation.

(f) Protections to Workers of Debarred Employers

A legal services provider suggested that the Department establish a system allowing H–2A workers from a debarred or decertified employer to be transferred to the next available H–2A employer in the state or region to protect these workers from becoming jobless due to enforcement actions against their employer. Because debarment applies only to an employer's ability to obtain future labor certifications, we believe that it is neither necessary nor useful to set up such a system, as a debarred employer would not have any H–2A workers.

(m) Beyond the Scope of the Regulation

Two grower associations suggested that the Department provide technical assistance to employers on complying with the H–2A program through training and a 1–800 hotline on selecting agents. The Department will provide guidance materials and training to the public to help explain how the H–2A program works. The Department does not intend at this time to establish a 1–800 phone number or referral system for selecting agents.

Timeline for Anticipated Training and Education Outreach Initiatives

Commenters suggested that the Department include a timeline for training and education outreach initiatives in the Final Rule and indicate who would be responsible for such training and outreach—the Department or the SWAs. The commenters also provided specific ideas for training and educational materials, including training on how to respond to the threat of litigation; how to respond to audits; how to comply with all program functions; the application process, and how to avoid violations and penalties. There were also requests for training in both English and Spanish.

The Department appreciates the input from commenters and the Office of Foreign Labor Certification will prepare and provide training based on these comments although at this time cannot describe the precise content and timing of such training.

B. Revisions to 29 CFR Part 501

Comments received that discussed whether the commenter was generally in favor of or generally opposed the proposed regulations typically did not differentiate between the proposed changes to 20 CFR part 655, Subpart B and 29 CFR part 501. Comments received on proposed changes in 29 CFR part 501 typically commented on a specific change proposed in this part. These are addressed below.

Section 218(g)(2) of the INA authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties, seeking appropriate injunctive relief, and requiring specific performance of contractual obligations, as may be necessary to ensure employer-compliance with the terms and conditions of employment under this section of the statute. The Secretary has determined that the enforcement of the contractual obligations of employers under the H–2A Program is the responsibility of the Wage and Hour Division (WHD). Regulations at 29 CFR part 501 were issued to implement the WHD's responsibilities under the H–2A Program and the amendment of these regulations is part of this proposed rulemaking.

Concurrent with the Department's finalization of the proposed amendments to its regulations in 20 CFR part 655, Subpart B to modernize the certification of temporary employment of nonimmigrant H–2A workers, the Department is finalizing the proposed amendments to its regulations at 29 CFR part 501 regarding enforcement under the H–2A Program.

The changes proposed for enhanced enforcement to complement the modernized certification process, so that workers are appropriately protected when employers fail to meet the requirements of the H–2A Program, are incorporated into this Final Rule. Given the number of changes proposed for 29 CFR part 501 and the number of sections affected by the proposed changes, we have included the entire text of the regulation and not just the sections changed. We note that a number of comments suggested changes but that the existing text of the regulation, which was to remain unchanged, already addressed such issues in the manner raised in the comments. We will discuss comments received and any changes to the regulatory text in the NPRM in response to comments.

Based on comments received and our recognition of the need for clarification, we made changes to the following sections of the proposed rule: Sections 501.0, 501.1, 501.3 through 501.6, 501.8, 501.10, 501.15, 501.16, 501.19 through 501.22, 501.30 through 501.32, 501.41, and 501.42.

The following sections have not been changed from the notice of proposed rulemaking (other than inserting non-substantive references to the Administrative Review Board): Sections 501.2, 501.33, and 501.43 through 501.45.

The following sections were not included in the proposed rule and have not been amended (other than inserting non-substantive references to the Administrative Review Board) since publication in 52 FR 20527, June 1, 1987: Sections 501.7, 501.17, 501.18, 501.34 through 501.40, 501.46, and 501.47.

Nomenclature Changes

The proposed rule made a number of non-substantive nomenclature changes and technical corrections to 29 CFR part 501. These include: reflecting that the INA was amended in 1988 while the current regulations were published in June 1987 and H–2A provisions that were in section 216 are now codified in Section 218 of the INA; changing references from the State Employment Service offices to the SWA; reflecting that appeals from administrative law judge decisions are made to the Department's Administrative Review Board; and replacing in some sections references to the Secretary with references to the Administrative Review Board.

Section 501.0 Introduction

Language was added to the proposed introduction § 501.0 to update the reference to Section 218 of the Immigration and Nationality Act (INA) and provide that corresponding employment only includes U.S. workers who are newly hired by employers

participating in the H–2A Program. Two commenters disagreed with this change. One found the Department's argument for removing U.S. farm workers who are not newly hired from the protection of the H–2A provisions unpersuasive. The other noted that, while the Department justifies these changes by noting situations where H–2A workers are paid more than similarly employed U.S. workers will arise very rarely, if ever, in practice, the fact that an irrational result arises only rarely does not serve as a justification for ever allowing it to occur and requested the Department to withdraw this proposed change. As we stated in the preamble to the proposed rule, the INA only requires that the employment of the alien in such labor or services not adversely affect the wages and working conditions of workers in the United States similarly employed. Where an employee has agreed to work at a certain wage, and begins to receive that wage prior to the time an employer has hired an H–2A worker, the subsequent hiring and payment of the H–2A worker at a rate that is higher than the wage received by the U.S. worker will not adversely affect the wages and working conditions of the U.S. worker—rather, the U.S. worker will be paid precisely what he or she would have had the H–2A worker not been hired at all. As such, the Department lacks the authority to require that H–2A employers pay existing workers the rates paid to subsequently hired H–2A workers. The Department has clarified in the Final Rule that the phrase ''in the occupations'' in proposed § 501.0 means ''workers in the same occupations as the H–workers.''

One commenter proposed that the definition of ''corresponding employment'' be clarified to exclude those persons who may be willing to work limited hours or fewer days than those for which full-time workers are sought under an H–2A job order. These regulations are applicable to the employment of U.S. workers newly hired by employers of H–2A workers in the same occupations during the period of time set forth in the labor certification approved by ETA. These workers are engaged in corresponding employment. Any U.S. worker who is hired in corresponding employment must receive the benefits and protections outlined in the H–2A job order, the work contract, and the applicable regulations. Consequently, an employee who is hired to perform any work covered by the job order during the contract period is entitled to all the material terms and conditions of the job order or work contract for the corresponding employment, but not for any time spent in work not covered by the job order or work contract. If part-time workers are engaged in corresponding employment, they are entitled to the same rights as the H–2A workers, including payment of the AEWR (or highest applicable H–2A-required rate). The H–2A record keeping requirements mandate the recording of all hours offered. Hours offered but not worked by a part-time employee would count towards the employer's three-fourths guarantee obligation. Some minor, non-substantive changes were made to the language of this provision for purposes of clarity.

Section 501.1 Purpose and Scope

One commenter suggested that the Wage and Hour Division does not need to be an enforcement authority in connection with the H–2A Program. As discussed above, the Secretary determined that the enforcement of the contractual obligations of employers under the H–2A Program is the responsibility of the WHD and there is no clear rationale for discontinuing WHD's responsibilities.

This section in the regulations previously listed as an ETA responsibility determining whether employment had been offered to U.S. workers for up to 50 percent of the contract period. The proposed rule requested comments on this requirement and proposed eliminating the 50 percent rule and replacing it with expanded, up-front recruitment requirements. In the final rule in 20 CFR part 655, Subpart B, the requirement will now be whether employment has been offered to U.S. workers until the end of the recruitment period specified in § 655.102(f)(3), a change that is more fully discussed in the preamble to the final rule for 20 CFR part 655, Subpart B. The language regarding this requirement in the Final Rule has been modified accordingly. Language in this section also clarifies the WHD's role when U.S. workers are laid off or displaced, in light of § 501.19(e) discussing WHD's authority to assess civil money penalties for violations of these requirements. Also, a commenter noted that the statutory language indicated that the Secretary was authorized to take action as described in § 501.1(c) and the language has been changed to reflect the statute.

One commenter suggested that the proposed language for § 501.1(c)(2) could be interpreted as disjunctive. The comment contends that clarifying language would deter violations by preventing employers from shifting liability to other entities and ensure workers' access to a meaningful recovery from either a FLC (see § 501.10 definitions for H–2A Labor Contractor (H–2ALC) definition) or its bond insurer. Accordingly, § 501.1(c)(2) includes the term ''and/or'' to demonstrate the liability of H–2ALCs as well as their surety for violations of the H–2A rules and regulations. This change is intended to clarify the surety's and the H–2ALC's liability and to provide an additional means of wage recovery.

The language of this provision has also been modified to conform to changes that have been made in § 501.20 of the Final Rule to WHD's debarment authority. The Final Rule provides that WHD may ''recommend * * * debarment from future certifications,'' as WHD will not have authority under the Final Rule to itself debar from certifications.

Section 501.2 Coordination of Intake Between DOL Agencies

The proposed rule clarified the procedure for addressing contractual H–2A labor complaints filed with either the ETA or any State Workforce Agency (SWA). Such complaints will be forwarded to the WHD office of the Department and will be administratively addressed as provided in these regulations. No changes have been made to § 501.2 in the Final Rule.

Section 501.3 Discrimination

Proposed § 501.3(b) added two provisions to the existing regulation prohibiting discrimination against persons exercising rights under the H–2A statute. The section modified the debarment remedy to conform to proposed § 501.20, which provided the WHD with authority to debar violators under certain conditions. The section also added language codifying the existing procedure for forwarding complaints based on citizenship or immigration status to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices. Under this procedure, complaints based on citizenship or immigration status are forwarded to the Department of Justice, while aspects of the complaints which allege a violation of this section, or any other portion of the H–2A statute or regulations, are investigated by the WHD.

The Department received four comments on § 501.3. One private citizen stated that guest workers should be protected from discrimination on the same terms as U.S. workers. One non-profit legal aid firm stated that H–2A

employers have a reputation for mistreating U.S. farm workers and urged the Department to closely monitor hiring and employment practices and severely penalize employers who discriminate against U.S. workers.

One agricultural organization stated that the Department has not explained the legal basis for this authority or the proposed new procedures for handling discrimination claims. The agricultural organization also stated that Congressional intent is contrary to the Department's assertion of broad authority over undefined forms of discrimination with an uncapped make whole remedy.

The final regulation does not contain new procedures for the investigation of discrimination complaints. As part of the *Application for Temporary Employment Certification,* an employer attests that it will not discriminate against persons who exercise their rights under the H–2A statute and regulations. Authority for the current regulation is found in Section 218(g)(2) of the INA which authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to ensure employer compliance with terms and conditions of employment.

The agricultural organization further stated that employment discrimination claims should be handled by the Equal Employment Opportunity Commission (EEOC). On the other hand, one farm worker advocacy organization argued that the Office of Special Counsel (OSC) has no statutory authority to enforce the rights of long-term, lawful permanent residents. This commenter proposed that § 501.3 should be modified to empower the WHD to investigate and prosecute complaints of discrimination on all unlawful grounds, including citizenship or immigrant status.

The Department has clarified the final regulation to make clear that the WHD will continue to investigate all alleged violations of the H–2A statute and regulations, and forward complaints of citizenship and immigration status, which it lacks authority to enforce, to the Department of Justice. Similarly, discrimination claims subject to EEOC jurisdiction will be forwarded to that agency. As noted above, where the same operative facts that support an allegation of citizenship discrimination or any other type of discrimination also support a claim of discrimination under the H–2A statute and regulations, which generally relate to retaliation for exercising rights under the program, the WHD will investigate the claim of discrimination under the H–2A statute and regulations and refer the claim of citizenship or other discrimination to the Department of Justice or to any other appropriate agency.

The language of this provision has been modified to conform to the changes made in § 501.20 of the Final Rule to WHD's debarment authority. The Final Rule provides that WHD ''may recommend to ETA debarment of any such violator from future labor certification,'' rather than stating that WHD ''may initiate action to debar any such violator from future labor certification.''

Section 501.3(a)(5) of the Final Rule provides, consistent with the proposed rule, that an employer may not retaliate or discriminate against an employee who has consulted with an attorney or an employee of a legal assistance program. This provision does not, however, provide employees license to aid or abet trespassing on an employer's property, including by persons offering advocacy or legal assistance. No matter how laudable the intent of those offering advocacy or legal services, an employee does not have the legal right to grant others access to the private property of an employer. A farm owner is entitled to discipline employees who actively aid and abet those who engage in illegal activity such as trespassing. Absent any evidence of a workers' actively aiding or abetting such activity, however, an employer's adverse action against an employee in response to that employee meeting with a representative of an advocacy or legal services organization, particularly on the worker's own time and not on the employer's property, would be viewed as retaliation.

Section 501.4 Waiver of Rights Prohibited

Proposed § 501.4 proposed a change to the existing regulation to conform to the modified definition of corresponding employment in § 501.0 and to remove language that was not necessary to the meaning or interpretation of the regulation. No other change was intended. The final regulation adds language that was included in the prior regulation to make clear that the prohibition on the waiver of rights does not prevent agreements to settle private litigation.

An agricultural organization expressed concern that this provision prohibits anyone from seeking a waiver of rights and recommended that the Department clarify that this does not preclude offering a settlement, proposing a waiver or general release, or informally resolving disputes in the workplace. As noted above, the Department has included language from the current regulation stating that agreements to settle private litigation are not prohibited. In other contexts employees may not waive statutory or regulatory rights.

Section 501.5 Investigation Authority of Secretary

This section reflects a change from the proposed rule to reflect that WHD will recommend debarment to ETA. *See* 29 CFR 501.20. In addition, the proposed rule provided that sanctions may be imposed on any employer that does not cooperate with an H–2A investigation. One commenter stated that the proposed rule changed the broader term *person* to *employer* and recommended the use of the prior language. The term *employer* is used to conform to the statutory language. To be consistent with language used elsewhere in the part and in 20 CFR 655 Subpart B, this section now includes the employer's attorney or agent.

Section 501.6 Cooperation With DOL Officials

The proposed changes to § 501.6 were intended to ensure that DOL officials receive cooperation from employers participating in the H–2A Program in conducting audits, investigations, and other enforcement procedures intended to ensure the efficiency and effectiveness of the Program and included language specifically addressing WHD's authority to debar under the H–2A Program. The regulation was changed to reflect the fact that WHD will make debarment recommendations to ETA and has been clarified to require all persons to cooperate with investigations so that a failure to cooperate, which encompasses interference with an investigation, would warrant appropriate action by WHD.

Section 501.8 Surety Bond

In order to assure compliance with the H–2A labor provisions and to ensure the safety and security of workers under the H–2A Program, proposed § 501.8 requires all H–2ALCs seeking H–2A labor certification to obtain a surety bond for $10,000, where the H–2ALC employs fewer than 50 employees, or for $20,000, where the H–2ALC's employees number 50 or more. The purpose of § 501.8 is to ensure that workers employed under the H–2A Program receive all wages and benefits owed to them by an H–2ALC who is found to have violated the provisions of the H–2A Program during the period for which it was certified. Rather than requiring H–2ALC applicants to remit

the bonds directly to the Department, however, proposed § 501.8 requires that the H–2ALC attest to having obtained the required bond and to provide the specific bond and bonding company information in conjunction with the H–2A certification application.

