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29 CFR Part 503

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Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Proposed Rule

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Part 655****Wage and Hour Division****29 CFR Part 503**

RIN 1205-AB58

**Temporary Non-Agricultural Employment of H-2B Aliens in the United States**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The Department of Labor (the Department or DOL) proposes to amend its regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. This Notice of Proposed Rulemaking (NPRM or proposed rule) proposes to revise and solicits comments on the process by which employers obtain a temporary labor certification from the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status. The Department also proposes to create new regulations to provide for increased worker protections for both U.S. and foreign workers and enhanced enforcement under the H-2B program.

**DATES:** Interested persons are invited to submit written comments on the proposed rule on or before May 17, 2011. Interested persons are invited to submit comments on the proposed H-2B registration form mentioned herein; comments must be received on or before May 17, 2011.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB58, by any one of the following methods:

- *Federal e-Rulemaking Portal* [www.regulations.gov](http://www.regulations.gov). Follow the Web site instructions for submitting comments.
- *Mail or Hand Delivery/Courier:* Please submit all written comments (including disk and CD-ROM submissions) to Michael Jones, Acting Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of

Labor, 200 Constitution Avenue NW., Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. Comments received by means other than those listed above or that are received after the comment period has closed will not be reviewed. The Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public on the <http://www.regulations.gov> Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments through the <http://www.regulations.gov> Web site.

*Docket:* For access to the docket to read background documents or comments received, go the Federal eRulemaking portal at <http://www.regulations.gov>. The Department will also make all the comments it receives available for public inspection during normal business hours at the Employment and Training Administration (ETA) Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as an electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

**FOR FURTHER INFORMATION CONTACT:** For further information on 20 CFR part 655,

subpart A, contact William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, ETA, 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 on 29 CFR part 503, contact Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0406 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****I. Revisions to 20 CFR Part 655 Subpart A***A. Statutory Standard and Current Department of Labor Regulations*

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H-2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary non-agricultural labor or services for which "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). Section 214(c)(1) of the INA requires DHS to consult with appropriate agencies before approving an H-2B visa petition. 8 U.S.C. 1184(c)(1). The regulations for the U.S. Citizenship and Immigration Services (USCIS), the agency within DHS which adjudicates requests for H-2B status, require that an intending employer first apply for a temporary labor certification from the Secretary of Labor (the Secretary). That certification informs USCIS that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). A certification from the Secretary currently is not required for H-2B employment on Guam, for which certification from the Governor of Guam is required. 8 CFR 214.2(h)(6)(iii).

The Department's regulations at 20 CFR part 655, Subpart A, "Labor Certification Process for Temporary Employment in Occupations other than

Agriculture or Registered Nursing in the United States (H-2B Workers),” govern the H-2B labor certification process, as well as the enforcement process to ensure U.S and H-2B workers are employed in compliance with H-2B labor certification requirements. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in ETA, the agency to which the Secretary of Labor has delegated her responsibilities described in the USCIS H-2B regulations. Enforcement of the attestations made by employers in the course of submission of H-2B applications for labor certification is conducted by the Wage and Hour Division (WHD) within the Department of Labor, to which DHS on January 16, 2009 delegated enforcement authority granted to it by the INA. 8 U.S.C. 1184(c)(14)(B).

Under the current regulations, an employer seeking to fill job opportunities through the H-2B program must demonstrate that it has a temporary need for the services or labor, as defined by one of four regulatory standards: (1) A one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). Generally, that period of time will be limited to 1 year or less but, in the case of a one-time occurrence, could last up to 3 years, consistent with the standard under DHS regulations at 8 CFR 214.2(h)(6) as well as current Department regulations. See 20 CFR 655.6(b).

Before 2008, the Department’s regulatory scheme was minimal; the process was governed primarily through program guidance issued by ETA, with enforcement by WHD only of independently applicable laws such as the Fair Labor Standards Act (FLSA). Before 2007, ETA processing was governed primarily by General Administration Letter No. 1-95, 60 FR 7216, Feb. 7, 1995, which laid out the processing of applications, first at the State Workforce Agency (SWA), then at the Federal level. Applications were filed first with the SWA, allowing them to review the applications, oversee the conduct of recruitment of potential U.S. workers, review the results, and then forward the application to OFLC with a recommendation of whether to approve or deny the application. ETA issued Training and Employment Guidance Letter (TEGL) No. 21-06, 72 FR 19961, Apr. 20, 2007, to replace the previous guidance for the processing of H-2B applications.

In January 2005, DHS and the Department issued companion NPRMs to significantly revise each agency’s H-2B processing procedures. 70 FR

3984, Jan. 27, 2005; 70 FR 3993, Jan. 27, 2005. This set of proposed rules suggested an attestation-based approach to adjudication, sending applications directly to USCIS with enhanced enforcement by the Department. The two agencies received significant opposition to these proposals. The Department withdrew its proposed rule as a result of these comments. See <http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117>.

In 2008, the Department again proposed regulations employing an attestation-based filing model. See 73 FR 29942, May 22, 2008. In this proposed model, SWAs no longer oversaw recruitment, instead allowing the employer to conduct its recruitment with no direct Federal or state oversight. This attestation-based model meant that OFLC could only review certain aspects of compliance with the regulations through post-certification audits rather than through the recruitment process, although the recruitment process itself was not dissimilar and the employers were performing the same activities as they would be with a SWA’s assistance and oversight. The proposed regulation also provided for enforcement by WHD through investigation and findings, leading to the imposition of civil money penalties and other actions. These regulations were proposed in light of (1) considerable workload increases for both the Department and the SWAs (an approximate 30 percent increase in applications in Fiscal Year (FY) 2007 over those received in FY 2006, and a similar increase during the first half of FY 2008); (2) limited appropriations funding for program-related operations, both at the Federal and SWA levels; and (3) frequent and increasing comments from the user community that the process was cumbersome, complicated, time-consuming, and inefficient. These proposed regulations were a substantial shift from the administration of the program which provided for greater SWA involvement in the application and recruitment process. The Department received substantial comment on the proposed rule, and issued a Final Rule on December 19, 2008 (the 2008 Final Rule), which became effective January 18, 2009. See 73 FR 78020, Dec. 19, 2008.

Under the current attestation-based processing model, before filing an application to seek H-2B workers, an employer must first recruit U.S. workers to ensure an adequate test of the labor market for the position. In addition, the employer must offer and subsequently pay throughout the period of employment a wage that is equal to or higher than the prevailing wage for the

occupation in the area of intended employment; provide terms and conditions of employment that are not less favorable than those offered to the foreign worker(s); and contact any previously laid-off workers.

One important change in the 2008 Final Rule was its inclusion of enforcement authority for the Department. Before 2008, the Department had no H-2B specific enforcement authority or process to ensure employer compliance with H-2B labor certifications. Congress vested DHS with that enforcement authority in 2005. See 8 U.S.C. 1184, as amended by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Public Law 109-13, 119 Stat. 231. That legislation authorized DHS to delegate this enforcement authority to the Department and DHS subsequently made that delegation. The 2008 Final Rule instituted an H-2B regulatory enforcement regime based upon DHS’s delegation.

On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), invalidated various provisions of the Department’s 2008 Final Rule and remanded the case to the Department to correct its errors. The court ruled that the Department had violated the Administrative Procedure Act when it did not adequately explain its reasoning for using skill levels as part of the H-2B prevailing wage determination process, and that it failed to consider comments relating to the choice of appropriate data sets in deciding to rely on Occupational Employment Statistics survey data rather than Davis Bacon Act and Service Contract Act wage data in setting the prevailing wage rates. The court ordered the Department to “promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order.” *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010). The Department began a separate rulemaking process to address the prevailing wage calculation and, on January 19, 2011, finalized its new prevailing wage calculation methodology in Wage Methodology for the Temporary Non-agricultural Employment H-2B Program Final Rule, 76 FR 3452 (Jan. 19, 2011). This NPRM does not address the matters in the Prevailing Wage Final Rule, and

commenters should not address those matters in this proceeding. However, commenters may wish to consider the content of that rule in fashioning their comments to the NPRM since the prevailing wage determination system set forth in the Prevailing Wage Final Rule will be applied to the final rule that results from this NPRM.

Additionally, the court invalidated and vacated 20 CFR 655.22(k) insofar as that provision permits the clients of job contractors to hire H-2B workers without submitting an application to the Department. As a result, the Department no longer accepts H-2B labor certification applications filed solely by job contractors.

Lastly, the court invalidated the following provisions on the ground that the Department did not provide a rational explanation of its policy choices: (1) 20 CFR 655.15(g) concerning the situations in which H-2B employers must contact unions as a potential source of labor; (2) the portion of 20 CFR 655.4 defining "full time"; and (3) the portion of 20 CFR 655.4 defining "job contractor" to mean an entity that "will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers." In this NPRM, the Department is proposing a new provision at section 655.44 specifying when H-2B employers must contact unions as a potential source of labor and a new definition of "full time" at section 655.5 and 29 CFR 503.4 and is thereby proposing to abandon the particular union contact and full time provisions that were invalidated by the court. The Department is also proposing a slightly modified definition of job contractor based on the invalidated definition; however, the Department has provided an explanation in section 655.5 of the preamble which clarifies the rationale for the underlying definition and its modification.

#### B. The Need for Rulemaking

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H-2B program. The Department believes that the policy underpinnings of the 2008 Final Rule, *e.g.* streamlining the H-2B process to defer many determinations of program compliance until after an application has been adjudicated, do not provide an adequate level of protection for either U.S. or foreign workers. These protections are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers and to ensure access to jobs for U.S. workers in order to satisfy

the statutory requirement that certifications be granted only if no U.S. workers are available.

First, there are insufficient worker protections in the current attestation-based model in which employers merely assert, and do not demonstrate, that they have performed an adequate test of the U.S. labor market and one which is in accordance with the regulations. Further, in the first year of the operation of the attestation-based system our experience indicates that employers are attesting to compliance with program obligations with which they have not complied, and that employers do not appear to be recruiting, hiring and paying U.S. workers, and in some cases the H-2B workers themselves, in accordance with established program requirements. Cases audited after certification by the OFLC in the 2 years since the adoption of an attestation-based program demonstrate a pattern of non-compliance or avoidance of demonstrating compliance. In the first round of audits conducted, which was primarily a random sample of cases, the Department found that 52 percent of employers that had attested to compliance with regulatory obligations were in fact not in compliance with those obligations. A second round demonstrated a higher level of compliance, but in total, the audited cases demonstrate a level of compliance of only 55 percent. The violations included evidence of both H-2B and U.S. workers being offered less than full-time work; misrepresentations as to the work time that was actually offered or the number of workers actually needed; workers being paid less than the prevailing wages; and U.S. workers being rejected for other than lawful, job-related reasons, such as not having a commercial driver's license when one is not required to perform the job. The identified violations come from different geographical sectors and relate to both new and experienced filers. The most disturbing evidence of non-compliance is, however, a lack of response from many of those audited—indicating anything from a company that does not exist (evidenced by returned mail) to an employer seeking to avoid liability by simply not informing the Department of its errors.

There has also been increasing evidence in the H-2B program of violations rising to the criminal level. The Department has seen increasing evidence of employers and agents filing fraudulent applications—involving hundreds or thousands of requested employees—for non-existent job opportunities. *U.S. v. Broyles*, 2:09-cr-00003–MSD–TEM–23 (E.D. Va. 2010)

(conspiracy to conspiracy to fraudulently obtain H-2B visas), *U.S. v. Barbugli*, 6:10-cr-00177–MSS–DAB, 6:10-mj-01089–KRS, 6:10-cr-00180–MSS–GJK (C.D. Fl. 2010) (three family members guilty for operations involving a labor staffing company obtaining fraudulent H-2B visas through more than 11 subsidiary companies), and *U.S. v. Manuel*, 9:10-cr-80057–KAM (S.D. FL. 2010) (false statements and conspiring to hold approximately 39 Filipino nationals in forced service to work in H-2B status in country clubs and hotels in Southeast Florida) represent the most recent criminal actions involving H-2B applications filed for fraudulent job opportunities or containing false information at odds with the treatment actually received by the workers. Moreover, the General Accountability Office (GAO) released a report in September 2010 summarizing a review of ten concluded criminal and civil cases covering the previous 5 years involving H-2B employers and recruiters. These cases demonstrated violations of various labor laws or the settlement of alleged violations such as wage and/or overtime violations; charging of fees by employers; and the submission of fraudulent documentation to obtain visas and other government benefits. The Department cannot ignore this rise in successful criminal and civil prosecutions which demonstrate the abuse of the H-2 program; while the attestation-based model may not be a direct cause of the types of action resulting in these criminal charges, the model provides more of an opportunity for such actions to occur and remain undetected.