The proposed requirement for a surety bond from H–2ALCs was met with approval from two commenters. A worker advocacy organization suggested that the Department consider other associated worker costs in addition to the number of employees to compute the amount of the bond that the H–2ALC would have to obtain.

Other commenters disagreed with the surety bond requirement. An agricultural organization that disagreed with § 501.8, as it was proposed, argued that the surety bonds will not be financially feasible for any but the largest H–2A contractors. It contends that such bonds are not only financially constrictive but are also difficult to obtain in the bond underwriting market. The Department notes, however, that several states, including California, Illinois, Oregon, and Idaho, have adopted similar state regulations requiring comparable surety bond amounts from employers and labor contractors without causing any significant impediments to employers and agricultural labor contractors. The Final Rule has been modified in response to these comments, however, to create a smaller bonding requirement of $5,000 for small H–2ALCs with fewer than 25 employees.

Several commenters argued that the Department's ability to increase the bond amounts based only on its discretion is unreasonable and is outside the scope of the Department's authority. Instead, they suggest that the regulation provide more objective criteria for setting the bond levels instead of relying solely on the discretion of the Secretary of Labor.

The Department has determined that it has the authority, where warranted by the circumstances and supported by objective criteria, to require that an H–2ALC obtain an increase in a bond amount if it is deemed necessary to effectuate the purposes of ensuring that the H–2ALC comply with the requirements and obligations of the H–2A Program. A clarification that objective criteria are required to support an increase in the bond amount has been added to the Final Rule. The due process rights of H–2ALCs are further preserved through the H–2ALC's right to request a hearing pursuant to § 501.33 regarding the Department's determination that the amount of a bond is to be increased in order to be allowed to participate in the H–2A Program. By reviewing the historic bonding requirements in conjunction with worker claims, the Department preserves the discretionary authority needed to ensure that the obligations owed by the H–2ALCs to workers employed under the H–2A program are fulfilled, including wages paid, and to ensure that the protections offered to those workers by the H–2A Program are maintained.

Section 501.10 Definitions

Section 501.10 incorporates the definitions listed in 20 CFR part 655, Subpart B that pertain to 29 CFR part 501. The discussion of definitions that are common to both 20 CFR 655.100 and 29 CFR 501.10 can be found in the preamble for 20 CFR 655, Subpart B above. Several changes were made to the definitions in § 501.10 to conform to changes to the definitions in 20 CFR 655, Subpart B.

As noted in two comments, the definition of *employ* in proposed 29 CFR 501.10 was defined as *to suffer or permit to work,* whereas the terms *employer* and *employee* were defined in terms of the common law test. Since the two concepts are different and the use of *suffer or permit to work* is precluded by the 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.

The definition of work contract has been updated to reflect language used in the proposed changes to 20 CFR part 655, Subpart B.

The proposal, like the Final Rule, utilized the term *successor in interest* in § 501.20. A definition of the term has therefore been added to the Final Rule.

Section 501.15 Enforcement

This section updated references to Section 218 of the INA and changed language addressing corresponding employment. Minor, non-substantive changes have been made to the language of the provision in the Final Rule for purposes of clarity and to update cross-references.

Section 501.16 Sanctions and Remedies

The proposed rule modified the current language to conform to the proposed regulation at § 501.20, which provided authority to the WHD to debar violators under certain circumstances and to conform to the bonding requirements in 20 CFR part 655, Subpart B.

A farm worker advocacy organization comments that the proposed rule can be read to restrict payment of back wages to fixed-site employers in the event that a joint employment relationship exists between a fixed-site employer and an H–2ALC. Since it is the Department's intent to hold both employers in a joint employment relationship liable for back wages, the regulation has been clarified to make that point plain.

The farm worker advocacy organization also commented that the distinction between the WHD's jurisdiction to debar and the ETA's jurisdiction to debar is unclear, and expressed concern that some violations that may merit debarment would not be acted upon. The commenter suggested that debarment authority be concurrent to assure that all appropriate allegations would be addressed. After careful consideration of this alternative, the Department has determined that WHD will make debarment recommendations to ETA. See preamble to § 501.20. The Final Rule has been modified accordingly. Because debarment is addressed explicitly in § 655.118, and because recommendations of debarment are addressed explicitly in § 501.20, the language from § 501.16 of the NPRM has been deleted to avoid potential confusion.

The rule has also been clarified to make explicit that back wages may be assessed in the event a U.S. worker is adversely affected by a layoff or displacement. This clarification conforms the regulation to the provisions of the proposed civil money penalty and debarment regulations which provide for penalties in the event a U.S. worker is adversely affected by a layoff or displacement. Assessment of back wages in the event of a layoff or displacement that is prohibited by these regulations will help to ensure that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of U.S. workers similarly employed. While the authority to assess back wages is already provided in the proposed regulation, the clarification is useful in light of the explicit penalty provisions in §§ 501.19 and 501.20.

Finally, the final rule modifies § 501.16 to make clear that injunctions may be sought to reinstate U.S. workers who are laid off or displaced in violation of the attestation provision found at § 655.105(j), where the Administrator/WHD has found a violation and the employer has refused reinstatement.

Section 501.19 Civil Money Penalty Assessment

Section 218(g)(2) of the INA authorizes the Secretary to set

appropriate penalties to assure compliance with the terms and conditions of employment under the H–2A statute. Proposed § 501.19 increased the maximum civil money penalties from the current maximum of $1,000 per violation. Section 501.19(c)(1) proposed an increase to a maximum penalty to $5,000 per worker for a willful failure to meet a condition of the work contract or for discrimination against a U.S. or H–2A worker who filed a complaint, has testified or is about to testify, or has exercised or asserted a protected right. Section 501.19(d) proposed a change to the maximum penalty for interference with a WHD investigation to $5,000 per investigation. Section 501.19(e) proposed an increase to $15,000 for the maximum penalty for a willful failure to meet a condition of the work contract that results in displacing a U.S. worker employed by the employer during the period of employment on the employer's application, or during the period of 75 days preceding such period of employment. Section 501.19(c)(2) proposed a new penalty of up to $50,000 per worker for a violation of an applicable housing or transportation safety and health provision of the work contract that causes the death or serious injury of any worker. The section also proposed a new penalty of up to $100,000 per worker where the violation of a safety and health provision involving death or serious injury is repeated or willful.

Three worker advocacy organizations and a U.S. Senator supported the Department's proposal to increase the amount of fines and penalties for noncompliance with H–2A rules. One commenter stated that enhanced enforcement activities are key to an effective attestation-based application program and encouraged the Department to utilize all fines levied for noncompliance to further enhance enforcement measures. Similarly, one worker advocacy organization stated that the increased money penalties are welcomed and may have some tangible deterrent effect; however, it did not think they were adequate to achieve meaningful assurance of employer compliance.

Fourteen commenters opposed the proposed increases in penalties and fines, arguing that the increases are excessive. Six commenters argued that the excessive increases in fines and penalties would discourage employers, especially new employers, from using the H–2A Program. Some agricultural organizations raised concerns that the increased penalties would deter employers from participating in the program out of fear that excessive penalties could end a business. Similarly, some agricultural organizations argued that the increased penalties are excessive given the complicated nature of the program and the likelihood of an inadvertent mistake on the part of the employer that could prove to be financially disastrous. One farm labor contractor argued that the fines are unnecessary since employers strive to treat all workers fairly and attempt to follow the rules.

Some commenters suggested that the Department not assess a $5,000 civil money penalty against employers new to the H–2A Program and the certification requirements. While one commenter endorsed and encouraged the Department's ability to utilize all fines and penalties for noncompliance with the H–2A rules, he raised some concern that the proposal does not provide any leeway to new users of the program. The commenter recommended a graduated system of fines to allow for a learning curve for new users. Similarly, one agricultural organization suggested that the civil money penalties be graduated for the first, second, and third offenses to allow for a learning curve due to the complexity of the program.

Initially, it should be noted that the current regulation at 29 CFR 501.19(c) provides penalties in the maximum amount of $1,000 for *each act* of discrimination or interference. While the Final Rule will result in increased penalties in some cases, it will also limit penalties for discrimination to $5,000 per worker and penalties for failure to cooperate to $5,000 *per investigation*, creating new caps for these penalties. The Department has revised 29 CFR 501.19(d) to cover a ''failure to cooperate with an investigation'' so that the language of the violation is consistent with §§ 501.6, 501.20, and 501.21.

The Department does not believe that higher penalties, where applicable, will prevent employers from participating in the H–2A Program. Rather, the Department agrees with this commenter that enhanced enforcement activities are key to an effective attestation-based application program and will assist the Department in enforcing worker protections. The higher penalties are an important and effective deterrent against violators who disregard their obligations under the attestation program and/or who discriminate against workers.

It is worth noting that some commenters believe that the penalties are excessive, while others claim they are inadequate. The Department believes that the general penalties of no more than $1,000 for each violation, and $5,000 for each willful failure to meet a covered condition of the work contract or for willful discrimination, are fully appropriate, and those penalties have been left unchanged in the Final Rule. To clear up ambiguities in the proposed rule, however, the Department has inserted clarifying language specifying how it is that the existence of separate violations subject to those penalties will be determined.

While the new sections increase the amount of the penalties that the Department may seek for some violations, they do not modify or change in any way the relevant factors that the Administrator/WHD will use in determining the amount of the penalty as listed in the prior rule. The Administrator/WHD will not seek the maximum amount for every violation. Rather, the Administrator/WHD will continue to evaluate the relevant factors listed in § 501.19(b), and the totality of the circumstances, when determining the amount of the penalty. The factors that will be considered include, but are not limited to, the previous history of violation(s) of the H–2A provisions of the Act and the regulations; the number of H–2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation(s); the gravity of the violation(s); efforts made in good faith to comply with the H–2A provisions of the Act and these regulations; explanation of the person charged with the violation(s); commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H–2A provisions of the Act; and the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the worker. The phrase ''H–2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment'' has been substituted for the phrase ''workers'' in § 501.19(b)(2) of the current regulation to clarify the scope of potentially impacted workers that the Department will examine in determining an appropriate penalty, and to make clear that workers will not be considered unless they were sufficiently proximate to the violation in question that the Department can fairly consider the workers to have suffered a direct adverse effect. These criteria assure that excessive penalties will not be assessed and that penalties will be appropriately tailored when minor or inadvertent violations are committed.

As previously noted, the Department's proposal also allows the Administrator/WHD to seek higher civil money penalties for a violation of an applicable housing or transportation safety and health provision of the work contract that causes death or serious injury of any worker. The Department has corrected a typographical error in § 501.19(c)(3), which inadvertently stated that ''[f]or purposes of paragraph (c)(3) of this section, the term *serious injury* means.'' The proposed section should have referenced paragraph (c)(2).

One agricultural organization supported increased prosecution of repeat or flagrant violators of the H–2A Program instead of implementing excessive fines for inadvertent violations. Some commenters disagreed with the $50,000 penalty per worker for these violations, and one agricultural organization opposed additional penalties of $50,000, and $100,000 for violations that result in injury and death. These commenters expressed concerns that in some circumstances an employer could have no reasonable means of knowing about housing or transportation defects or an employee's misbehavior or carelessness that could lead to serious injury or death. One agricultural organization argued that these penalty increases would not reduce accidents but would rather deter employers from participating in the H–2A Program.

The Department is sensitive to the fact that the proposed penalties represent increases of up to 100 times the current maximum penalty amount. Nevertheless, the Department believes that the current penalties are grossly inadequate to address serious program violations that kill or seriously injure workers. In light of the concerns expressed, however, and to better tailor the proposed very substantial penalties to the employer's actual level of culpability, the Department has modified the penalties in the Final Rule. The Final Rule provides that ''[f]or a violation of a housing or transportation safety and health provision of the work contract that proximately causes the death or serious injury of any worker, the civil money penalty shall not exceed $25,000 per worker, unless the violation is a repeat or willful violation, in which case the penalty shall not exceed $50,000 per worker, or unless the employer failed, after notification, to cure the specific violation, in which case the penalty shall not exceed $100,000 per worker.''

The Department also notes in response to these commenters that the Administrator/WHD will not seek the full amount in every circumstance. The Department will continue to evaluate the relevant factors listed in § 501.19(b), and the totality of the circumstances, to determine the civil money penalty assessment for these violations. For instance, the gravity of the violation(s); efforts made in good faith to comply with the H–2A provisions of the Act and these regulations; explanation of the person charged with the violation(s); and the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the worker will be considered by the Department in determining the civil money penalty assessment against an employer for a violation of an applicable housing or transportation safety and health provision of the work contract that causes death or serious injury of any worker. The Department believes that evaluating these relevant factors, along with the totality of the circumstances, should alleviate the commenter's concerns that excessive penalties will be assessed for inadvertent violations. Furthermore, one commenter expressed concern that serious injury is not further defined. It is the Department's view that § 501.19(c)(3), which defines serious injury as the permanent loss or substantial impairment of the senses, function of a bodily member, organ, or mental faculty, or the loss of movement of a body part, is sufficient to put employers on notice as to the types of injuries that the Department will consider when assessing a penalty.

One agricultural organization stated that penalties are not the proper deterrent to stop safety violations because they are imposed after an accident and recommended greater emphasis on preventing accidents. Similarly, two agricultural organizations requested a specified time period for employers to correct violations before penalties would be assessed. One agricultural organization stated that employers who make good faith efforts to comply with the revised H–2A Program should be allowed a 60 day compliance period to correct the error without the assessment of fines and penalties.

While the Department recognizes the need to prevent accidents before they happen, the Department believes that the burden to do so should rest with the employer who has attested that the housing and/or transportation provided to the workers meets all applicable requirements. Furthermore, the ability to assess a civil money penalty where violations have been found will serve as an important incentive for employers to ensure that the housing and transportation that they provide are safe to the H–2A and U.S. workers and meet all applicable safety and health requirements. The Department does not believe that a 60 day compliance period after a violation has been discovered would ensure that employers fulfill their obligations to provide safe housing and transportation. Rather, the 60 day compliance period would not be an effective deterrent for employers who might not cure safety violations until discovered by the Department.

One law firm argued that, to the extent that the Department contemplates issuing fines for violations of other laws, such as the Occupational Safety and Health Act or Fair Labor Standards Act, those fines would be duplicative and not authorized by law. The law firm also argued that there is no justifiable basis for treating H–2A employers more harshly than non-H–2A employers for violations of the same statute, but even if special treatment for violations of other laws by H–2A employers could be justified, any enhanced enforcement through heavier penalties or other punitive action for failure to comply fully with other laws as violations of the H–2A regulations should at least be deferred for at least 3 years after any new rules are implemented. The Department does not and will not assess penalties for the same housing violation under multiple laws at the same time. Where an employer violates an OSHA Temporary Labor Camp standard, which could also be a violation of the H–2A housing regulations, a violation will be charged under only one of those statutes. WHD follows this practice in enforcing OSHA temporary labor camp standards and MSPA housing standards that can apply to the same facility. However, an employer has an obligation to follow all applicable laws and regulations. To the extent that an employer is covered by the FLSA, the Division may enforce and seek remedies under both the H–2A program and the FLSA. Of course, payment of the AWER, or the prevailing hourly wage or piece rate under the H–2A Program, would also satisfy the obligation to pay the minimum wage under the FLSA. While all of the facts and circumstances of a given case will be considered in the assessment of any penalty, the Department has determined that a blanket 3 year deferral of penalty assessments is not warranted.