The steps offered in this proposed rule cannot entirely eliminate the concerns the Department has with an attestation-based application model. The evidence of non-compliance under such a model is, however, sufficient in the Department's view to warrant steps to ensure that employers who comply in good faith can do so while those who have no intent to uphold their obligations have a decreased opportunity to defraud the program. In eliminating the attestation-based application model, the Department also increases the efficiency of the program, by ensuring applications with potential violations can be addressed before recruitment or certification, rather than requiring the more drastic potential for debarment after audit.

In light of such non-compliance the Department has chosen to revisit the use of attestations, notwithstanding the use of post-certification program integrity measures. Increased enforcement such as that proposed in this NPRM, although

essential to a viable H-2B program, is not sufficient to ensure protection of workers in H-2B occupations who constitute a particularly vulnerable subgroup of the workforce. Rather, the most reliable method by which the Department can ensure compliance with the regulatory requirements is through the review of compliance through documentation provided to the Department in advance of the certification determination, rather than during the audit process. In addition to communicating to all the parties to the process the need to comply with those obligations, this review deters bad actors in the program from making false statements and also reinforces program requirements for those who are new to the program or unable to adequately discern their program obligations. To the extent that employers have incorrectly attested to compliance with program requirements through ignorance or misunderstanding of those requirements, the compliance-based model will identify those problems in the review of the application and offer the employer an opportunity to correct its error without penalty or delay in meeting its date of need.

Although the Department still seeks to maintain an efficient system, it has in this new rule struck a balance between reducing processing times and protecting U.S. worker access to these job opportunities. The structured time frames for the processing of applications set forth in the proposed rule help the agency to strike that vital balance. We would emphasize that the return to the certification model which was used in the program for its entire history until January 2009, and which was recently reintroduced into the H-2A program, creates no significant additional burdens on employers. It does not change the nature of the obligations with which employers must comply, or the documentation that employers must maintain, but merely adjusts the timing and circumstances under which that documentation, the evidence of compliance with those obligations, must be produced for review. While this change produces no additional burden on employers, it will substantially enhance overall program integrity by allowing the Department to identify potential problematic applications at the earliest possible time. It is also much less onerous on employers to be required to amend a deficient or incomplete application before it is certified, than to subject the employer to the potential for back pay, civil money penalties or debarment if the deficiencies in the application are not

identified until the job opportunity is gone.

The Department, however, is aware that in certain instances, employers would prefer a continuation of an attestation-based application process. Using an attestation-based application, applications would be streamlined and employers may be able to obtain some cost savings from not being required to duplicate and send documentation demonstrating compliance along with the application. Many employers have indicated to the Department the preference for a streamlined application system, with more of an emphasis on enforcement for compliance on the back end. This is the model that was put into place in the 2008 Final Rule and has support of many employers.

The Department remains concerned, however, whether its goals of ensuring compliance (both up-front compliance by those unfamiliar with program requirements and for those engaged in deliberate disregard for program obligations) can be met through increased program compliance assistance and post-certification enforcement. This is particularly true in a temporary worker program, where non-compliance would likely be identified through enforcement efforts well after the impacted H-2B workers have returned to their home country or the U.S. workers were already denied employment.

While a compliance demonstration model remains the Department's preferred alternative and as such is reflected in the proposed regulatory text, the Department proposes dual consideration of an alternative retaining the current attestation-based application system. The Department is interested in receiving comments on the alternative of maintaining the current or some modification of the current attestation-based program design. Specifically, the Department is seeking comments on whether it should develop certain attestations which can be required of all employers (such as an attestation for certain kinds of recruitment), or for only certain program compliance requirements. In order to provide information to address the Department's concerns, comments on any attestation alternative should focus on the following:

1. What kind of specific guidance could the Department provide that would benefit a first-time (or sporadic) employer in the H-2B program to avoid mistakes in making attestations of compliance with program obligations?

2. What kind of guidance would benefit frequent users of the program with respect to repetitive errors in

recruitment? What kind of guidance would be beneficial in avoiding errors in unique situations for these users?

3. Could pre-certification audits augment a post-certification audit in an attestation-based program model? If not, how would you propose the Department obtain information in the absence of supervised activity in order to arrive at certification while ensuring compliance with program obligations?

4. What additional sanctions could be taken against employers to ensure compliance with program requirements, given the potential for fraud in the H-2B program?

5. What other kinds of actions could the Department take to prevent an H-2B employer from filing attestations that do not meet program requirements?

Accordingly, in order to adequately protect U.S. and H-2B workers, the Department proposes the changes discussed below, including the proposal of a new 29 CFR part 503 to set forth WHD's investigative and enforcement roles. The Department is engaging in this new rulemaking to provide the public with notice and opportunity to comment on the H-2B program.

The NPRM seeks to help employers meet legitimate short-term temporary labor needs where and when there are no available U.S. workers. Over the years as the program has evolved, stakeholders in diverse industries throughout the country repeatedly have expressed concerns that some employers were inappropriately using H-2B workers for job opportunities that were permanent, thereby denying U.S. workers the opportunity for long-term employment. These employers' actions are at the detriment of other employers with a legitimate temporary need that are ultimately denied access to the program due to the statutory limitation on available visas. By preventing employers with a long-term permanent need from participating in the H-2B program, the Department would provide employers with genuine unmet temporary needs with a greater opportunity to participate in the program. Similarly, the proposed requirement that employers provide a single date of need or start date for the workers ensures that employers with legitimate temporary needs will have a better chance of receiving available visas in years in which the demand exceeds the supply.

The Department's proposal to bifurcate the current application process into a registration phase which addresses the employer's temporary need and an application phase which addresses the labor market test will enable the Department to prevent

employers without a legitimate temporary need from even filing an application. The current process where the adjudication of temporary need is concurrent with the evaluation of the labor market test often results in delays in processing employer applications for H-2B labor certifications. The Department believes that bifurcating this process will facilitate the timely processing of applications. This bifurcation allows the employers to conduct the labor market test closer to the date of need without the simultaneous adjudication of temporary need. Because the registration may be valid for up to 3 years, employers will be able to commence the process at the second phase without having to re-establish temporary need for the second and third years of registration, absent significant change in conditions, saving employer and public resources from re-adjudication of an obvious legitimate need. Additionally, removing employers without demonstrable temporary need from the application process further enables the Department and the SWAs to focus their limited resources on administering in a timely manner the labor market test. A registration process enables the Department to better serve the employers with legitimate temporary need, as well as the public by being able to focus on ensuring that U.S. workers are afforded full access to these job opportunities.

As part of the Department's commitment to openness and public input, DOL reached out to stakeholders, including employers, labor unions, advocates and other Federal agencies to learn more about their experiences with the H-2B program and hear their views on how the program can be improved to meet temporary labor needs, while ensuring U.S. worker access to the job opportunities and providing sufficient worker protections to both U.S. and H-2B workers. These listening sessions included targeted immigration sessions at the full-day Stakeholder Forum convened by WHD in Washington, DC and attended by hundreds of representatives from business, labor and other stakeholders, as part of its annual strategic planning process. These meetings provided the Department with a wealth and diversity of experience and views that helped better inform the drafting process. The Department hopes that the interested parties review this proposal and continue to engage and provide feedback and comments that are essential to ensuring an effective and workable final rule.

## II. Discussion of 20 CFR Part 655, Subpart A

### A. Introductory Sections

#### 1. Section 655.1 Scope and Purpose of Subpart A

This proposed provision informs program users of the statutory basis and regulatory authority for the H-2B labor certification process. This provision describes the Department's role in receiving, reviewing, adjudicating, and upholding the integrity of an *Application for Temporary Employment Certification*.

#### 2. Section 655.2 Authority of Agencies, Offices and Divisions in the Department of Labor

The Department proposes in this provision to describe the authority of and division of activities related to the H-2B program among the Department's agencies. It discusses the authority of OFLC, the office within ETA that exercises the Secretary's responsibility for determining the availability of U.S. workers and whether the employment of H-2B nonimmigrant workers will adversely affect the wages and working conditions of similarly employed workers. It also discusses the authority of WHD, the agency responsible for investigation and enforcement of the terms and conditions of H-2B labor certifications, as delegated by the DHS.

#### 3. Section 655.3 Territory of Guam

As in the 2008 Final Rule, under the proposed rule, the granting of H-2B labor certifications and the enforcement of the H-2B visa program in Guam will continue to reside with the Governor of Guam, pursuant to DHS regulations. However, this regulation proposes that the determination of all prevailing wages should be housed in the Department, including those for Guam. The function determining a prevailing wage for construction workers on Guam has most recently been housed with USCIS, which consults with the Governor of Guam as to the admission of H-2B construction workers on Guam. 8 CFR 214.2(h)(6)(iii). DHS and the Department are in agreement that issuing prevailing wages for all workers, including construction workers, would more appropriately be performed by the Department, specifically by the OFLC, because OFLC already provides prevailing wage determinations for all other U.S. jurisdictions. The Department, therefore, is proposing that the process for obtaining a prevailing wage in proposed section 655.12 also apply to H-2B job opportunities in Guam. Employment opportunities in

Guam would, under the proposed rule, be subject to the same process and methodology for calculating prevailing wages as any other jurisdiction within the Department's purview.

#### 4. Section 655.4 Special Procedures

The proposed rule continues the Department's authority to establish, continue, revise, or revoke special procedures that establish variations for processing certain H-2B *Applications for Temporary Employment Certification*. These are situations where the Department recognizes that variations from the normal H-2B labor certification processes are necessary to permit access to the program for specific industries or occupations. These variations permit access to the program for those who would otherwise be unable to readily comply with the program's established processes, such as by allowing itinerary employment for reforestation employers and certain employers in the entertainment industry. Under the proposed rule, as with the 2008 Final Rule, special procedures already in place on the effective date of the regulations will remain in force until otherwise modified or withdrawn by the Department.

#### 5. Section 655.5 Definition of Terms

Although the Department proposes a number of changes to the definitions section from the definitions contained in the 2008 Final Rule, many of the changes are to clarify meanings in minor ways that do not substantively change the meaning of the term. However, some substantive changes to definitions are also proposed.

The Department proposes to add a reference to the definition of "agricultural labor or services" from its own regulations governing H-2A temporary agricultural employment in order to assist in clarifying what non-agricultural employment is, by defining what it is not. The distinction between agricultural and non-agricultural employment is defined in part by the H-2A temporary agricultural regulations, drawn from the express authorization of the Department to define what constitutes agricultural labor or services. The Department is also offering a definition of "non-agricultural labor or services" as any type of employment that is not agricultural in nature.

The Department proposes to add the definition of "area of substantial unemployment" to the H-2B program. As will be discussed more fully below, employers seeking H-2B workers in areas of substantial unemployment may

be subject to enhanced recruitment based on the Certifying Officer's (CO) discretion. Further discussions of how the Department has derived the definition of "area of substantial unemployment" can be found in ETA's Training and Employment Guidance Letter No. 1-08, Aug. 20, 2008.

The Department proposes to amend the definition of an "attorney" to reflect the scope of activities attorneys can perform under the program.

The Department proposes to amend the definition of "Certifying Officer" to clarify that the Administrator, OFLC is the National CO.

The Department proposes to include the definition of "corresponding employment" under these H-2B regulations to more accurately reflect the DHS regulatory requirement that, as a condition for approval of H-2B petitions the Secretary certify that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). To ensure that U.S. workers are not adversely affected by the employment of H-2B workers, the Department proposes to require that employers provide to workers engaged in corresponding employment at least the same protections and benefits as those provided to H-2B workers (except for border crossing and visa fees which would not be applicable). Like the definition of corresponding employment in the H-2A program, "corresponding employment" is defined as the employment of workers who are not H-2B workers by an employer whose H-2B Application was approved by OFLC in any work included in the job order, or any work performed by the H-2B workers during the validity period of the job order. Workers in "corresponding employment" may be either workers hired during the recruitment process on an H-2B job order or workers who already work for an employer who perform the same work as H-2B workers.

Historically, there has been a recognition that U.S. workers should not be treated less favorably than temporary foreign workers. For example, a 1980 Senate Judiciary Report on Temporary Worker Programs stated that U.S. employers were required to offer domestic workers wages equal to foreign workers as a prerequisite for labor certification. See Congressional Research Service: "Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues, 53 (1980)." Current § 655.22(a) reflects this principle, requiring that the terms and conditions of offered

employment cannot be less favorable than those offered to H-2B workers. This provides for equal treatment of workers hired during the H-2B recruitment process. However, the current regulation does not encompass all workers who may be engaged in work performed by H-2B workers during the validity of the job order.

Courts have consistently upheld the Department's interpretation that the wages and benefits offered or provided to H-2A agricultural workers must also be provided to domestic workers. See *Farmer v. Employment Security Comm'n of N.C.*, 4 F.3d 1274, 1276, nn. 2, 3, 4 (4th Cir. 1993) (H-2A employers must make certain benefits available to all temporary agricultural laborers); see also *Williams v. Usery*, 531 F.2d 305, 306 (5th Cir. 1976) (the Secretary's authority is limited to making an economic determination of what rate must be paid all workers to neutralize any adverse effect resulting from the influx of temporary foreign workers). Similarly, in the H-2B non-agricultural context, paying the prevailing wage rate to all workers protects against possible wage depression from the introduction of foreign workers.

Further, under the current H-2B regulations, since employees hired during the current ten-day recruitment period in § 655.15(e) are entitled to the same offered terms and conditions of employment as the foreign workers hired for those positions, a longtime employee earning less than the advertised wage would be entitled to quit his current employment and re-apply for the same job with the same employer to obtain the higher wage rate offered to H-2B workers and U.S. workers hired during that recruitment period. This would be disruptive for the employer and could create an additional administrative burden for the SWAs for any workers being referred through them. It also puts too high a premium on longtime employees understanding their rights under the regulations, and feeling secure enough—rare in low-wage employment—to quit a job with the expectation of being immediately rehired. Under this NPRM, longtime U.S. workers would be entitled to the wage rates paid to H-2B employees without having to quit their jobs and be rehired.

The H-2B program must ensure that U.S. workers are not adversely affected by the presence of H-2B workers in the labor market. A primary means of providing this protection is to ensure that the jobs are available to U.S. workers under the same wages, benefits, and terms and conditions of employment provided to temporary

foreign workers. The problem we seek to address with this aspect of corresponding employment are H-2B employers who place H-2B workers in occupations and/or at job sites outside the scope of the labor certification and in violation of the regulations, thereby bypassing many of the protections U.S. workers otherwise enjoy under the program, such as domestic recruitment requirements, wage protections, and the right to be employed if available and qualified. We invite comments that propose alternatives to including in the definition of corresponding employment U.S. workers employed in occupations which are beyond the scope of the labor certification but at job sites where H-2B workers are placed and that will still ensure that U.S. worker protections are not undermined.

An employer employing H-2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the conditions in this section. The Department also invites members of the public to provide comments on whether and how each new proposed condition, including the application of transportation benefits, the three-quarter guarantee and the definition of full-time employment, should apply to H-2B workers and U.S. workers in corresponding employment.

The Department proposes to retain the definition of "employee" from the 2008 Final Rule, with minor clarifying edits. This definition is based on the common law, as set forth in the Supreme Court's holding in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322-324 (1992). The proposed clarifying edits would conform the definition to one used in most other Department-administered temporary foreign worker programs. To provide clarity, the Department proposes a definition of the term "H-2B worker" as an individual authorized to be in the United States to perform H-2B non-agricultural services or labor.

The Department proposes to amend the definition of "full time" in the H-2B program to mean 35 or more hours per week. The proposed increase in the number of hours from 30 to 35 to constitute full-time employment conforms more closely to the available data on full-time employment. This will also provide greater clarity for employers than the current regulation, which defines full time to mean 30 hours or more per week with a vague exception for unidentified local or

industry standards. The proposal also restores the pre-2008 level of 35 hours.

The District Court in *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), invalidated the definition in the 2008 H-2B Final Rule of full time as 30 hours a week, which was a change from the proposed definition of full time as 35 hours a week primarily because, in the court's view, the Department did not "consider[ ] the relevant factors and articulate[ ] a rational connection between the facts found and the choice made." *CATA*, 2010 WL 3431761 at \* 14 (quotation and citation omitted).

In accord with the *CATA* decision, the Department believes that the regulatory definition of full-time work should be supported by empirical data. In response to these data, the Department's position regarding the definition of full time has evolved. Though the 2008 Final Rule established a 30-hour work week as the standard for full time employment, the *CATA* court correctly pointed out that the 2008 Final Rule contained no meaningful rationale for that determination. After reviewing available information, the Department now believes that a 35-hour work week is more representative of the actual needs of employers and expectations of workers. First, the most recent statistics available from BLS indicate that the average hours worked during a week, including both full and part time employment was 34.3 hours during December 2010,<sup>1</sup> and that the average weekly hours worked of workers who usually work full time is 42.4 hours.<sup>2</sup> These statistics make clear that full time U.S. workers are employed for at least 35 hours per week. The last two years of experience under the current rule are consistent with the direction of BLS data. Though an exhaustive statistical analysis of hours requested is not feasible, it is clear that a substantial majority of H-2B employers recruit workers for 35 or more hours of work each week. All of the approximately 30 investigations undertaken by the WHD since enforcement authority was transferred from DHS have identified work weeks of at least 35 hours (with some even indicating possible overtime). In addition, as noted in the preamble to the current H-2B

regulations, landscapers—one of the largest groups of H-2B workers—typically work 35-hour weeks. See 73 FR 78038 (Dec. 19, 2008). Defining a workweek as at least 35 hours is consistent with existing H-2A regulations, and it is closer to the 40 hours per week standard used in the H-1B program. Furthermore, the use of the 35-hour week may increase the possibility of recruiting U.S. workers who may find the additional hours of work more attractive.

The Department anticipates that this change will not impose substantial cost on most employers. Since the data and experience referenced above indicated that a substantial majority of H-2B employers already employ workers for 35 hours or longer each week, the proposed rule will have no impact on a large proportion of the employer population. Furthermore, 66 percent of employers in FY2010 requested at least ten employees to work in the same occupation in the same area of intended employment, suggesting that some employers can avoid any adverse impact by requesting fewer workers and scheduling each to work several more hours per week. The Department seeks comments on costs to employers and other stakeholders of an increase from 30 to 35 hours per week.

Alternatively, the Department considered proposing a 40-hour threshold. This level is more in line with what the U.S. labor market generally considers as full time. Forty hours is also reflective of data actually captured by the December 2010 BLS Current Population Survey (CPS) concluding that the average workweek of non-agricultural workers who usually work full time is 42.4 hours long.<sup>3</sup> The Department is currently proposing 35 hours instead of 40 because 35 hours is more consistent with the Department's historical practice for the H-2B program, and should therefore not pose difficulty for the regulated community. However, the Department welcomes comments regarding whether extending the definition of a full-time workweek to at least 40 hours is more protective of U.S. workers and whether it conforms better to employer standards and needs.

The Department proposes to amend the definition of an "H-2B petition" to clarify that the petition includes the certified *Application for Temporary Employment Certification* and its attachments. This more closely reflects the Department of Homeland Security's

current H-2B regulations, in which a certified *Application for Temporary Employment Certification* is required.

In this NPRM, the Department proposes to amend the definition of a "job contractor." The U.S. District Court for the Eastern District of Pennsylvania in *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) invalidated the definition of "job contractor" under the 2008 Final Rule, concluding that the Department did not provide a rational explanation for its adoption of the language in the final rule that the job contractor "will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers." The court found the Department's explanation deficient because the Department stated that this language was to "make clear that the job contractor, rather than the contractor's client, must control the work of the individual employee." However, as the court stated, this language "did precisely the opposite—it clarified that it is the contractor's client who 'must control the work of the individual employee.'" The explanation is therefore not rationally connected to the change, which will accordingly be invalidated as arbitrary."

Accordingly, the Department would like to resolve any confusion and clarify that the phrase "the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying and firing the workers" was intended to clarify that an employer meets the definition of job contractor where the job contractor's client, rather than the job contractor, exercises primary supervision or control over the work of the individual employee.

The Department is proposing to amend the definition of job contractor to include the phrase "substantial, direct day-to-day" before "supervision or control" to clarify that an entity exercising some limited degree of supervision or control over the H-2B workers would still be considered a job contractor, while an entity exercising substantial, direct day-to-day supervision or control over the H-2B workers would not be considered a job contractor. This revised definition better reflects the activities of job contractors in the H-2B program.

The Department is not of the view that employers engaged in reforestation activities that have historically used the program will be impacted by this proposed action because their activities generally should not fall under the definition of a job contractor. Reforestation employers provide on site,

<sup>1</sup> Bureau of Labor Statistics, *Employment Situation*, Table B-2: Average weekly hours and overtime of all employees on private nonfarm payrolls by industry sector, seasonally adjusted, Dec. 2010. <http://www.bls.gov/news.release/empst.t18.htm>.

<sup>2</sup> Bureau of Labor Statistics, *Employment Situation*, Table A-24: Persons at work in agriculture and related and in nonagriculture industries by hours of work, Dec. 2010. <http://www.bls.gov/web/empst/spseea24.pdf>.

<sup>3</sup> Bureau of Labor Statistics, *Employment Situation*, Table A-24: Persons at work in agriculture and related and in nonagriculture industries by hours of work, Dec. 2010. <http://www.bls.gov/web/empst/spseea24.pdf>.



day-to-day supervision and direction of workers and are therefore not job contractors for the purposes of this proposed rule.

The Department also proposes an amended definition of the “offered wage.” The amended definition makes clear the employer’s obligation to pay all affected workers at least the highest of the prevailing wage, or the Federal, State, or local minimum wage.

The Department proposes to revise the definition of “strike.” The term is used in the same way as in the Department’s 2010 H–2A regulations. The proposed definition is broader than the current definition and includes any concerted work stoppage as a result of a labor dispute or any concerted interruption or slowdown of operation.

The Department also proposes to define several terms not previously defined in the 2008 Final Rule. The Department intends by these new definitions to provide interested parties with an understanding of terms that are either new or are commonly used in the H–2B program. As discussed more fully later in this preamble, the Department is including a definition of “H–2B Registration.” See discussion of § 655.11. Other terms have been proposed to provide program users with insight to better achieve program compliance, including “job offer” and “job order.” The Department proposes these definitions to ensure that employers understand the difference between the offer that is made to workers, which must contain all the material terms and conditions of the job, and the order that is the published document used by SWAs in the dissemination of the job opportunity.

The Department is including a proposed definition of a “Federal holiday” to provide clarity for employers about which holidays are included for purposes of tracking timelines that are used in this regulation. The Department proposes to move several definitions to the definition section, such as the “Administrator, OFLC,” that have appeared in different sections in previous regulations to provide one place for the definition of those terms.

The Department also proposes the removal of certain definitions that are obsolete in or inapplicable to the H–2B program. The terms “representative” and “eligible worker” for example, are proposed to be eliminated, as they are no longer used.

#### 6. Section 655.6 Temporary Need

The Department proposes an interpretation of temporary need that is directly reflective of the DHS definition

of that term and of the Department’s experience in the H–2B program. The DHS regulations define temporary need as a need for a limited period of time, where the employer must “establish that the need for the employee will end in the near, definable future.” 8 CFR 214.2(h)(6)(ii)(B). The proposed interpretation is consistent with this approach.

The Department proposes to exclude job contractors from being considered for participation in the H–2B program. Job contractors are defined in this regulation as entities that employ workers they supply to other entities and that are generally only engaged in the hiring, firing and payment of the workers they supply; they do not control the day-to-day performance of or directly supervise the services or labor of those workers. Furthermore, they have an ongoing business of supplying workers to other entities, even if that entity’s need for the services is temporary. It is the Department’s view that a job contractor’s ongoing need is by its very nature permanent rather than temporary and therefore the job contractor does not qualify to participate in the program. The contractor may have many clients, each of whom has a temporary need, but the contractor’s need for the employees it seeks to fulfill its contracts is ongoing and therefore of a potentially permanent duration. Accordingly, the contractor’s need would not be temporary.

This conclusion is consistent with the Board of Immigration Appeals’ seminal decision in *Matter of Artee*, 18 I. & N. Dec 366, Interim Decision 2934, 1982 WL 190706 (BIA 1982). *Matter of Artee* established that a determination of temporary need rests on the nature of the underlying need for the duties of the position. The Board of Alien Labor Certification Appeals (BALCA) has recently further clarified the definition of temporary need in *Matter of Caballero Contracting & Consulting LLC* 2009–TLN–00015 (April 9, 2009), finding that “the main point of *Artee* \* \* \* is that a job contractor cannot use [solely] its client’s needs to define the temporary nature of the job where focusing solely on the client’s needs would misrepresent the reality of the application.” BALCA, in *Matter of Cajun Constructors, Inc.* 2009–TLN–00096 (October 9, 2009), also decided that an employer that by the nature of its business works on a project until completion and then moves on to another, has a permanent rather than a temporary need. The Department concurs that a job contractor that provides workers to an employer on a temporary basis, but has an ongoing

need for such workers, is an entity with a permanent and not a temporary need.