The proposed § 501.19(e) states that the civil money penalty shall not exceed $15,000 per worker for willful layoff or displacement of any similarly situated U.S. worker employed in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within

the period beginning 75 days before the date of need. A civil money penalty will not be assessed for layoffs where the employer has offered the opportunity to the laid-off U.S. worker, and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons. The Final Rule has changed the 75 day period to a period within 60 days of the date of need in conformity with the change to § 655.100(a)(1)(ii) which modified the requirement that the employer begin advertising within 75 days of the date of need to within 60 days of the date of need.

Some commenters argued that $15,000 for displacement of a domestic worker was excessive and could put a small farm out of business. The Department is sensitive to the fact that this penalty represents a fifteen-fold increase in the maximum penalty provided for any offense under the current regulations. Nevertheless, unlawfully displacing a domestic worker is a serious offense that has a substantial adverse effect on the displaced worker, and thus falls within the core of the Department's enforcement responsibilities. Balancing these competing concerns, the Department has decided to adopt a $10,000 maximum penalty for displacement of a U.S. worker in the Final Rule, a tenfold increase over the current maximum penalty for any violation. This penalty will provide the Department with an important enforcement tool under this attestation-based program. The Department believes that a significant penalty will serve as an important deterrent for employers who might turn away qualified U.S. workers from an occupation covered by an *Application for Temporary Employment Certification.* As discussed above, the Department will continue to evaluate the relevant factors listed in § 501.19(b), as well as the totality of the circumstances, to determine the civil money penalty assessment for these violations.

One commenter argued that the Department was purporting to legalize the displacement of U.S. farm workers based on nothing more than an employer's unscrutinized, self-serving statement that U.S. workers did not want, or were unqualified for, the job. The Department did not intend this consequence, and on further consideration has determined that such an expansive safe harbor provision for layoffs is not necessary. Layoffs that are for lawful, job-related reasons are already protected under the text of the Final Rule, and the Department does not believe that it is appropriate to allow an employer to legitimize an otherwise illegal layoff simply by later offering the laid-off employee a new position. The Department has therefore limited the application of the safe harbor provision to situations ''where all H–2A workers were laid off'' before any U.S. workers were. In such a situation, the employment of H–2A workers will not have factored into the layoff of the U.S. workers.

One agricultural organization argued that the safe harbor provision seems to require an actual offer and would not be satisfied by a good faith, but unsuccessful, attempt to locate the domestic worker. The agricultural organization noted that it may be difficult to locate domestic workers to make the offer and recommended that the attestation could be satisfied with reasonable, good-faith efforts to contact these workers through a written communication to the worker's last known address or any other reasonably specific attempt to make contact. In light of the modifications to the safe harbor provision, these comments have been rendered moot.

The agricultural organization also argued that this section should be revised because the maximum period of admission under the H–2A Program for one employer is 10 months, making it possible that the employer could discharge the domestic worker at the end of the employer's period of need and then begin a new employment period 2 months later. This employer would have discharged the domestic worker within the displacement provision timeline, notwithstanding the fact that the employer was in compliance with the H–2A Program. The agricultural organization argued that this could expose employers to large fines for no reason other than the timing of the seasons. The agricultural organization recommended that the section be revised to reflect the time frames inherent in the H–2A regulations to avoid this inequitable outcome. As noted above, the time frames have been modified to prohibit displacement and layoff within 60 days of the date of need. In any event, in light of the modifications to the safe harbor provision, these comments have been rendered moot.

One law firm requested that the Department remove what they considered improper, substantial new penalties against agents and attorneys of H–2A employers who are found or accused of making material misrepresentations in the certification application process. The law firm stated that such disciplinary measures are usually handled through the state bar association and that imposing substantial penalties, including debarment merely for accusations of material misrepresentations, is a violation of due process principles. There is no explicit reference in this provision to attorneys or agents. As is discussed at greater length in the preamble to Part 655, the Department will not hold attorneys and agents strictly liable under the Final Rule for the misconduct of their clients. Rather, the Department will require some degree of personal culpability on the part of attorneys and agents before applying any form of penalty to them.

Some commenters argued that the new regulations failed to provide an appeals process for violations or fines and requested that procedures be developed to allow employers to appeal violations and fines when good faith efforts were taken to comply with the rules. The Department already provides such a process in Subpart C—Administrative Proceedings. The current § 501.30 provides the administrative proceedings that will be applied with respect to a determination to impose an assessment of civil money penalties. Under current and proposed § 501.33(a), any person who desires review of a civil money penalty determination shall make written request for an administrative hearing no later than 30 days after issuance of the notice to the official who issued the determination at the Wage and Hour Division. Such timely filing of an administrative appeal stays the determination pending the outcome of the appeals process pursuant to proposed § 501.33(d).

Section 501.20—Debarment and Revocation

The current regulations provide ETA with the authority to deny certification (i.e., debarment) and revoke certificates while requiring the WHD to report findings and make recommendations to ETA to deny future certifications and revoke current certificates. The NPRM proposed providing debarment authority for issues arising from WHD investigations to the Administrator/WHD, while debarment authority for issues arising out of the attestation process would have remained with ETA. The Final Rule modifies the proposal by adhering to the current practice, providing ETA authority for debarment and revocation, and providing the Wage and Hour Division authority to make a debarment recommendation.

A number of commenters opposed extending debarment authority to the

WHD. These commenters requested that debarment authority remain with ETA to avoid inconsistencies in the interpretation of the H–2A regulations between WHD and ETA. One of these commenters stated that extending debarment authority to the WHD would enhance enforcement, while recommending regulatory language requiring coordination between the two agencies. One commenter stated that the WHD should have concurrent debarment authority with ETA to ensure that debarment is available for all appropriate violations.

After a careful review of the comments, the Department has concluded that providing debarment authority to two different agencies within the Department for different, though potentially overlapping types of violations could result in unnecessary confusion. Debarment authority will therefore remain with ETA, which will entertain recommendations from WHD.

However, under the current system the Board of Alien Labor Certification Appeals (BALCA) adjudicates appeals of ETA debarment determinations based upon WHD recommendations, while appeals of WHD back wage and civil money penalty assessments are adjudicated by the Administrative Review Board (ARB). WHD debarment recommendations generally arise from the same set of facts, involving the same evidence as WHD back wage and civil money penalty assessments. To conserve resources and avoid unnecessary duplication of litigation, the Final Rule specifies at § 501.20(e) that ''In considering a recommendation made by the Wage and Hour Division to debar an employer or to revoke a temporary agricultural labor certification, the Administrator/OFLC shall treat final agency determinations that the employer has committed a violation as *res judicata* and shall not reconsider those determinations.''

The standards for debarment recommendations used by WHD have been conformed to ensure that they are identical to the standards used by ETA for debarment actions under 20 CFR 655, Subpart B, thus ensuring consistency in application, though ETA has some additional standards that are not applicable to the WHD role and will not be utilized by WHD.

The proposed rule did not include a change to the current revocation procedures, under which WHD provides recommendations to ETA for certificate revocation. That procedure is adopted in the Final Rule, together with more specific revocation criteria, which have been modified to conform to the criteria set forth in 20 CFR 655, Subpart B.

Section 501.21 Failure To Cooperate With Investigations

Section 501.21 has been modified in the Final Rule to conform to the changes made in § 501.20 regarding WHD's authority to make debarment and revocation recommendations to ETA. The relevant language in the Final Rule now provides that ''a civil money penalty may be assessed for each failure to cooperate with an investigation, and other appropriate relief may be sought. In addition, the WHD shall report each such occurrence to ETA, and ETA may debar the employer from future certification. The WHD may also recommend to ETA that an existing certification be revoked.''

Section 501.22 Payment and Collection of Civil Money Penalties

No changes to this section were proposed in the NPRM. The text of the current regulation has been included in the Final Rule with only one alteration, specifying that a ''penalty is due within 30 days.''

Section 501.30 Applicability of Procedures and Rules

The language in § 501.30 was revised in the proposed rule to illustrate the administrative process for assessing civil money penalties and seeking a debarment under the H–2A Program. With the exception of civil money penalty assessments and debarment disputes, the Department of Labor may file an action directly in Federal court seeking enforcement. Section 501.30 has been modified in the Final Rule to conform to the changes made in § 501.20 regarding WHD's authority to make debarment recommendations to ETA.

Section 501.31 Written Notice of Determination Required

The administrative process was revised in the proposed rule to reference WHD's authority to debar. Section 501.31 has been modified by deleting the phrase ''to debar'' to reflect the fact that WHD recommendations for debarment do not constitute ''determinations'' of the Administrator/WHD that are subject to hearing requests under § 501.33.

Section 501.32 Contents of Notice

This section was revised in the proposed rule to reference WHD's authority to debar. Section 501.32 has been modified by deleting the phrase ''whether to debar and the length of the debarment'' to reflect the fact that WHD recommendations for debarment do not constitute ''determinations'' of the Administrator/WHD that are subject to hearing requests under § 501.33.

Section 501.33 Requests for Hearing

The proposed rule added language to the regulation to make clear that exhaustion of the appeal of the Administrator/WHD's determination is required before a party may appeal an agency ruling to Federal court. No comments were received and the Final Rule is adopted as proposed.

Section 501.41 Decision and Order of Administrative Law Judge

Some minor, non-substantive changes were made to paragraph (c) of this provision, including the creation of a new paragraph (d), for purposes of clarity and consistency with § 501.42.

Section 501.42 Exhaustion of Administrative Remedies

Proposed § 501.42 clarified the current regulation to assure that the exhaustion of all administrative remedies is required before an appeal of the decision of the administrative law judge can be taken to the Federal courts pursuant to the Administrative Procedure Act.

One commenter noted that the additional language, stating that the decision of the administrative law judge shall be inoperative pending final review of the Administrative Review Board's (ARB) decision, was unnecessary to ensure exhaustion and harmful to workers. In *Darby* v. *Cisneros,* 509 U.S. 137, 152 (1993), the Supreme Court decided that agencies may not require exhaustion of administrative remedies before an appeal may be filed with a federal district court unless a rule is adopted that an agency appeal must be taken before judicial review is available, and it is provided that the initial decision is *inoperative* pending appeal. *Id.* Accordingly, the additional language is necessary to the exhaustion requirement. Further, it is unclear what harm may result from requiring that workers await a decision by the ARB before appealing to Federal court. There is a distinct public benefit from the uniform agency decision making process accorded by ARB review. Additional language has been added to this provision to clarify when an administrative law judge's decision becomes final agency action.

C. Revisions to 29 CFR Parts 780 and 788

In the notice of proposed rulemaking (NPRM) published February 13, 2008, the Department proposed a modification to Parts 780 and 788 of the FLSA

regulations to recognize that the production of ''Christmas'' trees through the application of agricultural and horticultural techniques to be harvested and sold for seasonal ornamental use constitutes agriculture as the term is defined under the FLSA. As explained in the preamble to the NPRM, the Department deemed this change necessary in light of the Fourth Circuit Court of Appeals' decision in *U.S. Department of Labor* v. *North Carolina Growers Association,* 377 F.3d 345 (4th Cir. 2004), and because it recognizes that modern production of such trees typically involves extensive care and management.

Many individual employers, trade associations, and associations of growers approved of the Department's proposed rule to classify Christmas tree farming as an agricultural activity under FLSA. Several commenters noted that the Christmas tree industry had undergone significant changes, such as no longer harvesting from natural stands, in the time since the FLSA was first passed in 1938. Commenters also listed a range of current common practices shared by Christmas tree producers and other row crop farmers, such as planting, pruning, weed control, pest control, transplanting, and harvesting under a deadline. The insight provided by these comments further confirms that the determination to classify Christmas tree farming as agriculture under the FLSA is appropriate.

Two commenters suggested that many of these activities were also covered by the 1938 FLSA primary definition of agriculture. Moreover, the commenters maintained that, since the FLSA classifies nursery activities as an agricultural activity, Christmas tree production and harvesting, which the commenters believed to be nearly identical to those in nursery production and harvesting, must also be classified as agricultural activity.

Several commenters expressed appreciation for the Department's attempt to establish a national standard for Christmas tree labor status. Several others maintained that the ambiguity surrounding the industry's status had hurt Christmas tree growers nationally because laws were not being applied in a uniform fashion across the states. In addition, many commenters pointed to the Fourth Circuit's 2004 decision in *North Carolina Growers Association,* in which the court held that Christmas tree farming fit the definition of agriculture as proof that Christmas tree production was an agricultural activity. *See* 377 F.3d at 352. This holding created confusion between the Department's classification and federal law. Two commenters noted that Christmas tree growers located in the Fourth Circuit may have achieved clarity with respect to their status as agricultural producers, but the status of all other Christmas tree growers not within the jurisdiction of the Fourth Circuit remained unclear until now.

Other commenters added that, under many other federal rules including property tax, sales tax, and agricultural worker's protection standards for pesticide use, Christmas tree growers were already considered to be agricultural. Several commenters acknowledged that certain Christmas tree growers may dig trees with a soil ball, which is considered a nursery activity and therefore an agricultural activity, but may also produce trees for harvesting by cutting, which has, historically, not been considered to be agricultural activity. The commenters noted that the decision to dig or cut a tree depends on market conditions at the time of harvest, and the same employees could hypothetically participate in both scenarios. Two commenters concluded, however, that this difference between nursery and Christmas tree harvesting was irrelevant because the production practices remained the same and should be construed as agriculture. Likewise, one commenter wrote that the same equipment was often used for both Christmas tree production and nursery projects.

Three commenters offered suggestions for minor changes to the rule stating that the proposed language offered overly specific timeframes for horticultural operations. The commenters argued that such timeframes may vary according to region and tree species and that future changes to horticultural procedures might affect some of the listed activities in the rule. One commenter further stated that removing the timeframes would not affect the Christmas tree industry's ability to operate within the FLSA's definition of agriculture, but would possibly eliminate an unnecessary rigidity that might otherwise disqualify Christmas tree production that appropriately qualifies for agricultural status. The Fourth Circuit's reasoning in the *North Carolina Growers Association* case clearly articulated that performance of certain actions on the plants is an important indicator that what is being produced is a seasonal ornamental horticultural commodity. *See* 377 F.3d at 345. The regulatory language addressing timeframes is sufficiently flexible to allow for variation in timeframes due to region, species, and procedural differences. Indeed, the Final Rule expressly qualifies the listed timeframes by saying that the agricultural techniques applied must be those ''such as the following.'' The Department will not apply the listed timeframes with undue rigidity.

One commenter, commenting on its own behalf and on behalf of numerous advocacy groups, opposed the rule, asserting that, while the H–2A program offered more comprehensive protections for workers than did the H–2B classification (under which many Christmas tree harvest workers had previously been allowed into the country to work), Christmas tree workers under the H–2A Program would lose their coverage under MSPA as well as their claims to overtime. The commenter added that the matter of overtime pay was critical because the Christmas tree harvest season can be extremely intense with extensive overtime work. Temporary, non-immigrant workers for Christmas tree production have been brought in under the H–2A Program and not the H–2B non-agricultural Program for many years now based on the IRC definition of agriculture, which the H–2A regulations use (as well as the FLSA definition of agriculture), and would not have been within the definition of a worker subject to MSPA. The proposed rule insures equity within the industry in that employers across the country will be bound by the same requirements under the FLSA in the wake of the Fourth Circuit's *North Carolina Growers Association decision. See id.* The Department is adopting the proposed changes for 29 CFR Part 780 without change.

No comments were received with respect to the proposed change to 29 CFR Part 788.10. Therefore, the Department is adopting the proposed rule without change in the Final Rule.

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 (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting 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) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising 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 has determined that this Final Rule is not an ''economically significant regulatory action'' under Section 3(f)(1) of E.O.12866. The procedures for filing an *Application for Temporary Employment Certification* under the H–2A visa category on behalf of nonimmigrant temporary agricultural workers, under this regulation, will not have an economic impact of $100 million or more. The regulation will not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, nor public health or safety in a material way. In fact, this Final Rule is intended to provide relief to affected employers both directly, by modernizing the process by which they can apply for H–2A labor certification, and indirectly, by increasing the available legal workforce. The Department, however, has determined that this Final Rule is a ''significant regulatory action'' under Section 3(f)(4) of the E.O. Summary of Impacts. The changes in this Final Rule are expected to have little net direct cost impact on employers, above and beyond the baseline of the current costs required by the program as it is currently implemented. The re-engineering of the program requirements, including attestation-based applications and pre-application recruitment, will have the effect of reducing employer application costs in time and resources and introduce processing efficiencies that will reduce costs for employers, particularly costs associated with loss of labor due to delayed certifications.

Employer costs for newspaper advertising will increase slightly, as the Final Rule will require that one of the two currently required advertisements be run on a Sunday. However, the Department believes that this cost increase will be offset by the certainty the Final Rule will provide regarding total recruitment costs. Most significantly, the Final Rule has eliminated the possibility that additional, unstated recruitment measures may be imposed on program users at the last minute, and further provides program users an annual list of traditional labor supply states that will inform them in advance of precisely where they will be required to engage in out-of-state newspaper advertising.

Civil money penalties have increased substantially under the Final Rule, but these represent avoidable costs, and the Department believes that they will have the deterrent effect of fostering greater program compliance under the Final Rule.

The biggest cost to employers under the Final Rule is likely to be an increased cost of foreign recruitment, since employers can no longer allow foreign recruiters with whom they are in privity of contract to charge foreign workers fees for recruitment. The Department believes that this cost can be substantially offset by collaborative recruitment, however, and that it will not be so large as to overcome employers' cost savings resulting from streamlining of the application process and program efficiencies. The Department requested comment on what costs these policies introduce and what efficiencies may be gained from adopting these new procedures, to foster a thorough consideration and discussion of the rule's costs and benefits before its finalization. Several commenters believed that the proposed changes could increase costs for employers and doubted that they would achieve the proposed objectives. Many of these concerns have been addressed by changes in the Final Rule, including reductions in the newspaper advertising and record retention requirements.

The additional record retention costs for employers are minimal and the Final Rule includes a three-year requirement as compared to the originally proposed five-year requirement. The new record retention requirements will require a burden of approximately ten minutes per year per application to retain the application and supporting documents above and beyond the one year of retention required by regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR 1602.14, promulgated pursuant to Title VII of the Civil Rights Act and the Americans With Disabilities Act, and 29 CFR 1627.3(b)(3), promulgated pursuant to the Age Discrimination in Employment Act. In FY 2007, 7,725 employers filed requests for 80,294 workers. Using standard administrative wage rates, including benefits, of $60.42 [15] per hour, this additional burden for each of the two years following the mandated year above is approximately $77,791 total per year (or approximately $10 per applicant per year) if the current number of requests remains constant. Any increase in the use of the program would result in the same ultimate burden to each individual applicant.

Employers will experience efficiencies as a result of the reengineering of the process. These savings are expected to result primarily from the simplified attestation-based application. While the Department cannot precisely estimate the cost savings as a result of this time saved, it believes that employers will experience economic benefits as a result of this reengineering of the application process to an attestation-based submission, including lower advertising costs and fewer unanticipated labor costs due to post-date-of-need hiring requirements. Savings to employers will be universal to new users as well as current participants. Savings from efficiency gains may be impacted, however, by increased usage of the program by agricultural employers, which could delay processing times within the Department.

B. Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires that a regulatory flexibility analysis be prepared and made available for public comment. The RFA must describe the impact of the rule on small entities. *See* 5 U.S.C. 603(a). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have significant economic impact on a substantial number of small entities. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and certifies under the RFA at 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. The rule does not substantively change existing obligations for employers who choose to participate in the H–2A temporary agricultural worker program.

The factual basis for such a certification is that even though this rule can and does affect small entities, there are not a substantial number of small entities that will be affected, nor is there a significant economic impact upon those small entities that are affected. Of the total 2,089,790 farms in the United States, 98 percent have sales of less than $750,000 per year and fall within SBA's definition of small entities. In FY 2007, however, only

[15] Derived by utilizing the Bureau of Labor Statistics 2006 median wage for Human Resources Manager wage of $42.55 and a 1.42 factor for the cost of benefits and taxes.

7,725 employers filed requests for only 80,294 workers. That represents fewer than 1 percent of all farms in the United States. Even if all of the 7,725 employers who filed applications under H–2A in FY2007 were small entities, that is still a relatively small number of employers affected. The Department does anticipate a substantial increase in program usage as a result of the Final Rule, but even a doubling in program usage would mean the participation of only about 15,500 employers, not all of whom would be small entities.

Even more important than the number of small entities affected, however, 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–2A program must continue to establish to the Secretary of Labor's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers and that their hiring of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Similar to the current process, employers under this newly reengineered H–2A process will file a standardized application for temporary labor certification and 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–2A process on employers, the Department calculated the current costs each employer likely pays in the range of $124.00–$170.00 to meet the advertising and recruitment requirements for a job opportunity, and spends approximately 3 hours of staff time preparing the standardized applications for the required offered wage rate and for temporary labor certification, final recruitment report, and retaining all other required documentation (e.g., newspaper ads, job orders, business necessity) in a file for audit purposes that is not otherwise required to be retained in the normal course of business. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager ($42.55), as published by the U.S. Department of Labor's Occupational Employment Statistics survey, O*Net OnLine,[16] and increased it by a factor of 1.42 to account for employee benefits and other compensation for a total staff time cost of $181.26 per applicant.

The Department acknowledges that there might be some extremely small businesses that may incur additional costs to file their application on-line if and when the Department moves to an electronic processing model. The total costs for the small entities affected by this program will most likely be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H–2A labor certification applications are considered to be small businesses, the net economic effect is not significant.

The Department invited comments from members of the public who believed there will be a significant impact on a substantial number of small entities or who disagree with the size standard used by the Department in certifying that this Final Rule will not have a significant impact on a substantial number of small entities. Several small farmers and ranchers offered that the proposal could have substantial impact on sheepherding operations and other small farmers. However, the comments offered addressed costs arising from requirements that were either already in place or were required by statute and therefore were unchanged by this rulemaking. Several other commenters from farming enterprises voiced concern that the Department's determination that the rulemaking was not economically significant was a judgment as to the economic significance of the industry. This was clearly a misconstruction of the Department's intent. The Department recognizes the economic importance of the agricultural and farming sector of the economy and has embarked on this rulemaking to ensure that there are sufficient workers available to ensure the economic success of both individual farms and the agricultural sector as a whole.

Several other commenters, including individual farmers and a law firm representing farming concerns, objected to what they saw as high costs of compliance with the new changes when taken together with the increased costs of filing applications with DHS. The Department appreciates and recognizes the strong cost pressures on American agricultural firms and has taken steps to reduce the costs of compliance wherever possible to ensure that farms of all sizes have the ability to participate in the program and have access to a reliable and legal workforce. We believe the improvements to this Final Rule address many of these concerns, while ensuring program integrity and worker protections.

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. Further, each agency is required to provide a process where State, local, and tribal governments may comment on the regulation as it develops, which further promotes coordination between the Federal and the State, local, and tribal governments.

The Department of Labor provided several opportunities for State, local, and tribal government input. Representatives from the Department in OFLC hosted webinars with the States on December 2 and 5, 2007, and then again on March 12 and 25, 2008, to discuss the issues outlined in Training and Employment Guidance Letter (TEGL) 11–07, Change 1 (November 14, 2007) that are now codified in the regulation. In addition, the Department hosted and continues to host regular conference calls to discuss these issues. Further, the Department fielded questions about the verification process from the States and posted the responses to them as Frequently Asked Questions on the program office Web site. Finally, the Department invited comments from all individuals, which includes State representatives, through the comment process for this regulation. As a result of these efforts, the Department received only six (6) comments from State agencies on unfunded mandates.

Each of the commenters stated that the regulation imposes an unfunded mandate because there are insufficient funds to support the H–2A activities at the State level. One commenter stated that the State would have difficulty maintaining the same level of quality in the program. Another commenter stated that the rule represents an unfunded mandate because there is no funding for litigation defense.

The Department disagrees that this final rule imposes an unfunded

[16] *Source:* Bureau of Labor Statistics 2006 wage data.

mandate. As noted in the proposed rule, the SWAs are required to perform certain activities for the Federal government under this program, and are compensated for the resources used in performing these activities. Further, under this final rule, the SWAs responsibilities are streamlined and generally reduced because they no longer are responsible for the substantive review of H–2A applications, which will allow the States to use grant funds for other program purposes. The Department recognizes that certain States may see an increase in the use of the program, as two commenters discussed, and as a result, may experience an increase in activities over another State with less H–2A activity. The Department addressed this issue in the proposed rule when it stated that it would analyze the amount of grants to each State to fund H–2A activities. The Department believes it would be premature to make a blanket statement regarding any increases the States may experience until after the new requirements are implemented. Therefore, the Department intends to make funding determinations based on that analysis and after an analysis of any increased usage trends among particular States as part of its normal program management operations. The Department believes it is also 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. A more substantive discussion on the Department's position on defending any potential litigation is located in other sections of the preamble.

Several commenters expressed a concern about using already limited Wagner-Peyser Act funds to compensate for H–2A activities. Although the Department understands the commenters' concern that Wagner-Peyser Act funds may be discontinued, such arguments are not relevant at this time given that the Department currently funds Wagner-Peyser Act activities and intends to continue doing so in the future.

Another commenter stated that TEGL 11–07, Change 1 imposes an unfunded mandate because compliance with the TEGL, which is now codified in the final rule, is a condition for the continued receipt of Wagner-Peyser Act funds. That same commenter also noted that the rule is more restrictive than H.R. 4088 (introduced in the 110th Congress), which is similar to the TEGL.

With regard to this comment, the Department included references to this TEGL in the proposed rule merely to inform the public that the provisions of the TEGL were clarified and codified in this rule. Because the Department already requires States under current program guidance to verify the employment authorization of workers before making H–2A referrals, the Final Rule's codification of these verification requirements will not impose significant new costs on States. The fact that a State may lose its funding for failing to comply with the program requirements, including those in the TEGL and now codified in this final rule, does not rise to the level of an unfunded mandate. The Department notes that this program is voluntary and like all voluntary Federal programs, it comes with responsibilities for managing the program and penalties for failing to adhere to those program requirements. There were no comments from the private sector on this issue. Therefore, for the reasons stated above, the Department has determined that this final rule does not impose any unfunded mandates.

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. The H–2A program is a Federal program that regulates work visas for temporary agriculture workers, protects employment opportunities for U.S. workers, and prevents an adverse effect on the wages and working conditions of U.S. workers. As noted elsewhere in this preamble, the Department has not reviewed the H–2A program comprehensively since its inception in 1986. 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. In addition, given that the H–2A program is an immigration program, it also is a program related to national security with national significance requiring Federal oversight and uniformity. Further, the relationship the States have with this program and the Federal government is by 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 concerns, but at the same time are consistent with the underlying legislation.

Furthermore, the Department consulted with the States on the eligibility verification requirements by several means. Representatives from the Department in OFLC hosted webinars with the States on December 2 and 5, 2007, and then again on March 12 and 25, 2008, to discuss the issues outlined in the TEGL that are now codified in the regulation. In addition, the Department hosted and continues to host regular conference calls to discuss these issues. Further, the Department fielded questions about the verification process from the States and posted the responses to them as Frequently Asked Questions on the program office Web site. Finally, the Department invited comments from all individuals, which includes State representatives, through the comment process for this regulation.

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–2A visa program and does not have tribal 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 has determined that although there may be some costs associated with the final rule, they are not of a magnitude to adversely affect family well-being. 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 received one comment on this section. This commenter stated that this rule would have a ''takings'' implication if farmers are forced out of business under this rule. The Department disagrees with this assessment. Although the cost associated with this regulatory action has an impact on commerce, it is not the type of impact addressed by the E.O. This final rule does not propose or implement licensing, permitting or other condition requirements on the use of private property nor does it require dedications or exactions from owners of private property. Accordingly, the Department has determined this rule does not have takings implications.

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 streamline the H–2A program and simplify the application process. Therefore, the Department has determined that the regulation meets the applicable standards set forth in Section 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

The Paperwork Reduction Act (44 U.S.C. 3501) information collection requirements, which must be implemented as a result of this regulation, were submitted to OMB on February 14, 2008, in conjunction with the NPRM. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l). The public was given 60 days to comment on this information collection under the NPRM even though originally the Department gave the public only 45 days to comment on the rest of the NPRM. On March 27, 2008, the Department published a notice in the **Federal Register** extending the comment period to April 14, 2008, for the rest of the NPRM, which then coincided with the comment period for the information collection. This same information collection was again submitted for public comment under another NPRM for a different program. The comments received pertaining to this rule were taken into consideration and a final package with the forms needed to implement this rule was submitted to OMB and received final approval on November 21, 2008, under OMB control number 1205–0466. The approval will expire on November 30, 2011. The information required under this collection is mandated in this final rule at §§ 655.100(a), 655.101, 655.102(c), 655.104(d), 655.105, 655.106, 655.107, 655.108, and 655.109.

The collection of information for the current H–2A 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) and OMB Control Number 1205–0134 (Form ETA 790). The Form ETA 750 will be gradually phased out and will no longer be used for the H–2A program for applications filed with a beginning date of need of July 1, 2009 or later. The Form ETA 790 will continue to be used in the H–2A program as it is required under 20 CFR 653.501 for all agricultural job orders.