As a result of the order issued by the U.S. District Court for the Eastern District of Pennsylvania in *CATA v. Solis*, Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), the Department has stopped accepting labor certification applications submitted by job contractors. In the *CATA* decision, the court interpreted DHS’ regulations to require every employer client of a “job contractor” as defined in the regulations at 20 CFR 655.4, to file a visa petition (and thus the underlying labor certification as well); therefore, requiring only job contractors to file a labor certification application would be contrary to DHS regulations. The proposal to eliminate job contractors altogether from the H–2B program, based on the determination that job contractors have a permanent need, effectively achieves the same result as the court’s ruling in *CATA* since the Department has yet to receive a labor certification application from a job contractor that meets both the requirements of the *CATA* decision and the existing H–2B regulations.<sup>4</sup>

The Department’s proposal regarding job contractors is based on our determination that job contractors, by their nature, have a permanent need for workers and therefore are not statutorily permitted to seek to employ H–2B workers. As stated above, the Department understands that in some circumstances the use of a job contractor may be advantageous to employers; job contractors presumably save some employers from the administrative functions of direct employment and provide their clients with useful, perhaps even cost-saving, service. However, the advantages provided to employers by using these services are not a legitimate basis for use of the H–2B program. Based on the Department’s determination that job contractors have

<sup>4</sup> While the *CATA* decision did not impose an outright prohibition on the participation of job contractors in the H–2B program, the Court left open the possibility that the Department may accept a labor certification application from a job contractor if its employer-client(s) also filed applications. However, the regulation at 20 CFR 655.20(e) only allows for one H–2B labor certification application to be filed for worksite(s) within one area of intended employment for each job opportunity with an employer. The H–2B regulations though recognize joint employment and do not prohibit the filing of a single labor certification by joint employers. Therefore, under the current regulations, a job contractor and its employer-client(s) could very well file a single application as joint employers and thus be in compliance with both the *CATA* decision (which prohibits allowing only the job contractor to file the application) and § 655.20(e) (which prohibits the filing of multiple applications for a single job opportunity).

a permanent need for workers, it cannot transgress the temporary parameters of the program to permit employers with permanent job opportunities to apply for temporary workers. The Department recognizes that by taking this position, the result may be that some employers who have been clients of such job contractors, and who have not previously participated in the program, may now seek to do so. We encourage those employers to submit information to us about their changed circumstances as a result of this proposal, including the potential costs or savings that may result.

DHS categorizes and defines temporary need into four classifications: Seasonal need; peakload need; intermittent need; and one-time occurrence. A one-time occurrence may be for a period of up to 3 years. The other categories are limited to 1 year or less in duration.

The Department proposes to define temporary need as less than 9 months, except in the case of a one-time occurrence. The definition is in keeping with the DHS definition of temporary need, in which the "period of time will be one year or less, but in the case of a one-time event could last up to 3 years." 8 CFR 214.2(h)(6)(ii)(B). The Department believes its proposed time period is an appropriate interpretation of the "or less" limitation contained in the DHS regulations, a limitation it has always previously applied in this program. This interpretation is necessary to ensure that the program is available only for employers with truly temporary or seasonal needs. The current approach that permits temporary certifications for periods up to 10 months encompasses job opportunities that the Department believes are permanent in nature and not consistent with Congressional intent to limit H-2B visas to employers with temporary or seasonal needs. If work is performed during all four seasons of the year, either it is not temporary or seasonal, consistent with statutory intent, or it is not the same work (for example, landscape workers who also perform snow removal duties) and thus would require separate applications. Employers that have recurring needs that are longer than 9 months should not have access to the H-2B temporary worker program for those job opportunities.

In addition, the Department's experience in administering the H-2B program indicates that some employers are not appropriately characterizing the nature of their peakload need, specifically where this need is based on a short-term, as opposed to seasonal,

demand. Peakload need is based on "seasonal or short-term demand" for which the employer needs to supplement its normal workforce. 8 CFR 214.2(h)(6)(ii)(A)(3). The Department is concerned that employers who cannot demonstrate a seasonal need mischaracterize a permanent need as a short-term temporary need, relying on a perceived short-term demand. Employers such as landscaping or construction companies frequently conduct year-round activities at a sustained level for the maximum allowable period of time for certification that would otherwise constitute a permanent need but for the two months when the H-2B workers return to their home countries. The slowdown in work is attributed more to the absence of H-2B workers, as opposed to an actual decrease in the demand for labor or services.

The Department is seeking comments and ideas from the public on factors or criteria that the Department should consider in determining whether the employer has a genuine peakload need based on short-term demand. In particular, the Department seeks comments on whether the Department should restrict the definition of short-term demand to one that is the direct result of climatic, environmental or other natural conditions. The Department would also appreciate comments on other alternatives limiting short-term demand to a specific time period, such as 6 months.

#### 7. Section 655.8 Requirements for Agents

The Department has long accepted applications from agents acting on behalf of employers in the H-2B program. However, in administering the H-2B program, the Department has become concerned about the role of agents in the program, especially as to whether their presence and participation have contributed to problems with program compliance, such as the passing on of prohibited costs to employees. The Department invites the public to provide ideas and suggestions on the appropriate role of agents in the H-2B program. In particular, the Department seeks comments on whether the Department should continue to permit the representation of employers by agents in the H-2B program.

Alternatively, if the Department were to continue to accept applications from agents, the Department seeks comments on any additional requirements that should be applied to agents to strengthen program integrity. At a minimum, the Department proposes to

require agents to provide copies of current agreements defining the scope of their relationships with employers to demonstrate that a bona fide relationship exists between an agent and employer. Where the agent is required under MSPA to have a Certificate of Registration, the agent must also provide a current copy which identifies the specific farm labor contracting activities that the agent is authorized to perform.

#### 8. Section 655.9 Disclosure of Foreign Worker Recruitment

The Department proposes to require the employer and its attorney and/or agents to provide a copy of any agreements with a foreign labor contractor or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers under an *Application for Temporary Employment Certification*. The disclosure of the terms and conditions of the agreement will assist the Department in determining whether the underlying transaction raises any program compliance concerns, including whether prohibited fees are being paid or passed on by the foreign labor contractor or recruiter. Additionally, information about the identity of the international recruiters will assist the Department in more appropriately directing its audits and investigations. By disclosing to the public the names of the foreign labor contractors and recruiters used by employers and their attorneys and/or agents participating in the H-2B program, the Department seeks to provide greater transparency regarding the H-2B worker recruitment process. In particular, the Department intends to use this list of foreign labor contractors and recruiters to facilitate information sharing between the Department and public, so that where the Department believes it is appropriate, it can more closely examine applications or certifications involving a particular labor contractor or recruiter identified by members of the public to have engaged in improper behavior.

#### B. Prefiling Procedures

##### 1. Section 655.11 Registration of H-2B Employers

The Department proposes requiring all employers to participate in a registration process that will allow the Department to assess the employer's claim of temporary need for non-agricultural temporary foreign workers before the employer is permitted to file an *Application for Temporary Employment Certification* to employ H-

2B workers. As discussed more fully below, the Department intends to use this process to ensure, in a manner that will facilitate the adjudication of applications, that each employer that seeks to employ temporary foreign workers in the H-2B category has a real and justifiable temporary need.

The Department proposes this registration step for a number of reasons. First, a registration process will streamline the adjudication of applications by ensuring an up-front determination of the employer's temporary need. The classification of an employer's need is a key issue in the current adjudicatory model, with significant resources employed in, and substantial frustration resulting from, the determination of whether an employer's need can be classified as temporary, and within that definition, whether it can be classified as a one-time, seasonal, intermittent, or peakload need. By requiring advance determination of the temporary need question, employers and workers seeking jobs can be assured of an application process that is closer in time to the dates of need and more focused on determining the availability of U.S. workers.

Second, the registration process will ensure a more efficient process to repeat users of the program. A registration approval that may be issued for a period of up to 3 years will allow employers to concentrate on their recruitment efforts in later years, while allowing the Department to focus on first-time or infrequent users whose program knowledge may be lacking. Slight variances in employers' underlying need will also be tolerated while significant variances (for example, an increase in the number of requested H-2B positions of more than 20 percent; a change of more than 14 days in the beginning or ending date of need; or a change in the nature of the job classification) will result in having to redetermine temporary need in accordance with § 655.11.

Under the proposed rule, an employer must file an *H-2B Registration* no fewer than 120 and no more than 150 calendar days before the date of initial need for H-2B workers. The *H-2B Registration* must be accompanied by supporting documentation showing the number of positions the employer desires to fill in the first year of registration; the period of time for which the employer needs the workers; and that the employer's need for the services or labor is non-agricultural, temporary and justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by DHS in

8 CFR 214.2(h)(6)(ii)(B) and interpreted in § 655.6. The employer is also required to sign the *H-2B Registration*, as is the employer's attorney or agent, if applicable.

Under the proposed rule, upon receiving a non-transferrable *H-2B Registration* and the accompanying documentation, the CO will, at a minimum, review the request for completeness and makes a determination based on whether the job classification and duties are non-agricultural; whether the employer's need for the services or labor to be performed is temporary in nature; whether the number of worker positions is justified; and whether the request represents a bona fide job opportunity.

The Department's proposal requires the CO to send any notice or request related to an *H-2B Registration* that requires a response from the employer by means assuring next day delivery, and that the employer's response be sent by similar means by the due date specified by the CO. The Department acknowledges that in many cases electronic mail may be the fastest way to relay correspondence and other information, and it may elect to use that method of transmission in order to ensure the fastest delivery. The proposal also allows employers to elect to use that method of delivery in their responses.

The proposed rule authorizes the CO to issue a Request for Further Information (RFI) if the CO determines the *H-2B Registration* cannot be approved as submitted. The CO may issue the RFI for a number of reasons, including but not limited to an incomplete or inaccurate ETA Form 9155; a job classification and duties that do not qualify as non-agricultural; the failure to demonstrate temporary need; and/or positions that do not constitute bona fide job opportunities. The RFI will inform the employer why the *H-2B Registration* is not sufficient for the CO to grant the registration; direct the employer to submit supplemental information or documentation in response to the RFI within 7 business days from the date of the RFI, and inform the employer that the CO will issue a Notice of Decision after reviewing the information submitted in response to the RFI. The RFI further informs the employer that a failure to comply with the RFI, including not providing all requested documentation within the specified timeframe, will result in a denial of the *H-2B Registration*. The proposed rule authorizes the CO to issue one or more additional RFIs before issuing a Notice

of Decision on the employer's *H-2B Registration*, if needed.

If the CO approves the *H-2B Registration*, the CO will send the decision to the employer, and a copy to the employer's attorney or agent, if applicable, notifying the employer that it is eligible to file an *Application for Temporary Employment Certification* to employ H-2B workers in the occupational classification for the anticipated number of positions and period of need stated on the approved *H-2B Registration*. Under the Department's proposal, the CO is authorized to approve an *H-2B Registration* for a period of up to 3 consecutive years for that occupation and area of intended employment. If the CO denies the request, the decision informs the employer why the request was denied, offers the employer an opportunity to request administrative review under § 655.61, and informs the employer that if it does not request administrative review within 10 business days, the denial of the *H-2B Registration* will be final.

The Department proposes requiring all employers that file an *H-2B Registration* to retain any documents and records not otherwise submitted proving compliance with this subpart. An employer whose *H-2B Registration* is approved is required to retain all records for a period of 3 years from the final date of applicability of the *H-2B Registration*. An employer whose *H-2B Registration* is denied or withdrawn is also required to retain all records for 3 years, to be measured from the date of the final registration decision or withdrawal by the employer. The Department's regulatory mandate to ensure that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers serves as the basis for the Department's authority to require employers to retain records relating to their *H-2B Registration*, even if the employer's *H-2B Registration* is ultimately withdrawn or denied. While it is extremely unlikely that the Department would audit any employer who initiated activity but did not actually file an application, these records would be potentially invaluable to the Department in evaluating future *H-2B Registrations* filed by the employer as to whether the employer has a temporary need that meets the requirements of the H-2B program.