As noted above, this final rule implements the use of the new information collection that OMB approved on November 21, 2008, under OMB control number 1205–0466. The approval will expire on November 30, 2011. The new Form ETA 9142, with instructions and appendices, has a public reporting burden estimated to average 2.17 hours for Form ETA 9142 per response or application filed. The Department has made changes to this final rule after receiving comments to the proposed rule and has made changes to the forms for clarity and program functionality. However, these changes do not impact the overall annual burden hours for the H–2A program information collection. The total costs associated

with the form, as defined by the Paperwork Reduction Act, is a maximum of $1,100 per employer for the Form ETA 9142. 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 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*.

2. Comments

The Department received only a few comments on this section of the NPRM. In each case, the commenters noted that there appeared to be an increase in the number of hours required under the new regulations, especially for the second recruitment report. One commenter estimated that it would take approximately 6.5 hours for an employer to complete two (2) recruitment reports, but did not provide data or a supporting rationale for this estimate. Most of the commenters did not specifically address the issue of our methodology or assumptions.

The combined paperwork burden estimate for the forms used for the H–2A program under the regulations in effect prior to the effective date of this final rule, Forms ETA 750 and ETA 790, was approximately 2.5 hours. Under this new collection of information, the Department estimates that the burden will be approximately 2.17 hours for Form ETA 9142, which includes one hour on average per employer to prepare the recruitment reports. There will be some employers who only require a few minutes to complete the recruitment report if only a few (or no) workers apply for the job opportunity, while other employers may spend two or more hours compiling the recruitment report if many workers apply for the job opportunity. As for other information requirements, the Department estimates that the affidavits of publication or tear sheets, which should be requested at the time of publication, require only one extra minute of time. Further, the Department estimates that requesting notice from the SWA confirming distribution of the job order will also only take an extra minute of time. Therefore, 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.

Another commenter stated that the form itself lacked sufficient space and the ''description for complying * * * [is] inadequate and materially misleading of the terms and conditions employers need to provide * * *.'' The Department notes, however, that this comment is related to the Form ETA 750, which will be discontinued, rather than the new collection form, ETA 9142. In addition, the Department added a notation to the new form that permits employers to submit additional pages of information if there is not sufficient space on the form for a response. In such cases, the information must clearly correspond to the appropriate section and question number noted on the form.

A couple of commenters on this section asked if any of the paperwork could be shifted to the Department, such as making copies of job orders, placing advertisements, and obtaining the tear sheets. Although the Department appreciates these comments, we find no reasonable justification for assuming this type of expense or responsibility. The responsibility for the applicable reporting requirements lies with program participant, which in this case is the applicant. The Department will continue to seek ways to improve program management efficiency and as noted elsewhere in this preamble, will be looking to implement an online application process in the future.

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, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

29 CFR Part 501

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

29 CFR Part 780

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

29 CFR Part 788

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

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

TITLE 20—EMPLOYEES' BENEFITS

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

■ 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), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

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

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

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

Subparts D and E authority repealed.

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

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

Subparts J and K authority repealed.

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

■ 2. Revise the heading to part 655 to read as set forth above.

■ 3. Revise § 655.1 to read as follows:

§ 655.1 Purpose and scope of subpart A.

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

■ 4. Revise subpart B to read as follows:

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

Sec.

655.90 Purpose and scope of subpart B.
655.92 Authority of ETA–OFLC.
655.93 Special procedures.

655.100 Overview of subpart B and definition of terms.
655.101 Applications for temporary employment certification in agriculture.
655.102 Required pre-filing recruitment.
655.103 Advertising requirements.
655.104 Contents of job offers.
655.105 Assurances and obligations of H–2A employers.
655.106 Assurances and obligations of H–2A Labor Contractors.
655.107 Processing of applications.
655.108 Offered wage rate.
655.109 Labor certification determinations.
655.110 Validity and scope of temporary labor certifications.
655.111 Required departure.
655.112 Audits.
655.113 H–2A applications involving fraud or willful misrepresentation.
655.114 Petition for higher meal charges.
655.115 Administrative review and de novo hearing before an administrative law judge.
655.116 Job Service Complaint System; enforcement of work contracts.
655.117 Revocation of approved labor certifications.
655.118 Debarment.
655.119 Document retention requirements.

§ 655.90 Purpose and scope of subpart B.

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

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

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

§ 655.92 Authority of ETA–OFLC.

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

§ 655.93 Special procedures.

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

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

§ 655.100 Overview of subpart B and definition of terms.

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

(ii) No more than 75 and no fewer than 60 calendar days before the first date the employer requires the services of the H–2A workers, and as a precursor to the filing of an *Application for Temporary Employment Certification,* the employer must initiate positive recruitment of eligible U.S. workers and cooperate with the local office of the State Workforce Agency (SWA) which serves the area of intended employment to place a job order into intrastate and interstate recruitment. Prior to commencing recruitment an employer must obtain the appropriate wage for the position directly from the ETA National Processing Center (NPC). The employer must then place a job order with the SWA; place print advertisements meeting the requirements of this regulation; contact former U.S. employees; and, when so designated by the Secretary, recruit in other States of traditional or expected labor supply with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. The SWA will post the job order locally, as well as in all States listed in the application as anticipated work sites, and in any additional States designated by the Secretary as States of traditional or expected labor supply. The SWA will keep the job order open until the end of the designated recruitment period. No more than 50 days prior to the first date the employer requires the services of the H–2A workers, the employer will prepare and sign an initial written recruitment report that it must submit with its *Application for Temporary Employment Certification (www.foreignlaborcert.doleta.gov).* The recruitment report must contain information regarding the original number of openings for which the employer recruited. The employer's obligation to engage in positive recruitment will end on the actual date on which the H–2A workers depart for the place of work, or 3 days prior to the first date the employer requires the services of the H–2A workers, whichever occurs first.

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

who apply—until the end of the designated recruitment period.

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

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

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

(ii) *Certified applications.* This subpart provides that an application for temporary agricultural labor certification will be certified if the CO finds that the employer has not offered and does not intend to offer foreign workers higher wages, better working conditions, or fewer restrictions than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, qualified, and eligible will not be available at the time and place needed to perform the work for which H–2A workers are being requested; and that the employment of such nonimmigrants will not adversely affect the wages and working conditions of similarly employed U.S. workers.

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

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

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

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

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

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

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

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

(iv) *Processing of application.* Once the application and job order have been accepted, the NPC will transmit a copy of the job order to the SWA(s) serving the area of intended employment to initiate intrastate and interstate clearance, request that the SWA(s) schedule an inspection of the housing, and provide instructions to the employer to commence positive recruitment in a manner consistent with § 655.102(d)(2) through (4). The NPC will designate labor supply States during this period on a case-by-case basis. Such designations must be based on information provided by State agencies or by other sources, and will to the extent information is available take into account the success of recent efforts by out-of-State employers to recruit in that State.

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

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

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

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

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

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

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

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

Agricultural association means any nonprofit or cooperative association of

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

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

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

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

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

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

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

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

DOL or Department means the United States Department of Labor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Joint employment means that where two or more employers each have sufficient definitional indicia of

employment to be considered the employer of an employee, those employers will be considered to jointly employ that employee. Each employer in a joint employment relationship to an employee is considered a joint employer of that employee.

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

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

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

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

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

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

Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.), to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1½ bushels), a bushel of potatoes, and Eastern apple box (1½ metric bushels), a flat of strawberries (twelve quarts), etc.

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

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

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

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

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

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

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

Successor in interest means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor for purposes of § 655.118, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in a debarment recommendation. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

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

(7) Similarity of products and services; and

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

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

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

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

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

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

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

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

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

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

Within [number and type] days means, for purposes of determining an employer's compliance with the timing requirements for appeals and requests for review, a period that begins to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the employer sends whatever communication is required by these rules back to the Department, as evidenced by a postal mark or other similar receipt.

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

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

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

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

(ii) Agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f). Work performed by H–2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the provisions of the FLSA as provided therein, including the overtime provisions in sec. 7(a) 29 U.S.C. 207(a);

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

(iv) Logging employment; or

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

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

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

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

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

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

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

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

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

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

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

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

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

transportation to market. See 29 U.S.C. 203(f), as amended.

(iii) *Agricultural commodity.* For purposes of paragraph (d)(2)(ii) of this section agricultural commodity includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree and *gum rosin* means rosin remaining after the distillation of gum spirits of turpentine. See 12 U.S.C. 1141j(g), sec. 15(g) of the Agricultural Marketing Act, as amended, and 7 U.S.C. 92.

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

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

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

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

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

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

§ 655.101 Applications for temporary employment certification in agriculture.

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

(2) If an H–2ALC intends to file an application, the H–2ALC must meet all of the requirements of the definition of employer in § 655.100(b), and comply with all the assurances, guarantees, and other requirements contained in this part and in part 653, subpart F, of this chapter. The H–2ALC must have a place of business (physical location) in the U.S. and a means by which it may be contacted for employment. H–2A workers employed by an H–2ALC may not perform services for a fixed-site employer unless the H–2ALC is itself providing the housing and transportation required by § 655.104(d) and (h), or has filed a statement confirming that the fixed-site employer will provide compliant housing and/or transportation, as required by § 655.106, with the OFLC, for each fixed-site employer listed on the application. The H–2ALC must retain a copy of the statement of compliance required by § 655.106(b)(6).

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

(b) *Filing.* The employer may send the *Application for Temporary Employment Certification* and all supporting documentation by U.S. Mail or private mail courier to the NPC. The Department will publish a Notice in the **Federal Register** identifying the address(es), and any future address changes, to which applications must be mailed, and will also post these addresses on the DOL Internet Web site at *http://www.foreignlaborcert.doleta.gov/.* The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). An association filing a master application as a joint employer may sign on behalf of its employer members. The Department may also require applications to be filed electronically in addition to or instead of by mail.

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

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

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

whether the request is for other good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, such things as the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

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

§ 655.102 Required pre-filing activity.

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

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

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

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

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

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

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

(4) Based on an annual determination made by the Secretary, as described in paragraph (i) of this section, recruit in all States currently designated as a State of traditional or expected labor supply with respect to each area of intended employment in which the employer's work is to be performed as required in paragraph (i)(2) of this section.

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

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

(3) The SWA will review the contents of the job order as provided in 20 CFR part 653 Subpart F and will work with the employer to address any deficiencies, except that the order may be placed prior to completion of the housing inspection required by 20 CFR 653.501(d)(6) where necessary to meet the timeframes required by statute and regulation. However, the SWA must ensure that housing within its jurisdiction is inspected as expeditiously as possible thereafter. Any issue with regard to whether a job order may properly be placed in the job service system that cannot be resolved with the applicable SWA may be brought to the attention of the NPC, which may direct that the job order be placed in the system where the NPC determines that the applicable program requirements have been met. If the NPC concludes that the job order is not acceptable, it shall so inform the employer using the procedures applicable to a denial of certification set forth in § 655.109(e).

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

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

(3) (i) For the first 5 years after the effective date of this rule, the recruitment period shall end 30 days after the first date the employer requires the services of the H–2A workers, or on the last day the employer requires the services of H–2A workers in the applicable area of intended employment, whichever is sooner (the 30-day rule). During that 5-year period, the Department will endeavor to study

the costs and benefits of providing for continuing recruitment of U.S. workers after the H–2A workers have already entered the country. Unless prior to the expiration of the 5-year period the Department conducts a study and publishes a notice determining that the economic benefits of such extended recruitment period outweigh its costs, the recruitment period will, after the expiration of the 5-year period, end on the first date the employer requires the services of the H–2A worker.

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

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

(B) *Investigations.* The CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

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

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

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

(3) The newspaper advertisements must satisfy the requirements of §§ 655.103 and 655.104. The employer must maintain copies of newspaper pages (with date of publication and full copy of ad), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

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

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

(i) *Additional positive recruitment.* (1) Each year, the Secretary will make a determination with respect to each State whether there are other States (''traditional or expected labor supply States'') in which there are a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State, as well as which newspapers in each traditional or expected labor supply State that the employer may use to fulfill its obligation to run a newspaper advertisement in that State. Such determination must be based on information provided by State agencies or by other sources within the 120 days preceding the determination (which will be solicited by notice in the **Federal Register**), and will to the extent information is available take into account the success of recent efforts by out-of-State employers to recruit in that State. The Secretary will not designate a State as a traditional or expected labor supply State if the State has a significant number of employers that are recruiting for U.S. workers for the same types of occupations and comparable work. The Secretary's annual determination as to traditional or expected labor supply States, if any, from which applicants from each State must recruit will be published in the **Federal Register** and made available through the ETA Web site.

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

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

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

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

(ii) Identify each recruitment source by name;

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

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

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

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

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

§ 655.103 Advertising requirements.

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

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

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

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

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

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

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

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

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

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

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

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

§ 655.104 Contents of job offers.

(a) *Preferential treatment of aliens prohibited.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. Except where otherwise permitted under this section, no job offer may impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers.

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

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

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

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

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

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

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

damage which is not the result of normal wear and tear related to habitation.

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

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

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

(i) An employer must make the required attestation, which may include an attestation that the employer is complying with the procedures set forth in § 654.403, at the time of filing the *Application for Temporary Employment Certification* pursuant to § 655.105(e)(2).

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

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

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

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

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

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

(h) *Transportation; daily subsistence.* (1) *Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has departed to the employer's place of employment. For an H–2A worker coming from outside of the U.S., the place from which the worker has departed is the place of recruitment, which the Department interprets to mean the appropriate U.S. consulate or port of entry. When it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H–2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to U.S. workers. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount

permitted under paragraph (g) of this section.

(2) *Transportation from last place of employment to home country.* If the worker completes the work contract period, and the worker has no immediately subsequent H–2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. For an H–2A worker coming from outside of the U.S., the place from which the worker has departed will be considered to be the appropriate U.S. consulate or port of entry.

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

(i) *Three-fourths guarantee.* (1) *Offer to worker.* The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and has been approved by the CO. The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect. Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks × 48 hours/week = 480-hours × 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total guaranteed. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If the employer affords the U.S. or H–2A worker during the total work contract period less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

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

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with paragraph (j)(2) of this section.

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

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

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

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

representative, and by the worker and designated representatives as described in this paragraph.

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

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

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

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

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

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

(4) The hours actually worked by the worker;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

will retain records of all rejections as required by § 655.119.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) The job order for an H–2ALC may contain work locations in multiple areas of intended employment, and may be submitted to any one of the SWAs

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

(2) The H–2ALC must conduct separate positive recruitment under § 655.102(g) through (i) for each area of intended employment in which the H–2ALC intends to perform work, but need not conduct separate recruitment for each work location within a single area of intended employment. The positive recruitment for each area of intended employment must list the name and location of each fixed-site agricultural business to which the H–2ALC expects to provide H–2A workers, the expected beginning and ending dates when the H–2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site. Such positive recruitment must be conducted pre-filing for the first area of intended employment, but must be started no more than 75 and no fewer than 60 days before the listed arrival date (or the amended date, if applicable) for each subsequent area of intended employment. For each area of intended employment, the advertising that must be placed in any applicable States designated as traditional or expected labor supply States must be placed at the same time as the placement of other positive recruitment for the area of intended employment in accordance with § 655.102(i)(2).

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

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

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

(i) If the additional worksite(s) are in the same area(s) of intended employment as represented on the *Application for Temporary Employment Certification,* the H–2ALC is not required to re-recruit in those areas of intended employment if that recruitment has been completed and if the job duties at the new work sites are similar to those already covered by the application.

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

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

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

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

(7) To satisfy the requirements of § 655.102(h), the H–2ALC must contact all U.S employees that worked for the H–2ALC during the previous season, except those excluded by that section, before filing its application, and must advise those workers that a separate job opportunity exists for each area of intended employment that is covered by the application. The employer may advise contacted employees that for any given job opportunity, workers may be required to complete the remainder of the H–2ALC's itinerary.

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

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

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

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

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

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

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

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

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

except where workers' compensation is used to cover such transportation as described in § 655.104(h)(3).

§ 655.107 Processing of applications.

(a) *Processing.* (1) Upon receipt of the application, the CO will promptly review the application for completeness and an absence of errors that would prevent certification, and for compliance with the criteria for certification. The CO will make a determination to certify, deny, or issue a Notice of Deficiency prior to making a Final Determination on the application. Applications requesting that zero job opportunities be certified for H–2A employment because the employer has been able to recruit a sufficient number of U.S. workers must comply with other requirements for H–2A applications and must be supported by a recruitment report, in which case the application will be accepted but will then be denied. Criteria for certification, as used in this subpart, include, but are not limited to, whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; made all the assurances and met all the obligations required by § 655.105, and/or, if an H–2ALC, by § 655.106; complied with the timeliness requirements in § 655.102; and complied with the recruitment obligations required by §§ 655.102 and 655.103.

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

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

(2) The notice will:

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

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

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

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

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

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

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

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

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

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

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

(3) Other amendments to the application, including elements of the job offer and the place of work, may be approved by the CO if the CO determines the proposed amendment(s) are justified by a business reason and will not prevent the CO from making the

labor certification determination required under § 655.109. Requested amendments will be reviewed as quickly as possible, taking into account revised dates of need for work locations associated with the amendment.

(e) *Appeal procedures.* With respect to either a Notice of Deficiency issued under paragraph (b) of this section, the denial of a requested amendment under paragraph (d) of this section, or a notice of denial issued under § 655.109(e), if the employer timely requests an expedited administrative review or *de novo* hearing before an ALJ, the procedures set forth in § 655.115 will be followed.

§ 655.108 Offered wage rate.

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

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

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

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

(e) *Adverse effect wage rate.* The AEWR will be based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey. The NPC will obtain wage information on the AEWR using the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center Web site (*http://www.flcdatacenter.com/*). This wage shall not be less than the July 24, 2009 Federal minimum wage of $7.25.

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

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

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

(3) Level III wage rates are assigned to job offers for employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. These employees perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be an indicator that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as lead, senior, crew chief, or journeyman would be indicators that a Level III wage should be considered.

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

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

§ 655.109 Labor certification determinations.

(a) *COs.* The Administrator, OFLC is the Department's National CO. The Administrator, OFLC, and the CO(s) in the NPC(s) (by virtue of delegation from the Administrator, OFLC), have the authority to certify or deny applications for temporary employment certification under the H–2A nonimmigrant classification. If the Administrator, OFLC has directed that certain types of temporary labor certification applications or specific applications under the H–2A nonimmigrant classification be handled by the National OFLC, the Director(s) of the NPC(s) will refer such applications to the Administrator, OFLC.

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

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

(d) *Approved certification.* If temporary labor certification is granted, the CO must send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney. The Final Determination letter will notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office and to continue to cooperate with the SWA by accepting all referrals of eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the end of the recruitment period as set forth in § 655.102(f)(3). However, the employer will not be required to accept referrals of eligible U.S. workers once it has hired

or extended employment offers to eligible U.S. workers equal to the number of H–2A workers sought.

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

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

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

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

(4) State that if the employer does not request an expedited administrative judicial review or a *de novo* hearing before an ALJ within the 7 calendar days, the denial is final and the Department will not further consider that application for temporary alien agricultural labor certification.

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

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

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

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

(4) State that if the employer does not request an expedited administrative judicial review or a *de novo* hearing before an ALJ within the 7 calendar days, the denial is final and the Department will not further consider that application for temporary alien agricultural labor certification.

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

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

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

(2) *Timeliness.* Fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely. Non-payment of fees by the date that is 30 days after the issuance of the certification will be considered a substantial program violation and subject to the procedures in § 655.115.

§ 655.110 Validity and scope of temporary labor certifications.

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

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

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

(2) *Ineligible employer-members.* Workers may not be transferred or referred to an association's employer member if that employer member has

been debarred from participation in the H–2A program.

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

(2) *Long-term extension.* For extensions beyond 2 weeks, an employer may apply to the CO at any time for an extension of the period of employment on the certified *Application for Temporary Employment Certification* for reasons related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will grant or deny the request for extension of the period of employment on the *Application for Temporary Employment Certification* based on the available information, and will notify the employer of the decision in writing. The employer may appeal a denial for a request of an extension in accordance with the procedures contained in § 655.115. The CO will not grant an extension where the total work contract period under that application and extensions would be 12 months or more, except in extraordinary circumstances.

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

(2) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO by telephone or electronic mail, and must be confirmed by the employer in writing as required by this paragraph. If the employer telephonically or via electronic mail requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

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

§ 655.111 Required departure.

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

(b) *Notice to worker.* Upon establishment of a program by DHS for registration of departure, an employer must notify any H–2A worker that when the worker departs the U.S. by land at the conclusion of employment as provided in paragraph (a) of this section, the worker must register such departure at the place and in the manner prescribed by DHS.

§ 655.112 Audits.

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

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

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

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

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

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

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

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

(d) *Audit violations.* If, as a result of the audit, the CO determines the employer failed to produce required documentation, or determines that the employer violated the standards set forth in § 655.117(a) with respect to the application, the employer's labor certification may be revoked under § 655.117 and/or the employer may be referred for debarment under § 655.118. The CO may determine to provide the audit findings and underlying documentation to DHS or another appropriate enforcement agency. The CO shall refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

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

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

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

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

(a) *Meal charges.* Until a new amount is set under this paragraph an employer may charge workers up to $9.90 for providing them with three meals per day. The maximum charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12 month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the Administrator, OFLC, as a Notice in the **Federal Register**. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206 (FLSA), the charge or deduction must meet the requirements of 29 U.S.C. 203(m) of the FLSA, including the recordkeeping requirements found at 29 CFR 516.27.

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

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

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

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

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

(a) *Administrative review.* (1) *Consideration.* Whenever an employer has requested an administrative review before an ALJ of a decision by the CO: Not to accept for consideration an *Application for Temporary Employment Certification;* to deny an *Application for Temporary Employment Certification;* to deny an amendment of an *Application for Temporary Employment Certification;* or to deny an extension of an *Application for Temporary Employment Certification,* the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ (which may be a panel of such persons designated by the Chief Administrative Law Judge from BALCA established by 20 CFR part 656, which will hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The ALJ may not remand the case and may not receive evidence in addition to what the CO used to make the determination.

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

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

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

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

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

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

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

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

(b) Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, may be referred to the U.S. Department of Justice, Civil Rights

Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or an SWA. Likewise, if OSC becomes aware of a violation of these regulations, it may provide such information to the appropriate SWA and the CO.

§ 655.117 Revocation of approved labor certifications.

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

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

(2) The CO finds that the employer:

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

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

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

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

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

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

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

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

(3) If, after reviewing the employer's timely filed rebuttal evidence, the CO finds that the employer more likely than not meets one or more of the bases for revocation under § 655.117(a), the CO will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination that the temporary agricultural labor certification should be revoked. The CO's notice will contain a detailed statement of the bases for the decision, and must offer the employer an opportunity to request a hearing. The notice must state that, to obtain such a hearing, the employer must, within 10 calendar days of the date of the notice file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the Administrator, OFLC. The timely filing of a request for a hearing will stay the revocation pending the outcome of the hearing.

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

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

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

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

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

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

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

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

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

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

§ 655.118 Debarment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) The Administrator, OFLC will send to the employer, attorney, or agent a *Notice of Intent to Debar* by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed debarment. The employer, attorney or agent may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The Administrator, OFLC must consider all relevant evidence presented in deciding whether to debar the employer, attorney, or agent.

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

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

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

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

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

(iii) Review by the ARB.

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

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

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

(*1*) The issue or issues raised;

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

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

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

(f) *Debarment involving members of associations.* If the Administrator, OFLC determines a substantial violation has occurred, and if an individual employer-member of an agricultural

association acting as a joint employer is determined to have committed the violation, the debarment determination will apply only to that member of the association unless the Administrator, OFLC determines that the association or other association members participated in the violation, in which case the debarment will be invoked against the complicit association or other association members.

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

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

§ 655.119 Document retention requirements.

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

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

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

(i) Proof of recruitment efforts including:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subpart C—[Removed and Reserved]

■ 5. Subpart C is removed and reserved.

TITLE 29—LABOR

■ 6. Revise part 501 to read as follows:

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

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

Subpart A—General Provisions

§ 501.0 Introduction.

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

§ 501.1 Purpose and scope.

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

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

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

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

(2) [Reserved]

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

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

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

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

§ 501.2 Coordination of intake between DOL agencies.

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

§ 501.3 Discrimination prohibited.

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

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

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

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

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

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

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

§ 501.4 Waiver of rights prohibited.

No person shall seek to have an H–2A worker, or other U.S. worker hired in corresponding employment by an H–2A employer, waive any rights conferred under sec. 218 of the INA, the

regulations at 20 CFR part 655, Subpart B, or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the INA or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the INA or these regulations. This does not prevent agreements to settle private litigation.

§ 501.5 Investigation authority of Secretary.

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

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

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

(d) *Report of violations.* Any person may report a violation of the work contract obligations of sec. 218 of the INA or these regulations to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of DOL, WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.6 Cooperation with DOL officials.

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

§ 501.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S. knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 501.8 Surety bond.

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

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

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

§ 501.10 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

DOL or Department means the United States Department of Labor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Office of Foreign Labor Certification (OFLC) means the organizational

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

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

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

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

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

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

Prevailing piece rate means that amount that is typically paid to an agricultural worker per piece (which includes, but is not limited to, a load, bin, pallet, bag, bushel, etc.) to be determined by the SWA according to a methodology published by the Department. As is currently the case, the unit of production will be required to be clearly described; e.g., a field box of oranges (1½ bushels), a bushel of potatoes, and Eastern apple box (1½ metric bushels), a flat of strawberries (twelve quarts), etc.

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

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

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

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

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

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

(7) Similarity of products and services; and

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

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

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

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

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

U.S. worker means a worker who is:

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

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

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

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

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

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

(i) *Agricultural labor* as defined and applied in sec. 3121(g) of the Internal

Revenue Code of 1954 at 26 U.S.C. 3121(g);

(ii) *Agriculture* as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f) (Work performed by H–2A workers, or workers in corresponding employment, that is not defined as agriculture in sec. 3(f) is subject to the provisions of the FLSA as provided therein, including the overtime provisions in sec. 7(a) at 29 U.S.C. 207(a));

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

(iv) Logging employment; or

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) *Agricultural commodity.* For purposes of paragraph (b)(1)(ii) of this section, *agricultural commodity* includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. *Gum spirits of turpentine* means spirits of turpentine made from gum (oleoresin) from a living tree and *gum rosin* means rosin remaining after the distillation of gum spirits of turpentine. *See* 12 U.S.C. 1141j(g) (sec. 15(g) of the Agricultural Marketing Act, as amended), and 7 U.S.C. 92.

(3) *Of a temporary or seasonal nature.*

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

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

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

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

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

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

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

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

Subpart B—Enforcement of Work Contracts

§ 501.15 Enforcement.

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

§ 501.16 Sanctions and remedies—General.

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

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

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

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

§ 501.17 Concurrent actions.

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

§ 501.18 Representation of the Secretary.

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

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

§ 501.19 Civil money penalty assessment.

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

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

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

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

(3) The gravity of the violation or violations;

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

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

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

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

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

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

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

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

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

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

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

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

(e) For a willful layoff or displacement of any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within 60 days of the date of need other than for a lawful, job-related reason, except that such layoff shall be permitted where all H–2A workers were laid off

first, the civil penalty shall not exceed $10,000 per violation per worker.

§ 501.20 Debarment and revocation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 501.21 Failure to cooperate with investigations.

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

§ 501.22 Civil money penalties—payment and collection.

Where the assessment is directed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty is due within 30 days and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator, WHD by certified check or by money order, made payable to the order of *Wage and Hour Division, United States Department of Labor.* The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 501.30 Applicability of procedures and rules.

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

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

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

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the Administrator, WHD including the amount of any unpaid wages due or actions necessary to fulfill a covered contractual obligation, the amount of

any civil money penalty assessment and the reason or reasons therefore.

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

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

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

§ 501.33 Request for hearing.

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

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

(1) Be typewritten or legibly written;

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

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

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

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

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

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

Rules of Practice

§ 501.34 General.

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

§ 501.35 Commencement of proceeding.

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

§ 501.36 Caption of proceeding.

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

In the Matter of __, Respondent.

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

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the Administrator, WHD, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by *Order of Reference,* promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

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

§ 501.38 Notice of docketing.

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

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

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

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

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

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

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

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

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

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

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

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

(d) *Disposition.* In the event an agreement containing consent findings

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

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

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

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

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

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

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

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

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

§ 501.43 Responsibility of the Office of Administrative Law Judges.

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

§ 501.44 Additional information, if required.

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

(a) The issue or issues raised;

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

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

§ 501.45 Final decision of the Administrative Review Board.

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

Record

§ 501.46 Retention of official record.

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

§ 501.47 Certification.

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

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

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

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

■ 10. Revise § 780.115 to read as follows:

§ 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not agricultural or horticultural commodities, for the purpose of the FLSA. (*See* § 780.205 regarding production of Christmas trees.) It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within sec. 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.200 through 780.209 discussing the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute agriculture. For a discussion of the exemption in sec. 13(b)(28) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter.

■ 11. Revise § 780.201 to read as follows:

§ 780.201 Meaning of forestry or lumbering operations.

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

■ 12. Revise § 780.205 to read as follows:

§ 780.205 Nursery activities generally and Christmas tree production.

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

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

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

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

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

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

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

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

(4) Pruning or shearing yearly;

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

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

■ 13. Revise § 780.208 to read as follows:

§ 780.208 Forestry activities.

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

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

■ 14. Revise § 788.10 to read as follows:

§ 788.10 Preparing other forestry products.

As used in the exemption, other forestry products means plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns, roots, stems, leaves, Spanish moss, wild fruit, and brush. Christmas trees are only included where they are gathered in the wild from forests or from uncultivated land and not produced through the application of extensive agricultural or horticultural techniques. *See* 29 CFR 780.205 for further discussion. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations that change the natural physical or chemical condition of the products or that amount to extracting (as distinguished from gathering) such as shelling nuts, or that mash berries to obtain juices.

Signed in Washington this 5th day of December 2008.

Brent R. Orrell,

Deputy Assistant Secretary, Employment and Training.

Victoria A. Lipnic,

Assistant Secretary, Employment Standards Administration.