For instance, in the first year, an employer files an *H-2B Registration* in which the employer claims it has a seasonal need with dates of need from

February to November. The Department grants the *H-2B Registration*, but the employer subsequently withdraws its *H-2B Registration*. In the second year, the same employer files an *H-2B Registration* for the identical job opportunity, except that its dates of need are now from April to December. Due to the changes in dates of need, the Department may have some concerns as to the legitimacy of the employer's temporary need and thus may request the employer to provide documentation of temporary need in support of both its previous and current year's *H-2B Registration*. Especially given that any burden that would be placed on an employer would be minimal<sup>5</sup>—*i.e.*, the employer merely would be required to retain documents for 3 years—making these records available to the Department clearly is worthwhile to uphold the integrity of the *H-2B* labor certification program and to ensure optimal employment opportunities for U.S. workers and no adverse effect on the wages and working conditions of U.S. workers.

#### 2. Section 655.12 Use of Registration of H-2B Employers

The Department proposes to permit an employer to file an *Application for Temporary Employment Certification* upon approval of its *H-2B Registration*, and for the duration of the registration's validity period, which may be up to 3 consecutive years from the date of issuance. The employer, however, may not use the same approved *H-2B Registration* to file an *Application for Temporary Employment Certification* if the employer's need for workers has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers); if the beginning or ending date of need for the job opportunity has changed by more than 14 calendar days; if the nature of the job classification and/or duties has changed; and/or if the temporary nature of the employer's need for services or labor is no longer temporary. If these changes occur, the proposed rule requires the employer to file a new *H-2B Registration*. Limiting the use of the employer's approved *H-2B Registration* in this way ensures the integrity of the registration process by requiring employers to submit a new *H-2B Registration* when the employer's circumstances change significantly.

<sup>5</sup> The EO 12866 analysis estimates the cost per employer to comply with document retention requirements to be not in excess of \$21.99.

#### 3. Section 655.10 Prevailing Wage

The Department proposes a modified process for obtaining a prevailing wage. In order to provide clarity, the proposed rule simplifies how an employer requests prevailing wage determinations (PWD). Under the proposed rule employers must request PWDs from the NPWC before posting their job orders with the SWA and the PWD must be valid on the day the job orders are posted. Employers should continue to request a PWD in the *H-2B* program at least 60 days before the date on which the determination is needed.

As discussed above, the determination of a prevailing wage has been the subject of another rulemaking, necessitated by the court's decision in *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), which culminated in the publication of the Wage Methodology for the Temporary Non-agricultural Employment *H-2B* Program Final Rule, 76 FR 3452, Jan. 19, 2011. This NPRM does not address or seek to amend the prevailing wage methodology established under that final rule.

#### 4. Section 655.13 Review of PWDs

The Department proposes changes to the process for the review of PWDs for purposes of clarity and consistency. The proposed rule reduces the number of days within which the employer must request review of a PWD by the NPWC Director from 10 calendar days to 7 business days from the date of the PWD. The proposed rule revises the language of the 2008 Final Rule to reflect that the NPWC Director will review determinations. For similar reasons, the proposed rule specifies that the employer has 10 business days from the date of the NPWC Director's final determination within which to request review by BALCA. No other substantive changes were made to this section.

#### C. Application for Temporary Employment Certification Filing Procedures

##### 1. Section 655.15 Application Filing Requirements

This provision sets out the basic requirements with which employers need to comply in order to file an *Application for Temporary Employment Certification* once they have an approved *H-2B Registration*. Under the proposed rule, the Department has returned to a post-filing recruitment model in order to ensure better and more thorough compliance by *H-2B* employers with program requirements. The Department's experience in administering the *H-2B* program since

the implementation of the 2008 Final Rule suggests that the lack of oversight by the Department and the SWAs during the pre-filing recruitment process has resulted in failures to comply with program requirements. The recruitment model described below will enhance coordination between OFLC and the SWAs, better serve the public by providing U.S. workers more access to available job opportunities, and assist the employer in obtaining the qualified personnel that it requires in a timelier manner. The proposed rule allows the Department to work more closely with the SWAs by requiring the employer to file the *Application for Temporary Employment Certification* and a copy of the job order with the Chicago NPC at the same time it files the job order with the SWA. The employer must submit this filing no more than 90 days and no fewer than 75 days before its date of need. The proposed process continues to employ the SWAs' significant knowledge of the local labor market, job requirements, and local prevailing practices by authorizing the SWA to review the contents of the job order for compliance and submit to the CO any deficiencies pursuant to § 655.16. The Department continues to require employers to file separate applications when there are different dates of need for the same job opportunity within an area of intended employment. This prohibition against staggered entries based on a single date of need is intended to ensure that employers provide U.S. workers the maximum opportunity to consider the job opportunity and is consistent with USCIS policies. The Department recognizes that there may be industries whose participation in the *H-2B* program may be constrained as a result of this revised timeframe in years in which the statutory cap of 33,000 visas for the six-month intervals beginning October 1 and April 1 is at issue. However, this is largely a function of the statutory cap on the available visas over which the Department has no control.

While the Department has begun efforts to establish an online format for the submission of an *Application for Temporary Employment Certification*, as such a system depends upon the resolution of issues in this rulemaking, it cannot be immediately implemented when a final rule becomes effective. Thus there will have to be a period during which paper submissions remain the means by which applications must be filed. Therefore, the Department proposes to continue to require filing of an *Application for Temporary Employment Certification* in a paper

format until such time as an electronic system can be fully implemented. The Department proposes to continue to use Form ETA 9142 to collect the necessary information; however, the form's appendices will be slightly modified to reflect changes from the 2008 Final Rule (such as a change of tense to note pre-recruitment filing). As in the 2008 Final Rule, the proposed rule requires the *Application for Temporary Employment Certification* to contain original signatures.

## 2. Section 655.16 Filing of the Job Order at the SWA

The proposed rule requires the employer to submit the job order directly to the SWA at the same time as it files the *Application for Temporary Employment Certification* and a copy of the job order with the NPC, no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need. Ensuring that the recruitment of U.S. workers occurs closer in time to the actual job availability makes the recruitment more realistic and more likely to result in greater opportunities for U.S. workers. The proposed rule continues to use the SWAs' experience with the local labor market, job requirements, and prevailing practices by requiring the SWA to review the contents of the job order for compliance with § 655.18 and notify the CO of any deficiencies within 4 business days of its receipt of the job order. The proposed rule differs from the 2008 Final Rule in that it prohibits the SWA from posting the job order before receiving a Notice of Acceptance from the CO directing it to do so. It is the Department's belief that the cooperative relationship between the CO and the SWA continues to ensure program integrity. Additionally, by requiring such concurrent filing and review, the CO can simultaneously address job order deficiencies identified by the NPC and the SWA in a single Notice of Deficiency before the employer conducts its recruitment. This coordination will ensure greater program integrity and efficiency.

Upon placement of the job order in intra and interstate clearance, the SWA must keep the job order on its active file and continue to refer U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until 3 days before the date of need, when it is assumed that the last H-2B worker has departed for the place of employment, unless informed otherwise by the employer, as provided in proposed § 655.40. This ensures the job order is afforded maximum visibility for the most relevant period of time—

the time during which workers are most likely to apply for an imminent job opening, and when employers are most in need of workers. This is a substantial change from the current practice of keeping the job order open only for a short time, but the Department believes the change will ensure that U.S. workers are apprised of the job opening and provided a meaningful opportunity to apply when they are most likely to do so and most likely to accept the offered employment.

## 3. Section 655.17 Emergency Situations

Under the proposed rule, an employer may file an *H-2B Registration* and/or an *Application for Temporary Employment Certification* fewer than 75 days before the start date where an employer has good and substantial cause and there is sufficient time for the employer to undertake an adequate test of the labor market. This is a change from the current regulations which do not allow for emergency filings. This affords employers flexibility while maintaining the integrity of the application and recruitment processes. To meet the good and substantial cause test, the employer must provide to the CO detailed information describing the reason(s) which led to the emergency request. Such cause may include the substantial loss of U.S. workers due to Acts of God or pandemic health issues, damage to facilities resulting from weather or other conditions, or new contracts that require earlier start dates. However, the CO's denial of an *H-2B Registration* in accordance with the procedures under § 655.11 does not constitute good and substantial cause necessitating a waiver request.

## 4. Section 655.18 Content of the Job Order

The job order is essential for providing U.S. workers sufficient information to make informed employment decisions. The Department proposes to require employers to inform applicants in the job order not only of the typical information provided in advertisements, but also of several key assurances and obligations to which the employer is committing to by filing an *Application for Temporary Employment Certification* for H-2B workers. The job order must also be provided to H-2B workers with its pertinent terms in a language the worker understands.

a. *Prohibition Against Preferential Treatment* (§ 655.18(a)). Under the proposed rule, the employer is responsible for providing to U.S. workers at least the same level of benefits, wages, and working conditions

that are being or will be offered or paid to H-2B workers, similar to the requirements under current § 655.22(a). The additional requirement is that this guarantee must be set forth in the job order to be sure that all workers are aware of their rights.

b. *Bona Fide Job Requirements* (§ 655.18(b)). The Department proposes to require that the job qualifications and requirements listed in the job order be bona fide and consistent with those required by employers that do not use H-2B workers for the same or comparable occupations in the same area of intended employment, consistent with the requirements in current § 655.22(a). The intent of this provision is to prevent employers from artificially making the job opportunity unattractive to U.S. workers, thereby increasing the need for H-2B workers.

c. *Benefits, Wages, and Working Conditions Covered Under* (§ 655.18(c)-(g)). The Department proposes to require the employer to list all of the following benefits, wages, and working conditions in the job order: the rate of pay, frequency of pay, deductions that will be made, and that the job opportunity is full-time. These requirements are generally consistent with those required in current § 655.17 and § 655.22; where changes were made, they are discussed in the preamble to § 655.20. These disclosures are critical to a potential applicant's decision whether to accept the opportunity.

d. *Three-Fourths Guarantee* (§ 655.18(h)). The Department proposes to require that H-2B employers guarantee payment of wages for at least three-fourths of the contract period and proposes to require the employer to list this guarantee in the job order. Currently, there is no minimum number of hours that employers are required to provide to H-2B workers. The NPRM proposes to require that employers guarantee the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual date of need, whichever is later, and which ends on the expiration date specified in the job order or in any extensions. Again, awareness of this guarantee would be critical to a U.S. worker's ability to evaluate the job opportunity and thus influence the decision to accept the employer's job offer. These proposed requirements are similar to the three-fourths guarantee in the H-2A program; however, that program assesses the guarantee based upon the entire contract period rather than based upon 4-week

periods. Recent experience enforcing the H-2B regulations demonstrates that workers are often provided much less work than that promised in the job order and this occurrence has convinced the Department that this protection is necessary.

e. *Transportation and Visa Fees* (§ 655.18(i)). The proposed rule requires the job order to disclose that the employer will provide, pay for, or fully reimburse the worker for inbound and outbound transportation and daily subsistence costs. This requirement applies to both U.S. workers who are not reasonably able to return to their residence within the same workday and H-2B workers when traveling to and from the employer's place of employment. Additionally, if applicable, the job order must disclose that the employer will provide daily transportation to the workers to the worksite. The job order also must disclose that the employer will reimburse the H-2B workers for visa and related fees.

f. *Employer-Provided Items* (§ 655.18(j)). The proposed rule requires the job order to indicate that the employer will provide workers with all tools, supplies, and equipment needed to perform the job at no cost to the employee. This requirement, which is consistent with current § 655.22(g) which requires all deductions to be reasonable, gives the workers additional protection against improper deductions from wages, and assures them that they will not be required to pay for items necessary to perform the job.

g. *Board, Lodging, or Facilities* (§ 655.18(k)). While not required to offer such benefits, if the employer intends to provide H-2B workers with room and board or other such facilities or offer assistance in securing such lodging, it must be disclosed in the job order and offered to all U.S. worker-applicants who cannot reasonably return to their residence within the same workday. This requirement is intended to ensure that the employer offers, to the extent practicable, the U.S. workers the same benefits, wages, and working conditions as those offered to the H-2B workers. If the employer intends to make a deduction from cash wages for the reasonable costs of board, lodging or other facilities, it must disclose that in the job order.

Some employers qualify under existing special procedures to use a single *Application for Temporary Employment Certification* to recruit and employ itinerant workers in multiple areas of intended employment on the same job order. Consistent with case law interpreting the primary benefit

principle under the Fair Labor Standards Act, in the situation where employees must move from one temporary work location to another, the employee's temporary housing while at a particular work location is primarily for the benefit of the employer. See *Masters v. Maryland Management Co.*, 439 F.2d 1329 (4th Cir. 1974); *Marshall v. DeBord*, 1978 WL 1705 (E.D. Okla. 1978); *Bailey v. Pilots' Association for the Bay and River Delaware*, 406 F. Supp. 1302 (E.D. Pa. 1976). Similarly, the transportation required to move the employees from one work location to the next work location, as well as the daily transportation between the temporary housing and the worksite, is primarily for the employer's benefit. See 29 CFR 531.32(c); 29 CFR 778.217(b)(3). Therefore, employers operating under the special procedures mechanism to employ itinerant workers will be required to pay for housing and transportation expenses that are primarily for the benefit of the employer, and the employer's job order will have to advise potential employees of this obligation.

#### D. Assurances and Obligations

##### 1. Section 655.20 Assurances and Obligations of H-2B Employers

Proposed § 655.20 would replace current § 655.22 and contains the employer obligations that WHD will enforce. The Department proposes to modify, expand, and clarify current requirements to ensure that an employer's need for H-2B workers is genuine because no qualified U.S. workers are available, and that the employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers. Requiring compliance with the following enhanced conditions of employment is the most effective way to meet these goals. As discussed in the preamble to § 655.5, workers engaged in corresponding employment are entitled to the same protections and benefits provided to H-2B workers.

a. *Rate of Pay* (§ 655.20(a)). Proposed § 655.20(a) draws from several different provisions of existing § 655.22. For example, the Department proposes to modify the current § 655.22(e) on the employer's responsibility to pay the offered wage throughout the worker's authorized period of employment to include the requirement that the payment must be made "free and clear." Further discussion of "free and clear" appears below.

The proposed section also adds a requirement that productivity standards that are a condition of job retention

must be specified in the job order and must be no more than normally required by non-H-2B employers for the occupation in the area of intended employment. The Department maintains that imposition of productivity standards should be evaluated by the SWA prior to acceptance of the *Application for Temporary Employment Certification* in order to ensure that there is no adverse effect on the working conditions of similarly employed U.S. workers.

The Department recognizes that some occupations for which H-2B workers are sought have traditionally been piece-rate jobs and the *Application for Temporary Employment Certification* allows an employer to compute pay on a piece-rate basis. The proposed section allows piece rates to serve as the basis for computing wages only if the piece rate paid is at least equal to the piece rate normally paid to workers performing the same activity in the area of intended employment. Consistent with current § 655.22(g)(1), in every workweek the piece rate must result in wages at least equal to what the weekly earnings would have been had the worker's pay been computed based upon the offered hourly wage. If the piece rate earnings do not equal at least the required amount, this proposed paragraph requires that the employer supplement the worker's wages on a workweek basis to meet the offered wage. Finally, the proposal eliminates the current option of paying wages on a monthly basis.

b. *Wages Free and Clear and Deductions* (§§ 655.20(b) and 655.20(c)). The Department's experience demonstrates that some employers may seek to reduce their wage liability by imposing unauthorized deductions on gross wages. The proposed obligations in paragraphs (b) and (c) of this section seek to ensure payment of the offered wage by requiring that wage payments be final, unconditional, and "free and clear" and by limiting deductions which reduce wages to below the required rate. Specifically, authorized deductions are limited to those: required by law; made under a court order; that are for the reasonable cost or fair value of board, lodging, or facilities furnished (only if disclosed in the job order); or that are amounts paid to third parties authorized by the employee or a collective bargaining agreement. Deductions for costs that are primarily for the benefit of the employer are never reasonable. Unauthorized or impermissible deductions include those not specified in the job order; "kick backs" paid to the employer or employer representative; and amounts paid to third parties which

are unauthorized, unlawful, or from which the employer or its foreign labor contractor, recruiter, agent worker, or affiliated person benefits to the extent such deductions reduce the actual wage to below the required wage. The FLSA and 29 CFR part 531 provide appropriate guidance in determining the permissibility of deductions, as indicated in the proposed paragraph.

*c. Job Opportunity is Full-Time (§ 655.20(d)).* In proposed § 655.20(d), the Department redefines full-time employment as at least 35 hours per week, an increase from the current level of 30 hours. A 35-hour workweek more accurately reflects the nature of full-time work and strikes an appropriate balance between the employer's needs and the employment and income needs of both U.S. and foreign workers. Additionally, consistent with the FLSA, this NPRM adds the requirement that the workweek will be a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods which may start on any day or hour of the day. Accordingly, wages would be computed based on this workweek. This requirement establishes a clear period for determining whether the employer has paid the required wages, which will aid in enforcement.

*d. Job Qualifications and Requirements (§ 655.20(e)).* Proposed § 655.20(e) clarifies the existing § 655.22(h) by stating that each job qualification and requirement listed in the job order must be consistent with normal and accepted qualifications required by non-H-2B employers for similar occupations in the same area of intended employment. OFLC will determine what is normal and accepted during the pre-certification process. The proposed paragraph also allows the CO to require the employer to substantiate any job qualifications specified in the job order.

*e. Three-Fourths Guarantee (§ 655.20(f)).* The Department has determined that the three-fourths guarantee required in the H-2A program provides protection that is necessary in the H-2B program as well. The guarantee has been required under the H-2A program since its inception in 1987; in the 2008 Final Rule, the Department defended the requirement: "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." 73 FR 77152 (Dec. 18, 2008).

Recent experience in enforcing the H-2B regulations demonstrates that

workers are often provided much less work than that promised in the job order, which has convinced the Department that this protection is necessary. For example, the Department's enforcement experience has revealed employers that stated on their H-2B applications that they would provide 40 hours of work per week when, in fact, their workers averaged far fewer hours of work. Indeed, in some weeks the workers did not work at all.

In addition to the Department's recent experience enforcing the H-2B regulations, the Department is aware of testimony involving cases in which unscrupulous employers which have obtained H-2B labor certification have overstated the period of need and/or the number of hours for which the workers are needed. For example, H-2B workers testified at a hearing before the Domestic Policy Subcommittee, House Committee on Oversight and Government Reform, on April 23, 2009 that there were several weeks in which they were offered no work; others testified that their actual weekly hours—and hence their weekly earnings—were less than half of the amount they had been promised in the job order. Daniel Angel Castellanos Contreras, a Peruvian engineer, was promised 60 hours per week at \$10–\$15 per hour. According to Mr. Contreras, "The guarantee of 60 hours per week became an average of only 20 to 30 hours per week—sometimes less. With so little work at such low pay [\$6.02 to \$7.79 per hour] it was impossible to even cover our expenses in New Orleans, let alone pay off the debt we incurred to come to work and save money to send home."<sup>6</sup> Miguel Angel Jovel Lopez, a plumber and farmer from El Salvador, was recruited to do demolition work in Louisiana with a guaranteed minimum of 40 hours of work per week. Mr. Lopez testified, "Instead of starting work, however, I was dropped off at an apartment and left for two weeks. Then I was told to attend a two week training course. I waited three more weeks before working for one day on a private home and then sitting for three more weeks."<sup>7</sup> Testimony at the same hearing by three attorneys who represent H-2B workers stated that these witnesses' experiences were not

<sup>6</sup> Testimony of Daniel Angel Castellanos Contreras before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2, (2009, Apr. 23) <http://oversight.house.gov/images/stories/documents/20090423085101.pdf>.

<sup>7</sup> Testimony of Miguel Angel Jovel Lopez before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2, (2009, Apr. 23) <http://oversight.house.gov/images/stories/documents/20090423085606.pdf>.

aberrations but were typical. Hearing on The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers, 111th Cong. (Apr. 23, 2009).

Furthermore, a 2010 report by the American University Washington College of Law International Human Rights Law Clinic and the Centro de los Derechos del Migrante, Inc. documented the prevalence of work shortages for women working on H-2B visas in the Maryland crab industry. The researchers found that "[s]everal women interviewed spent days and weeks without work when crabs were scarce. During this time most continued to make rent payments, and struggled to send money to family back in Mexico."<sup>8</sup>

WHD enforcement experience from the H-2A program provides further evidence supporting the need to extend guaranteed minimum work protections to H-2B workers who in many ways are similarly situated to their H-2A counterparts. Though the three-fourths guarantee is already in place in the H-2A program, WHD has found employers substantially violating its provisions. For instance, as recently as January 2011, WHD assessed \$1/3 million in back wages from a vegetable farm employer which failed to provide to 244 workers—148 of whom were U.S. workers—at least 75 percent of the work hours promised. This case is currently in litigation.

Few legal options exist for H-2B workers who feel their work contracts have been violated. An initial barrier to legal recourse is purely practical: H-2B workers are not eligible for services from federally-funded legal aid programs. As a result, most H-2B workers have no access to lawyers or information about their legal rights. Furthermore, the H-2B job order, which specifies the terms and conditions of employment, including work hours, may not be enforceable through private litigation. See *Garcia v. Frog Island Seafood, Inc.*, 644 F.Supp.2d 696, 716–18 (E.D.N.C. 2009) (holding H-2B job orders would not be treated as enforceable contracts). A guaranteed number of hours, enforceable by WHD, may well be the only protection H-2B workers have if employers misrepresent the amount of work the worker will actually be provided.

<sup>8</sup> American University Washington College of Law International Human Rights Law Clinic and Centro de los Derechos del Migrante, Inc. *Picked Apart: The Hidden Struggles of Migrant Worker Women In the Maryland Crab Industry*, 2, July 2010. [http://www.wcl.american.edu/clinical/documents/20100714\\_auwcl\\_ihrcl\\_picked\\_apart.pdf?rd=1](http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrcl_picked_apart.pdf?rd=1).

In an effort to combat such abuses, § 655.20(f) proposes to require a guaranteed offer of employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period. The Department proposes to use successive 4-week periods to measure the three-fourths guarantee instead of measuring the three-fourths guarantee over the course of the entire time period of need (as in the H-2A three-quarters guarantee), in order to ensure that work is offered during the entire time period certified by the Department. Four-week increments will aid the Department in enforcing the statutory and regulatory temporary need requirement. When employers file applications for H-2B certifications, they represent that they have a need for full-time temporary work during the entire time period for which they request certification from the Department. Using a 4-week period will prevent employers from requesting workers for nine months, for example, if they really only have a need for their services for seven months. Thus, a 4-week period will help to ensure that employers do not assert that they need workers throughout the winter months if the work cannot be conducted in such weather and there is little or no work for the workers to perform until spring. Using a 4-week period also prevents an employer from inappropriately stating, for example, that it needs workers until October 31st, if its season is over and there generally is little or no work after September 30th, in the hopes that the employees will simply leave the job before the end of the period so the employer will be relieved of its obligation to pay for their return transportation. When a worker accepts a job offer that promises full-time work for a set period of time and foregoes other opportunities to make that commitment, the worker has a right to be provided with the promised amount of work for the entire period for which work was promised. The hours are not fungible, and should not be provided primarily in the middle of the period of need in order to meet the three-fourths guarantee.

These 4-week periods would begin the first workday after the worker's arrival at the place of employment or the advertised contractual first date of need, whichever is later, and would end on the expiration date specified in the job order or in any extensions. The Department believes that this guarantee will impose no burden on employers that have accurately stated their need for workers, even if the employer's calculation of the amount of available

work is off by as much as 25 percent. Therefore, the three-fourths guarantee offers the appropriate level of protection for workers who are employed by unscrupulous employers, without any penalty or burden to compliant employers.

The proposed system provides for a workday to be based on the workday hours stated in the employer's job order and require the guarantee in each 4-week period. The 4-week period would be based on the employer's workweek. If a worker arrives and starts work after the first day of the employer's workweek, resulting in a partial workweek, then the initial 4-week guarantee period could result in a period of as long as 4 weeks and 6 days. Similarly, the worker might cease employment before the end of a final 4-week period, resulting in a guarantee period as short as one workday. In such cases, the guarantee is increased for the initial period and decreased for the last period on a pro rata basis.

Under the proposed guarantee, the employer would be required to pay the worker three-fourths of the wages the worker would have earned in any 4-week period if the employer had offered the worker the number of hours specified in the job offer. In contrast to the guarantee provided under the H-2A program, this proposal does not exclude hours offered on the worker's Sabbath and Federal holidays from the three-fourths guarantee requirement in recognition of the fact that many H-2B workers are employed in the hospitality industry that need those workers available during those times.