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division.

Note: The following appendix will not appear in the Code of Federal Regulations.

BILLING CODE 4510–FP–P

OMB Approval: 1205-0466
Expiration Date: XX/XX/XXXX

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

Please read and review the filing instructions carefully before completing the ETA Form 9142. 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)*: *	

B. Temporary Need Information

1. Job Title *		
2. SOC (ONET/OES) code *	3. SOC (ONET/OES) occupation title *	
4. Is this a full-time position? * ☐ Yes ☐ No	**Period of Intended Employment**	
	5. Begin Date * *(mm/dd/yyyy)*	6. End Date * *(mm/dd/yyyy)*

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

☐ **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*)

☐ a. New employment *

☐ b. Continuation of previously approved employment * without change with the same employer

☐ c. Change in previously approved employment *

☐ d. New concurrent employment *

☐ e. Change in employer *

☐ f. Amended petition *

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

☐ Seasonal ☐ Peakload ☐ One-Time Occurrence ☐ Intermittent

9. Statement of Temporary Need *

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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 master applications filed on behalf of more than one employer under the H-2A program, submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application.

1. Legal business name *		
2. Trade name/Doing Business As (DBA), if applicable		
3. Address 1 *		
4. Address 2		
5. City *	6. State *	7. Postal code *
8. Country *	9. Province	
10. Telephone number *	11. Extension	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	
14. Type of employer application (choose only one box below) *		

☐ 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.

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Contact's job title *		
5. Address 1 *		
6. Address 2		
7. City *	8. State *	9. Postal code *
10. Country *	11. Province	
12. Telephone number *	13. Extension	14. E-Mail address

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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) §
5. Address 1 §		
6. Address 2		
7. City §	8. State §	9. Postal code §
10. Country §	11. Province	
12. Telephone number §	13. Extension	14. E-Mail address
15. Law firm/Business name §	16. Law firm/Business FEIN §	
17. State Bar number (only if attorney) §	18. State of highest court where attorney is in good standing (only if attorney) §	
19. Name of the highest court where attorney is in good standing (only if attorney) §		

F. Job Offer Information

a. Job Description

1. Job Title *	
2. Number of hours of work per week Basic *: _____ Overtime: _____	3. Hourly Work Schedule * A.M. *(h:mm)*: ___ : ____ P.M. *(h:mm)*: ___ : ____
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. *	

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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)
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 §	
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)
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 §
5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *	

c. Place of Employment Information

1. Worksite address 1 *	
2. Address 2	
3. City *	4. County *
5. State/District/Territory *	6. Postal code *
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, such as the Metropolitan Statistical Areas (MSAs) or the city(ies)/township(s)/county(ies) and the corresponding state(s) where work will be performed. If filing as a farm labor or job contractor, please see the General Instructions for further details. §	

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G. Rate of Pay

1. Basic Rate of Pay Offered *	1a. Overtime Rate of Pay *(if applicable)* §
From: $ _____ . _____ To (Optional): $ _____ . _____	From: $ _____ . _____ To (Optional): $ _____ . _____
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: §	
3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures) §	
4. For H-2A applications where the rate of pay is based upon **multiple crop or agricultural activities**, please confirm that **Appendix A.1** is complete and being submitted with the filing of this application. §	☐ Yes ☐ No ☐ N/A

H. Recruitment Information

1. Name of State Workforce Agency (SWA) serving the area of intended employment *		
2. SWA job order identification number *	2a. Start date of SWA job order *	2b. End date of SWA job order *
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)* *	Dates of Print Advertisement *	
4.	From:	To:
5.	From:	To:

6. Additional Recruitment Activities. A description of efforts to recruit U.S. workers **MUST** begin in this space. For each recruitment activity, identify the type or source of recruitment (e.g., additional SWA job orders, newspaper/journal name, contact with former employees) and the date(s) on which recruitment was conducted. *

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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.2 or Appendix B.1 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.2.** §	❑ 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.1.** §	❑ 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 §
4. Job Title §		
5. Firm/Business name §		
6. E-Mail address §		

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 _____ to _____.

_____

Department of Labor, Office of Foreign Labor Certification — Determination Date (date signed)

_____

Case number — Case Status

L. 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 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours 10 minutes per response for H-2A and 2 hours 45 minutes for H-2B, 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 Temporary Employment Certification
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IMPORTANT: Please read these instructions carefully before completing the ETA Form 9142 –Application for Temporary Employment Certification. These instructions contain full explanations of the questions and attestations that make up the ETA Form 9142. ***In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. If the employer received approval by the Department of Labor to submit this form non-electronically, ALL required fields/items must be completed as well as any fields/items where is a response is conditioned on the response to another required field/item.***

Anyone, who knowingly and willingly furnishes any false information in the preparation of ETA Form 9142 and any supporting documentation, or aids, abets, or counsels another to do so is committing a federal offense, punishable by fine or imprisonment up to five years or both (18 U.S.C. §§ 2, 1001). Other penalties apply as well to fraud or misuse of this immigration document and to perjury with respect to this form (18 U.S.C. §§ 1546, 1621).

OMB Notice: These reporting instructions have been approved under the Paperwork Reduction Act of 1995. 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 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours and 10 mintues for H-2A and 2 hours and 45 minutes for H-2B 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.**

Section A
Employment - Based Nonimmigrant Visa Information

1. Enter the following classification symbol to indicate the type of visa supported by this application: **"H-2A"** or **"H-2B"**

Section B
Temporary Need Information

1. Enter the title of the job opportunity for which the application for temporary employment certification is being sought by the employer.

2. Enter the six or eight-digit Standard Occupational Classification (SOC)/Occupational Network (O*NET) code for the occupation, which most clearly describes the work to be performed.. For example, the six-digit SOC code for a fruit or vegetable harvester or orchard worker is 45-2092.02 (Farmworkers and Laborers, Crop).

3. Enter the occupational title associated with the SOC/O*NET (OES) code. For example, the occupational title associated with SOC/O*NET code 45-2092.02 is "Farmworkers and Laborers, Crop".

4. Enter whether this position is full-time by indicating "Yes" or "No". Although there is no regulatory definition for full-time employment, the Department generally considers 35 hours per week as the distinction point between full-time and part-time.

5. Enter the beginning date for the worker's period of employment. Use a month/day/full year (MM/DD/YYYY) format.

6. Enter the end date for the worker's period of employment. Use a month/day/full year (MM/DD/YYYY) format.

7. The collection of this item contains two parts. First, enter the number of workers being requested for certification. Second, use collection items (a) through (f) to enter the number of workers in each applicable category based on the answer to the first part of this item. Every box MUST be filled. If the employer has no workers in a particular category, please indicate "0 (zero)."

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8. Mark the appropriate box to indicate the nature of the employer's temporary need for the services or labor to be performed. Only one standard of temporary need may be selected. The following definitions generally apply to temporary agricultural and non-agricultural work:

   Seasonal Need: The employer must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the employer's permanent employees.

   Peakload Need: The employer must establish that (1) it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and (2) the temporary additions to staff will not become a part of the employer's regular operation.

   One-Time Occurrence: The employer must establish that either (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s).

   Intermittent Need: The employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

9. Provide a statement clearly describing the employer's temporary need for the services or labor to be performed. The employer's statement must explain (a) the nature of the employer's business or operations, (b) why the job opportunity and number of workers being requested for certification reflect a temporary need, and (b) how the employer's request for the services or labor to be performed meets the chosen standard under Question 8 of a seasonal, peakload, one-time occurrence, or an intermittent basis.

Section C
Employer Information

1. Enter the full legal name of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application. The employer's full legal name is the exact name of the individual, corporation, LLC, partnership, or other organization that is reported to the Internal Revenue Service. For master applications filed on behalf of more than one employer under the H-2A program, submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application

2. Enter the full trade name or "Doing Business As" (DBA) name, if applicable, of the business, person, association, firm, corporation, or organization, i.e., the employer filing this application.

3. Enter the street address of the employer's principal place of business.

4. If additional space is needed for the street address, use this line to complete the employer's street address.

5. Enter the city of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.

6. Enter the state of the employer's principal place of business.

7. Enter the postal (zip) code of the employer's principal place of business.

8. Enter the country of the employer's principal place of business. If the city and country are the same, the name must still be entered in both fields.

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9. Enter the province of the employer's principal place of business, if applicable.

10. Enter the area code and telephone number for the employer's principal place of business. Include country code, if applicable.

11. Enter the extension of the telephone number for the employer's principal place of business, if applicable.

12. Enter the nine-digit Federal Employer identification Number (FEIN) as assigned by the IRS. Do not enter a social security number.

    Note: All employers, including private households, MUST obtain an FEIN from the IRS before completing this application. Information on obtaining an FEIN can be found at www.IRS.gov.

13. Enter the four to six-digit North American Industry Classification System (NAICS) code that best describes the employer's business, not the alien's job. A listing of NAICS codes can be found at http://www.census.gov/epcd/www/naics.html

14. Mark the appropriate to indicate the type of application being filed for temporary employment certification. Only one application type can be selected.

Section D
Employer Point of Contact Information

An employer point of contact is an employee of the employer whose position authorizes the employee to provide information and supporting documentation concerning this Application for Temporary Employment Certification and to communicate with the Department of Labor on behalf of the employer. The employer point of contact should be the individual most familiar with the content of this application and circumstances of the foreign worker's employment.

Note: The employer point of contact information in this Section, specifically the name, telephone number, and email address, must be different from the attorney/agent information listed in Section E, unless the attorney is an employee of the employer.

1. Enter the last (family) name of the employer's point of contact.

2. Enter the first (given) name of the employer's point of contact.

3. Enter the middle initial of the employer's point of contact.

4. Enter the job title of the employer's point of contact.

5. Enter the business street address for the employer's point of contact.

6. If additional space is needed for the street address, use this line to complete the street address.

7. Enter the city of the employer's point of contact. If the city and country are the same, the name must still be entered in both fields.

8. Enter the state of the employer's point of contact.

9. Enter the postal (zip) code of the employer's point of contact.

10. Enter the country of the employer's point of contact. If the city and country are the same, the name must still be entered in both fields.

11. Enter the province of the employer's point of contact, if applicable.

12. Enter the area code and business telephone number of the employer's point of contact. Include country code, if applicable.

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13. Enter the extension of the telephone number of the employer's point of contact, if applicable.

14. Enter the business e-mail address of the employer's point of contact in the format name@emailaddress.top-level domain.

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Section E
Attorney or Agent Information (if applicable)

Note: The attorney/agent information in this Section, specifically the name, telephone number, and email address, must be different from the employer's point of contact information in Section D, unless the attorney is an employee of the employer.

1. Identify whether the employer is represented by an attorney or agent in the process of filing this application. Only mark one box. If "Yes" complete the remainder of Section E. If "No" in question 1, skip questions 2 to 19 and continue to Section F. Associations filing H-2A applications as an agent on behalf of one or more of its grower members must mark "Yes" to this question.

2. Enter the last (family) name of the attorney/agent.

3. Enter the first (given) name of the attorney/agent.

4. Enter the middle initial of the attorney/agent.

5. Enter the street address of the attorney/agent.

6. If additional space is needed for the street address, use this line to complete the attorney/agent's street address.

7. Enter the city of the attorney/agent. If the city and country are the same, the name must still be entered in both fields.

8. Enter the state of the attorney/agent.

9. Enter the postal (zip) code of the attorney/agent.

10. Enter the country of the attorney/agent. If the city and country are the same, the name must still be entered in both fields.

11. Enter the province of the attorney/agent, if applicable.

12. Enter the area code and telephone number of the attorney/agent. Include country code, if applicable.

13. Enter the extension of the telephone number of the attorney/agent, if applicable.

14. Enter the e-mail address of the attorney/agent in the format name@emailaddress.top-level domain .

15. Enter the attorney/agent's law firm or business name.

16. Enter the attorney/agent's law firm or business nine-digit FEIN as assigned by the IRS.

17. Enter the attorney's state Bar number. If the attorney is licensed in more than one state, enter only one state Bar number. If submitting this form electronically and the attorney is licensed in a state which does not issue state Bar numbers, leave the field blank and once confirmed it will be automatically prepopulated with "N/A."

Note: The answers to questions 18 and 19 below should correspond to the same state for which a Bar number was provided in question 17, if any.

18. Enter the state of the highest court where the attorney is in good standing.

19. Enter the name of the highest court in the state where the attorney is in good standing.

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Section F
Job Offer Information

a. Job Description

1. Enter the same job title as the one entered under Section B question 1.

2. Enter the basic hours of work required per week and, if applicable, overtime hours per week in accordance with State and Federal law for the work and area of employment.

3. Enter the daily work schedule for the job opportunity (e.g., 9 a.m. to 5 p.m., 7 a.m. to 11 a.m. and 4 p.m. to 8 p. m.).

4. Mark "Yes" or "No" as to whether the job opportunity supervises the work of other employees.

5. If "Yes" is marked in question 4, enter the total number of employees the job opportunity will supervise.

6. Describe the job duties, in detail, to be performed by any worker filling the job opportunity. Specify any equipment to be used and pertinent working conditions.

b. Minimum Requirements

1. Identify whether the minimum U.S. diploma or degree required by the employer for the job opportunity is none, high school/GED, Associates, Bachelor's, Master's, Doctorate, or Other. Only mark one box.

1-A. If "Other" in question 1, enter the specific U.S. diploma or degree required. (Example: JD, MD, DDS, etc.). If the answer to question 1 is not "Other," enter "N/A."

1-B. Enter the major(s) and/or field(s) of study required by the employer for the job opportunity. You may list more than one field and/or more than one related major. If the answer to question 1 is "None" or "High School", enter "N/A."

2. If the employer requires a second U.S. diploma or degree for the job opportunity, mark "Yes." Otherwise, mark "No."

2-A. If "Yes" in question 2, enter the specific second U.S. diploma or degree required. If the answer to question 2 is "No", enter "N/A."

3. If the employer requires training for the job opportunity, mark "Yes." Otherwise, mark "No." Training may include, but is not limited to: programs, coursework, or training experience (other than employment). When answering this question, do not duplicate requirements – the training required should not be counted as education or experience required.

3-A. If "Yes" in question 3, enter the number of months of training required by the employer for the job opportunity. If the answer to question 3 is "No", enter "0" (zero). When answering this question, do not duplicate time requirements – the training time required should not be counted as (added to) education or experience time required.

3-B. If "Yes" in question 3, enter the field(s) and/or name(s) of the training required by the employer for the job opportunity. You may list more than one field and/or more than one name. If the answer to question 3 is "No", enter "N/A."

4. If the employer requires employment experience, mark "Yes." Otherwise, mark "No."

4-A. If "Yes" in question 4, enter the number of months of experience required by the employer. If the answer to question 4 is "No", enter "0" (zero).

4-B. If "Yes" in question 4, enter the occupation in which experience is required by the employer for the job opportunity. If the answer to question 4 is "No", enter "N/A."

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5. Enter the job related special requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, test results. Document business necessity for a foreign language requirement.