The Department recognizes that workers may fail or refuse to work hours which have been offered by the employer. Consequently, the proposed section allows the employer to count any hours offered consistent with the job order that a worker freely and without coercion chooses not to work, up to the maximum number of daily hours on the job order, in the calculation of guaranteed hours. The proposed section also allows the employer to offer the worker more than the specified daily work hours, but the employer may not require the employee to work such hours or count them as offered if the employee chooses not to work the extra hours. However, the employer may include all hours actually worked when determining whether the guarantee has been met. Furthermore, as detailed in § 503.16(g), the CO can terminate the employer's obligations under the guarantee in the event of fire, weather, or another Act of God that makes the fulfillment of the job order impossible.

As indicated above, the purpose of the guarantee is to ensure that employers do not misuse the program by overstating their need for full-time, temporary workers, such as by carelessly calculating the starting and ending dates of their temporary need, the hours of work needed per week, or the total number of workers required to do the work available. The Department believes that the guarantee will motivate employers to carefully consider the extent of their workforce needs before applying for certification, thus discouraging employers from applying for unnecessary workers or from promising work which may not exist. To the extent that employers more accurately describe the amount of work available and the periods during which work may be more or less available, it gives both U.S. and foreign workers a better chance to realistically evaluate the desirability of the offered job. Not only will this result in workers working most of the hours promised in the job order but it may also make the capped H-2B visas available to other employers whose businesses need to use H-2B workers. The three-fourths guarantee is a reasonable deterrent to such potential carelessness and a necessary protection for workers, while still providing employers with flexibility relating to the required hours, given that many common H-2B occupations involve work that can be affected by weather conditions.

An hour guarantee is necessary to protect the integrity of the H-2B program and to protect the interests of both workers and employers in the H-2B program. At the same time, the Department invites the public to suggest alternative guarantee systems that may better serve those goals. In particular, the Department seeks comments on whether a 4-week increment is the best period of time for measuring the three-fourths guarantee or whether a shorter or longer time period would be more appropriate.

*f. Impossibility of Fulfillment* (§ 655.20(g)). In proposed § 655.20(g), the Department acknowledges that circumstances beyond the control of the employer or the worker, such as a natural disaster or a fire, might result in the need to terminate a worker's employment before the expiration date of a job order. Therefore, the new language in this paragraph allows employers to terminate a job order in certain circumstances when approved by the CO. In such an event, the employer would be required to meet the three-fourths guarantee discussed in paragraph (f) of this section based on the starting date listed in the job offer or



first workday after the arrival of the worker, whichever is later, and ending on the work termination date. The employer would also be required to attempt to transfer the H-2B worker (if permitted under the INA) or worker in corresponding employment to another comparable job. Absent such transfer, the employer would have to comply with the proposed transportation requirements in paragraph (j) of this section.

g. *Frequency of Pay (§ 655.20(h))*. The proposed § 655.20(h) adds the requirements that the employer indicate the frequency of pay in the job order and that workers be paid every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Further, wages must be paid when due. Allowing the employer to pay less frequently than every 2 weeks and to not make timely payment of wages imposes an undue burden on workers who traditionally are paid low wages and live paycheck to paycheck.

h. *Earnings Statements (§ 655.20(i))*. Proposed § 655.20(i) adds requirements for the employer to maintain accurate records of worker earnings and provide the worker on or before each payday an appropriate earnings statement. This proposed paragraph also lists the information that the employer must include in such a statement. Providing such statements to employees will enhance program integrity because employees will have a timely and clear understanding of the basis for their pay, and such statements will provide the Department with additional information in any investigation or audit.

i. *Transportation and Visa Fees (§ 655.20(j))*. The Department proposes changes relating to transportation and visa costs in § 655.20(j). The Department has determined that the cost of transporting workers from remote locations to the worksite is an expense that primarily benefits employers who choose to use the H-2B program and it is the Department's intention to ensure that the cost of transporting workers from remote locations to the worksite are not passed on to the employees.

The NPRM would require an employer to provide, pay for, or reimburse the worker in the first workweek the cost of transportation and subsistence from the place from which the worker has come to the place of employment. Similarly, at the end of the employment, the NPRM would require the employer to provide or pay for the U.S. or foreign worker's return transportation and daily subsistence from the place of employment to the place in the worker's home country

from which the worker departed to work for the employer, if the worker has no immediate subsequent approved H-2B employment. If the worker has been contracted to work for a subsequent and registered employer, the last H-2B employer to employ the worker would be required to provide or pay the U.S. or foreign worker's return transportation. Therefore, prior employers would not be obligated to pay for return transportation costs. Employers also would be required to pay or reimburse the worker for the H-2B worker's visa, visa processing, border crossing, and other related fees including those fees mandated by the government (but not for passport expenses or other charges primarily for the benefit of the workers).

The proposed changes are consistent with the Department's interpretation of the FLSA, explained in Field Assistance Bulletin No. 2009-2 (Aug 21, 2009), that H-2B workers' transportation and visa costs are primarily for the benefit of the employer. The employer benefits because it obtains foreign workers where the employer has certified that there are not sufficient able, willing and qualified U.S. workers available to perform the work. Transporting these workers from remote locations to the workplace is primarily for the benefit of the employer who has sought authority to bring in workers from foreign countries.

The Bulletin explained that an employer must bear such expenses if shifting them to the employee would bring the employee's effective rate of pay below the FLSA minimum wage. H-2B employers covered by the FLSA must, therefore, pay such expenses to meet FLSA requirements. See *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002); but see *Castellanos-Contreras v. Decatur Hotels, LLC*, F.3d, 2010 WL 3816016 (5th Cir. 2010). Moreover, the current (and proposed) H-2B regulations specifically require employers to comply with all applicable Federal, State, and local employment-related laws.

The Department's proposal would require the employer to pay these expenses if payment by the employee would bring the employee's rate of pay below the offered wage. The proposed requirement protects U.S. workers from adverse effect by protecting the integrity of the offered wage. Without these protections, the employer, who is obligated to pay the "offered wage" which is generally higher than the FLSA minimum wage, could take deductions from wages that could reduce the effective wage to the FLSA minimum.

The following illustrates the benefits of this proposal. Under the current regulation the employer is not obligated to reimburse H-2B workers for inbound transportation, visa, visa processing, border crossing, and other related costs even though the Department has determined that under the FLSA these costs are primarily for the benefit of the employer. Further, the only restriction on deductions from pay are found in current 20 CFR 655.22(g)(1), which states,

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

In this illustration, the employer, a landscaping contractor in Orange County, FL, provides a disclosure to the employee that the employer will advance the \$800<sup>9</sup> for inbound transportation, visa, visa processing, and other related fees as well as the return transportation cost, and deduct the costs from the employee's paycheck until fully repaid. The employee, from Mexico, is hired to work for a landscaping company for 12 weeks and the Level 1 prevailing wage, as determined by OES, is \$8.90 per hour. The employee works 40 hours and is entitled to be paid \$356.00. Since the employer disclosed that he would advance the transportation costs and visa related fees and recoup those costs through deductions from the worker's pay, the worker is paid \$290.00, the amount equivalent to the FLSA minimum wage for 40 hours work. The worker would be paid \$290 instead of \$356.00 each of the subsequent 11 workweeks until the \$800 is recouped by the employer. This is so even though the WHD has determined that the transportation and visa-related cost for H-2B workers is primarily for the benefit of the employer. Further, the Department has determined that in order to protect the labor market from the adverse effects on wages caused by the presence of temporary foreign workers in this labor market the minimum wage that must be paid by H-2B employers is \$8.90. Without a provision requiring the employer to pay the transportation cost and visa-related fees the wage provisions of the H-2B program are severely compromised, providing an economic incentive for employers to hire foreign workers who

<sup>9</sup> The transportation cost is estimated to be \$286 each way, \$10.64 daily for subsistence, and \$150 for visa fees. For a more detailed discussion of the estimated cost of transportation, see Section IV. Administrative Information, A. Executive Order 12866 of this preamble.

can be paid the FLSA wage instead of the “offered wage” in contravention of the Department’s obligations to prevent adverse effect under the program.

This NPRM also adds daily subsistence costs during inbound and outbound travel as an expense the employer is required to cover in addition to the actual transportation, consistent with a similar provision under the H–2A program. Because U.S. workers living far away from an area of intended employment may accept an H–2B job opportunity, the proposed rule provides the same treatment for U.S. workers who are unable to return to their residence each workday.

Finally, the Department proposes that all employer-provided transportation—including transportation to and from the worksite, if provided—meet applicable safety, licensure, and insurance standards. Under this proposed rule, all transportation and subsistence costs covered by the employer (even costs not required by this section) must be disclosed in the job order.

The proposed requirement that the employer pay inbound and outbound transportation, subsistence, visa, visa processing, border crossing, and related fees in this provision applies to H–2B workers, including those who have traveled to the place of employment but have not started work due to their displacement by a U.S. worker. See Proposed § 655.40 (U.S. worker recruitment period terminates on the third day preceding the employer’s date of need or the date the last foreign worker departs for the employment, whichever is later). DHS regulations currently allow H–2B workers to enter the U.S. ten days before their employment start date. 8 CFR 214.2(h)(13)(i). Thus, there may be a gap in time between the time when an H–2B worker enters the country intending to work for the employer (up to 10 days before the date of need) and the time when the employer is no longer obligated to hire qualified U.S. workers for these job opportunities (three days before the employer’s date of need or the date the last foreign worker departs, if later). Because employers have the ability to control the travel of H–2B workers from the point of visa issuance to the worksite, the Department expects that employers will delay the H–2B worker’s departure date until the required recruitment period has ended. In the rare event that an H–2B worker enters the country before the U.S. worker recruitment period has ended and the position has been filled by a U.S. worker, the employer must reimburse the foreign worker for these costs and/or provide payment for the

cost of return transportation at the time the worker presents for employment.

j. *Employer-Provided Items* (§ 655.20(k)). The Department proposes to add a new requirement under § 655.20(k), consistent with the requirement under the FLSA regulations at 29 CFR part 531, that the employer provide to the worker without charge all tools, supplies, and equipment necessary to perform the assigned duties. The employer may not shift to the employee the burden to account for damage to, loss of, or normal wear and tear of, such items. This proposed provision gives workers additional protections against improper deductions of the employer’s business expenses from required wages.

k. *Disclosure of the Job Order and Notice of Worker Rights* (§§ 655.20(l) and 655.20(m)). Worker notification is a vital component of worker protection and program compliance. Proposed §§ 655.20(l) and 655.20(m) would enhance worker notifications. Proposed § 655.20(l) requires that the employer provide a copy of the job order to H–2B workers no later than the time of application for a visa and to workers in corresponding employment no later than the first day of work. The job order will contain information about the terms and conditions of employment and employer obligations as provided in proposed § 655.18 and must be in a language understandable to the workers. Proposed § 655.20(m) requires that the employer post a notice in English of worker rights and protections in a conspicuous location and post the notice in other appropriate languages if such translations are provided by the Department.

l. *No Unfair Treatment* (§ 655.20(n)). Proposed § 655.20(n) adds new language on nondiscrimination and nonretaliation protections which are basic to statutes that the Department enforces. Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person’s attempt to report or correct perceived violations of H–2B provisions. As provided in proposed 29 CFR 503.20, make-whole relief is available for victims of discrimination and retaliation under this paragraph.

m. *Comply with the Prohibitions Against Employees Paying Fees* (§ 655.20(o)). Proposed § 655.20(o) amends current § 655.22(j) by expanding the list of persons who may not seek reimbursement from workers for any costs associated with obtaining H–2B employment certification or employment, and by repeating the new requirement in proposed § 655.20(b)

that wages must be paid free and clear. This paragraph also clarifies that H–2B employers or their agents may recoup costs that are the responsibility of, and primarily for, the benefit of the worker. Passport fees, currently included in § 655.22(g)(2), are noted here as an example of a cost that is primarily for the benefit of the worker.

n. *Contracts with Third Parties to Comply with Prohibitions* (§ 655.20(p)). In § 655.20(p), the Department proposes to amend current § 655.22(g)(2) to require that an employer that engages any agent or recruiter must prohibit in a written contract the agent or recruiter from seeking or receiving payments from prospective employees. The contract must be made available to the CO, WHD or other Federal party, upon request. The Department also proposes to eliminate the reference to DHS regulations at 8 CFR 214.2(h)(5)(xi)(A) to avoid confusion in light of the proposed provisions concerning the employer responsibilities for transportation and visa costs in § 655.20(j). Similarly, the current sentence allowing an employer to recover visa costs is removed, consistent with proposed § 655.20(j)(2).

o. *Prohibition Against Preferential Treatment of H–2B Workers* (§ 655.20(q)). Proposed § 655.20(q) is similar to § 655.22(a) of the current rule, which prohibits employers from providing better terms and conditions of employment to H–2B workers than to U.S. workers. The language has been modified to reflect the change to a certification process from the current attestation-based process.

p. *Non-Discriminatory Hiring Practices, Recruitment Requirements, and Continuing Requirement to Hire U.S. Workers* (§§ 655.20(r), 655.20(s), and 655.20(t)). The current regulations require that the employer recruit and hire qualified U.S. workers during a limited 10-day period before filing the *Application for Temporary Employment Certification*. The Department firmly believes that this represents inadequate time and effort to ensure that there are no or insufficient qualified U.S. workers to fill the employer’s temporary employment needs. To remedy this inadequacy, the Department proposes to extend the employer’s recruitment and hiring obligations by making the changes in §§ 655.20(r), 655.20(s), and 655.20(t), as described below.