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Section F
Job Offer Information *(continued)*

c. Place of Employment

It is important for the employer to define the area of intended employment with as much geographic specificity as possible. This information is used for purposes of reviewing and verifying regulatory compliance with advertising, positive recruitment requirements, and prevailing wage determinations.

Important Note: For farm labor or job contractors filing under the H-2A or H-2B visa programs where multiple worksites are involved or where special procedures apply, submit a separate attachment identifying, by business name and address, all physical locations where the services or labor is expected to be performed. Enter the address of the first worksite location on the form using questions 1 through 7, and then use question 7-A to identify the business name for the first worksite location and write the words "See attached worksites".

1. Enter the street address of the worksite location identified in question1, where work will be performed. The worksite address must be a physical location and cannot be a P.O. Box.

2. If additional space is needed for the street address, use this line. If no additional space is needed, enter "N/A."

3. Enter the city of the worksite location.

4. Enter the county of the worksite location.

5. Enter the state/district/territory of the worksite location.

6. Enter the postal (zip) code of the worksite location.

7. If work will be performed in location(s) other than the address listed in questions 1-6 above, mark "Yes" and complete question 7-A. If work will not be performed in location(s) other than the address listed in questions 1-6 above, mark "No."

7-A. If "Yes" in question 7, identify the geographic place(s) of employment with as much specificity as possible, such as the
Metropolitan Statistical Areas (MSAs) or the city(ies)/township(s)/county(ies) and the corresponding state(s) where work will be performed. The employer must provide enough geographic detail to cover all the worksite locations of intended employment.

Section G
Rate of Pay

1. Enter the rate of pay to be paid to the nonimmigrant workers. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

   Enter the top of the wage range to be paid to the nonimmigrant workers in the section indicating "To (Optional)."

1-A. Enter the rate of overtime pay, if applicable, to be paid to the nonimmigrant workers. If the wage offer is expressed as a range, enter the bottom of the wage range to be paid.

   Enter the top of the wage range to be paid to the nonimmigrant workers in the section indicating "To (Optional)."

2. Enter whether the rate of pay is in terms of per year, month, two weeks, week or hour in the section indicating "Rate is Per." Mark only one box.

2-A. If the answer to question 2 is "Piece Rate", enter the wage offer requirements. Describe the unit size that governs how the piece rate is paid, such as tree size/spacing, weight/size/number of boxes picked/packed, dimensions of bags or boxes filled. For example: 5/8 bushel, 90 pound bag or box, 10 box bin.

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3. Enter any additional wage information covered by the job opportunity and the anticipated area(s) of intended employment (e.g., itinerant work, multi-state worksite locations). In order to expedite the application review process, employers are **strongly encouraged** to list all valid prevailing wage determinations received by the OFLC National Processing Center (NPC) in support of the application as well as all corresponding wage offers.

4. If the Application for Temporary Employment Certification is being filed under the H-2A program and the job offer and rate of pay will be based on multiple crop or agricultural activities, indicate whether Appendix A.1 is complete and being submitted with the filing of this application by answering "Yes" or "No". If the job opportunity is offering a single rate of pay, then mark "N/A".

Section H
Recruitment Information

1. Enter the name of the State Workforce Agency which received the job offer from the employer and placed a job order on its active file for recruitment of U.S. workers.

2. Enter the unique job order number provided by the State Workforce Agency.

2-A Enter the start date of the SWA job order. Use a month/day/full year (MM/DD/YYYY) format.

2-B Enter the end date of the SWA job order. Use a month/day/full year (MM/DD/YYYY) format.

3. Mark "Yes" or "No" whether there is a Sunday edition of a newspaper (of general circulation) in the area of intended employment.

   Note: Only if the job opportunity is located in a rural area of intended employment that does not have a newspaper that publishes a Sunday edition, is the employer permitted to use the newspaper edition with the widest circulation in the area of intended employment, and not a Sunday edition.

4. Enter the name of the newspaper of general circulation or other publication in which the employer placed an advertisement for the job opportunity.

   For the named newspaper/publication, enter the start and end dates in which the newspaper advertisement referenced was printed. Use a month/day/full year (MM/DD/YYYY) format. If the newspaper advertisement or publication took place on 1 day, then enter the same date in the "From:" and "To:".

5. Enter the name of the newspaper of general circulation or other publication in which the employer placed a second newspaper advertisement for the job opportunity.

   For the named newspaper/publication, enter the start and end dates in which the newspaper advertisement referenced was printed. Use a month/day/full year (MM/DD/YYYY) format. If the newspaper advertisement or publication took place on 1 day, then enter the same date in the "From:" and "To:".

6. Describe other efforts to positively recruit U.S. workers for the job opportunity. For each positive recruitment activity, identify the type or source of recruitment (e.g., additional SWA job orders, out-of-state newspaper, contact with former employees) and the date(s) on which the recruitment was conducted.

Section I
Declaration of Employer and Attorney/Agent

1. Employer must read and agree to all the applicable terms, assurances, and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Mark "Yes" or "No" to confirm that Appendix A.2 is complete and being submitted with the filing of this application.

Section J
Preparer

This section must be completed 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.

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1. Enter the last (family) name of the person preparing this application by or on behalf of the employer.

2. Enter the first (given) name of the person preparing this application by or on behalf of the employer.

3. Enter the middle initial of the person with preparing this application by or on behalf of the employer.

4. Enter the Firm/Business name of the person with preparing this application by or on behalf of the employer.

5. Enter the email address of the person with preparing this application by or on behalf of the employer. Format must be in the format name@emailaddress.top-level domain.

Section K
U.S. Government Agency User ONLY

Read this section. No entries required.

Section L
OMB *Paperwork Reduction Act/Information Control Number 1205-0310*

Read this section. No entries required.

APPENDIX A.1
Rate of Pay Information for Multiple Crop or Agricultural Activities

This appendix must only be completed for applications for temporary labor certification filed under the H-2A program. The rate of pay for each crop or agricultural activity covered by the application must be disclosed in this appendix. For each crop or agricultural activity, the following information must be disclosed (where applicable):

1. Enter the name of the crop or agricultural activity.

2. If applicable, enter the hourly rate of pay. In no event may rate be less than the applicable FLSA or State minimum, or the applicable prevailing hourly wage rate, whichever is higher.

3. If applicable, enter the piece rate of pay.

4. If a piece rate of pay is entered, describe the unit used when piece rates are being paid. Describe the unit size that governs how the piece rate is paid, such as tree size/spacing, weight/size/number of boxes picked/packed, dimensions of bags or boxes filled. For example: 5/8 bushel, 90 pound bag or box, 10 box bin.

5. Describe 1) Any bonus or incentives aside from the flat rate or piece rate, e.g., garden space, milk, eggs, meat, health insurance; 2) Special conditions on guaranteed weeks of work, under what conditions bonuses or incentives are to be paid, if any; 3) If the activity is covered by a "schedule of rates", indicate conditions under which each of the rates on the schedule applies; 4) Describe frequency of pay arrangements, e.g., daily, weekly, biweekly; 5) Indicate deductions to be made from workers' wages, such as Social Security, workers' compensation, health insurance, Federal or state tax. If applicable, note whether employer of record or farm labor contractor will be responsible for deductions.

APPENDIX A.2
Employer and Attorney/Agent Declarations (H-2A Applications ONLY)

A. Attorney/Agent Declaration

1. Enter the last (family) name of the attorney/agent representing the employer in the filing of this application.

2. Enter the first (given) name of the attorney/agent representing the employer in the filing of this application.

3. Enter the middle initial of the attorney/agent representing the employer in the filing of this application.

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4. Enter the Firm/Business name of the attorney/agent representing the employer in the filing of this application.

5. Enter the email address of the attorney/agent representing the employer in the filing of this application. Format must be in the format name@emailaddress.top-level domain.

6. The attorney/agent must sign the application. Read the entire application and verify all contained information prior to signing.

7. The attorney/agent must date the application. Use a month/day/full year (MM/DD/YYYY) format.

B. Employer Declaration

1. Enter the last (family) name of the person with authority to sign on behalf of the employer.

2. Enter the first (given) name of the person with authority to sign on behalf of the employer.

3. Enter the middle initial of the person with authority to sign on behalf of the employer.

4. Enter the job title of the person with authority to sign on behalf of the employer.

5. The person with authority to sign on behalf of the employer must sign the application. Read the entire application and verify all contained information prior to signing.

6. The person with authority to sign on behalf of the employer must date the application. Use a month/day/full year (MM/DD/YYYY) format.

APPENDIX B.1
Employer and Attorney/Agent Declarations (H-2B Applications ONLY)

A. Attorney/Agent Declaration

1. Enter the last (family) name of the attorney/agent representing the employer in the filing of this application.

2. Enter the first (given) name of the attorney/agent representing the employer in the filing of this application.

3. Enter the middle initial of the attorney/agent representing the employer in the filing of this application.

4. Enter the Firm/Business name of the attorney/agent representing the employer in the filing of this application.

5. Enter the email address of the attorney/agent representing the employer in the filing of this application. Format must be in the format name@emailaddress.top-level domain.

6. The attorney/agent must sign the application. Read the entire application and verify all contained information prior to signing.

7. The attorney/agent must date the application. Use a month/day/full year (MM/DD/YYYY) format.

B. Employer Declaration

1. Enter the last (family) name of the person with authority to sign on behalf of the employer.

2. Enter the first (given) name of the person with authority to sign on behalf of the employer.

3. Enter the middle initial of the person with authority to sign on behalf of the employer.

4. Enter the job title of the person with authority to sign on behalf of the employer.

5. The person with authority to sign on behalf of the employer must sign the application. Read the entire application and verify all contained information prior to signing.

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6. The person with authority to sign on behalf of the employer must date the application. Use a month/day/full year (MM/DD/YYYY) format.

OMB Approval:
Expiration Date

Application for Temporary Employment Certification

ETA Form 9089T – APPENDIX A
U.S. Department of Labor

For Use in Filing Applications Under the H-2A Agricultural Program ONLY

A. Rate of Pay Information for Multiple Crop or Agricultural Activities

Important Note: The rate of pay for each crop or agricultural activity **MUST** begin in the spaces below. If necessary, add attachment to continue and complete the rate of pay for all crop activities covered by the application.

Agricultural Crop Activity	Hourly Wage	Piece Rate Wage	Piece Rate Unit(s)	Special Pay *(bonus, etc.)*
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
	$ ___ . ___	$ ___ . ___		
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	$ ___ . ___	$ ___ . ___		

OMB Paperwork Reduction Act

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 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours 10 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.**

Tracking Number: _____ Status: _____

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Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
U.S. Department of Labor

For Use in Filing Applications Under the H-2A 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 9142, 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
4. Firm/Business name		
5. E-Mail address		
6. Signature		7. Date signed

B. Employer Declaration

By virtue of my signature below, ***I HEREBY CERTIFY*** *the following conditions of employment:*

1. The job opportunity is a full-time temporary position, the qualifications for which do not substantially deviate from the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.
2. The specific job opportunity for which the employer is requesting H-2A 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.
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 and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections as required by 20 CFR 655.119.
4. The job opportunity offers U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers and complies with the requirements at 20 CFR 655, Subpart B.
5. The offered wage rate is the highest of the adverse effect wage rate in effect at the time the application is certified, the prevailing hourly or piece rate, or the Federal or State minimum wage, and the employer will pay the offered wage during the entire period of the approved labor certification.
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 adverse effect wage rate, prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage, whichever is greatest.
7. There are no U.S. workers available in the area(s) capable of performing the temporary services or labor in the job opportunity, and the employer will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the date that is 30 days after the first date the employer requires the services of the H-2A worker.
8. All fees associated with processing the temporary labor certification will be paid in a timely manner.

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

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Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
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9. During the period of employment that is the subject of the labor certification application, the employer will:
   (i) Comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;
   (ii) Provide for or secure housing for workers who are not reasonably able to return to their permanent residence at the end of the work day that complies with the applicable local, State, or Federal standards and guidelines for housing without charge to the worker;
   (iii) Where required, has timely requested a preoccupancy inspection of the housing and, if one has been conducted, received certification;
   (iv) Provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements of 20 CFR 655.104(e).
   (v) Provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer under 20 CFR 655.104(d)) and the employer's worksite without cost to the worker.

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

11. The employer and its agents have not sought or received payment of any kind from the employee for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

12. The employer has and will contractually forbid 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.

13. The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has with just cause:
   (i) Filed a complaint under or related to Sec. 218 of the INA (8 U.S.C. 1188), or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;
   (ii) Instituted or caused to be instituted any proceeding under or related to Sec. 218 of the INA, or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;
   (iii) Testified or is about to testify in any proceeding under or related to Sec. 218 of the INA or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;
   (iv) Consulted with an employee of a legal assistance program or an attorney on matters related to Sec. 218 of the INA or this subpart or any other Department regulation promulgated under Sec. 218 of the INA; or
   (v) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by Sec. 218 of the INA, or this subpart or any other Department regulation promulgated under Sec. 218 of the INA.

14. The employer has not and will not discharge any person because of that person's taking any action listed in paragraph 14(i) through (v) listed above.

15. The employer will inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under 20 CFR 655.111, unless the H-2A worker is being sponsored by another subsequent employer.

16. Upon the separation from employment of any H-2A worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than two work days after such separation is effective under 20 CFR 655.104(n).

17. If the application is being filed as an H-2A Labor Contractor the following additional attestations and obligations apply under 20 CFR 655.106:
   (i) The H-2A Labor Contractor will provide upon request the MSPA Farm Labor Contractor (FLC) certificate of registration number and expiration date if required under MSPA, 1801 U.S.C. et seq., to have such a certificate;
   (ii) The H-2A Labor Contractor will identify upon request the farm labor contracting activities it is authorized to perform as an FLC under MSPA as shown on the FLC certificate of registration, if required under MSPA, 1801 U.S.C. et seq., to have such a certificate of registration;

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

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Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
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(iii) The H-2A Labor Contractor will provide with this application a list of the names and locations of each fixed-site agricultural business to which the H-2A Labor Contractor expects to provide H-2A workers, the expected beginning and ending dates when the H-2A Labor Contractor will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site;

(iv) The H-2A Labor Contractor is able to provide proof of its ability to discharge financial obligations under the H-2A program by agreeing to secure and to present, upon request, a surety bond as required by 29 CFR 501.8, stating on the application the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated pursuant to 29 CFR 501.8) and any identifying designation utilized by the surety for the bond;

(v) The H-2A Labor Contractor has engaged in, or will engage in within the timeframes required by 20 CFR 655.102 as modified by 20 CFR 655.106(a), recruitment efforts in each area of intended employment in which it has listed a fixed-site agricultural business; and

(vi) The H-2A Labor Contractor has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a written statement stating that:

a. All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable housing standards in 20 CFR 655.104(d); and

b. All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and will provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, except where workers' compensation is used to cover such transportation as described in 20 CFR 655.104(h)(3).

I hereby designate the agent or attorney identified in section E (if any) of the ETA Form 9142 and section A above to represent me for the purpose of labor certification and, by virtue of my signature in Block 5 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
4. Title		
5. Signature		6. Date signed

OMB Paperwork Reduction Act

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 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 2 hours 10 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.**

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

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