First, consistent with current § 655.22(c), proposed § 655.20(r) reaffirms the Department’s commitment to ensuring that U.S. workers have priority for H–2B job opportunities by stating that U.S. workers who apply must either be offered the job or rejected

only for lawful, job-related reasons, and by prohibiting discrimination. The proposal clarifies that this hiring obligation remains in effect throughout the period set forth in proposed paragraph (t).

Second, proposed § 655.20(s) requires that the employer conduct required recruitment as described in proposed §§ 655.40–46.

Last, proposed § 655.20(t) extends the period during which the employer must hire qualified U.S. workers referred by the SWA or who respond to recruitment to 3 days before the date of need or the date the last H–2B worker departs for the workplace for the certified job opportunity, whichever is later.

q. *No strike or lockout (§ 655.20(u))*. The Department proposes in § 655.20(u) to modify the “no strike or lockout” language in the current regulations at § 655.22(b) to enhance worker protections. Currently, requests for H–2B workers are not certified if the workers would be filling positions that are open due to a strike, lockout, or work stoppage. Under the proposed paragraph the CO would deny an H–2B certification if there is a strike or lockout at the worksite. Under the current regulation, an unscrupulous employer might be able to transfer U.S. workers to fill positions vacated by striking workers, thus employing H–2B workers in the positions those U.S. workers vacated.

r. *No Recent or Future Layoffs (§ 655.20(v))*. Proposed § 655.20(v) modifies the dates of impermissible layoffs of U.S. workers currently described in § 655.22(i). The period during which an H–2B employer must not lay off any similarly employed U.S. worker continues to begin 120 days before the date of need but would be extended from 120 days after the date of need to the end of the certification period. The Department also proposes adding the requirement that H–2B workers must be laid off before any U.S. worker in corresponding employment. These restrictions are essential in order to further the purpose of protecting U.S. workers.

s. *Contact with Former U.S. Employees (§ 655.20(w))*. Proposed § 655.20(w) requires employers to contact former U.S. employees who worked with them within the last year, including any who were laid off within 120 days before the date of need. This expands the current requirement that employers contact only former employees who were laid off during the 120 days preceding the date of need and for an additional 120 days after date of need.

t. *Area of Intended Employment and Job Opportunity (§ 655.20(x))*. Proposed § 655.20(x) modifies current § 655.22(l) by additionally prohibiting the employer from placing a worker in a job opportunity not specified on the *Application for Temporary Employment Certification*. This clarifies that an H–2B worker is only permitted to work in the job and in the location that OFLC approves unless the employer obtains a new certification.

u. *Abandonment/Termination of Employment (§ 655.20(y))*. In proposed § 655.20(y), the Department addresses a worker’s voluntary abandonment of a job or termination. This NPRM proposes retaining, in slightly amended form, current § 655.22(f) by requiring written notification to the OFLC and to DHS when a worker separates from employment before the certified end date. DHS has published in its own regulations at 8 CFR 214.2(h)(6)(i)(F) and its instructions at 73 FR 77816 (Dec. 19, 2008). Clarifications of how an employer in such circumstances must comply with proposed transportation and subsistence requirements under paragraph (j) and the three-fourths guarantee under paragraph (f) of this section are also added to proposed § 655.20(y). Specifically, the employer would be relieved of providing return transportation expenses if an employee voluntarily abandons employment, and the three-fourths guarantee period would end with the last full 4-week period before the separation if an employee either voluntarily abandons employment or is terminated for cause.

v. *Compliance with Applicable Laws (§ 655.20(z))*. In proposed § 655.20(z), the Department proposes to retain existing provisions in § 655.22(d) with minor revisions and to add a provision prohibiting the employer from holding or confiscating workers’ passports, visas, or other immigration documents in accordance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.

#### *E. Processing of an Application for Temporary Employment Certification*

##### 1. Section 655.30 Processing of an Application and Job Order

Under the proposed rule, upon receipt of an *Application for Temporary Employment Certification* and copy of the job order, the CO at the NPC will promptly conduct a comprehensive review of all documentation submitted by the employer to verify employer compliance with program requirements. This process differs from the application processing model under the 2008 Final

Rule where the CO initially reviews only attestations.

An additional difference between the 2008 Final Rule and the proposed rule in the review of the *Application for Temporary Employment Certification* is that under the proposed rule, the CO’s review of the *Application for Temporary Employment Certification*, in most cases,<sup>10</sup> will no longer entail a determination of temporary need, i.e., whether the employer has established a need for the non-agricultural services or labor to be performed that is temporary in nature. Instead, under the proposed rule, this aspect of the CO’s review will be limited to verifying that the employer previously submitted a request for and was granted *H–2B Registration*, and that the terms of the *Application for Temporary Employment Certification* have not significantly changed from those approved under the *H–2B Registration*.

The proposed rule also requires the use of next day delivery methods, including electronic mail, for any notice or request sent by the CO requiring a response from the employer and the employer’s response to such a notice or request. This proposed section also communicates a long-standing program requirement that the employer’s response to the CO’s notice or request must be sent by the due date or the next business day if the due date falls on a Saturday, Sunday or a Federal holiday.

##### 2. Section 655.31 Notice of Deficiency

Under the proposed rule, the CO will be required to issue a formal Notice of Deficiency where the CO determines that the *Application for Temporary Employment Certification* and/or job order contain errors or inaccuracies, or fails to comply with applicable regulatory and program requirements. The proposed provision requires the CO to issue the Notice within 7 business days from the date on which the NPC receives the employer’s *Application for Temporary Employment Certification* and job order. This timeline is designed to ensure that the SWA has sufficient time to conduct its own review of the job order and notify the CO within 4 business days of any deficiencies as provided in § 655.16, as well as the timely processing of an employer’s

<sup>10</sup> As provided in the discussion of § 655.11, each employer filing an *Application for Temporary Employment Certification* will be required under the proposed rule to establish temporary need through the registration process. However, in limited circumstances where the employer has applied for a temporary labor certification on an emergency basis under emergency procedures in § 655.17 without an approved *H–2B Registration*, the CO may be required to also make a determination regarding temporary need.

### *Application for Temporary Employment Certification.*

Once the CO issues a Notice of Deficiency to the employer, the CO will provide the SWA and the employer's attorney or agent, if applicable, a copy of the notice. The Notice of Deficiency will include the specific reason(s) why the *Application for Temporary Employment Certification* and/or job order is deficient, identify the type of modification necessary in order for the CO to issue a Notice of Acceptance, and provide the employer with an opportunity to submit a modified application and/or job order within 10 business days from the date of the Notice of Deficiency. The Notice will also inform the employer that it may, alternatively, request administrative review before an Administrative Law Judge (ALJ) within 10 business days of the date of the Notice of Deficiency and instruct the employer regarding how to file a request for such review in accordance with the administrative review provision under this subpart. Finally, the Notice of Deficiency will inform the employer that failing to timely submit a modified *Application for Temporary Employment Certification* and/or job order, or request administrative review will cause the CO to deny that employer's *Application for Temporary Employment Certification*.

The Notice of Deficiency is similar to the Request for Information (RFI) process used by the CO under the 2008 Final Rule. The concurrent submission of the job order to the CO and the SWA will ensure the thorough examination of the employer's job requirements and enable employers to timely and effectively comply with all program requirements.

### 3. Section 655.32 Submission of a Modified Application or Job Order

As previously stated, the CO will deny any *Application for Temporary Employment Certification* where the employer neither submits a modification nor requests a timely administrative review. A denial of an *Application for Temporary Employment Certification* for failure to timely submit a sufficiently responsive modification or request for review as prescribed above will be final and cannot be appealed. This proposal differs from the 2008 Final Rule, in which the CO has discretion to deny the employer's application or require supervised recruitment if the employer fails to comply with an RFI.

In addition, the proposed rule requires the CO to deny an *Application for Temporary Employment Certification* and/or job order if the

modification(s) made by the employer do not comply with the requirements for certification under § 655.50. The proposed rule grants the employer the right to appeal the denial of the modified *Application for Temporary Employment Certification* and/or job order via the administrative review procedures set forth in § 655.61 of this proposed rule.

Under the proposed rule, if the CO accepts the modification(s) and issues a Notice of Acceptance, the CO will require the SWA to modify the job order in accordance with the accepted modification(s), as necessary. The Department proposes this explicit requirement to ensure the integrity of the simultaneous submission process and ensure that any material terms and conditions of employment and employer obligations contained in the job order correspond to the terms, conditions and obligations contained in an accepted *Application for Temporary Employment Certification*.

In addition to requiring modification before the acceptance of an *Application for Temporary Employment Certification*, the Department proposes to permit the CO to require the employer to modify a job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the applicable minimum benefits, wages, and working conditions. Where the CO requires a later modification, the CO will update the electronic job registry to reflect the necessary modification(s) and direct the SWA(s) in possession of the job order to replace the job order in their active files with the modified job order. The employer also is required to disclose the modified job order to all workers who were recruited under the original job order or *Application for Temporary Employment Certification*. This requirement is also new in the proposed rule and is intended to ensure that U.S. workers have access to meaningful employment opportunities and that workers remain informed about the benefits, wages and working conditions offered by the employer.

### 4. Section 655.33 Notice of Acceptance

Under the proposed rule, the Department requires the CO to issue a formal notice accepting the employer's application for processing. Upon accepting the *Application for Temporary Employment Certification* and job order, the CO will send a Notice of Acceptance to the employer (and the employer's attorney or agent, if applicable), with a copy to the SWA,

within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification* or modification, provided that the *Application for Temporary Employment Certification* and job order meet all the program and regulatory requirements.

The Notice of Acceptance under the proposed rule will direct the employer to recruit U.S. workers in accordance with employer-conducted recruitment provisions in §§ 655.40–655.47, as well as to conduct any additional recruitment in accordance with the CO's directions, consistent with § 655.46. The Notice of Acceptance will advise the employer that it must conduct such recruitment of U.S. workers within 14 calendar days from the date of the notice and informs the employer that such employer-conducted recruitment is required in addition to SWA circulation of the job order in intrastate and interstate clearance under § 655.16. The Notice of Acceptance also requires the employer to submit a written report of its recruitment efforts as specified in § 655.48.

The Notice of Acceptance directs the SWA: (1) To place the job order in intra- and interstate clearance, including (i) circulating the job order to the SWAs in all other States listed on the employer's *Application for Temporary Employment Certification* and job order, as anticipated worksites and (ii) to any States where the CO directs the SWA to circulate the job order; (2) to keep the job order on its active file and continue to refer U.S. workers to the employer until the end of the recruitment period defined in § 655.40(c); and (3) to transmit the same instructions to all other SWAs to which it transmits the job order. Under the proposed rule, the Notice of Acceptance advises the employer of its obligation to notify all SWAs in possession of its job order if the last H–2B worker has not departed for the place of employment by the third day preceding the employer's date of need. This indicates to the SWA when to stop referring potential U.S. workers to the employer. In order to increase the exposure of U.S. workers to H–2B job opportunities, the Notice of Acceptance also requires the SWA(s) to circulate a copy of the job order to certain labor organizations, where the job classification is traditionally or customarily unionized, as described in greater detail in § 655.44.

The elements of the Notice of Acceptance described in the proposed rule reflect an enhanced process for the recruitment of U.S. workers. The Department expects these additional requirements will provide timely and meaningful notice of job opportunities

and thus increase the likelihood that U.S. workers will learn of and apply for the available job opportunities.

#### 5. Section 655.34 Electronic Job Registry

The Department proposes posting employers' H-2B job orders, including modifications and/or amendments approved by the CO, on an electronic job registry to disseminate the job opportunities to the widest audience possible. The electronic job registry was initially created to accommodate the posting of H-2A job orders, but the Department proposes to expand the registry to include H-2B job orders. The job orders will be posted by the CO on the job registry after acceptance of an *Application for Temporary Employment Certification* for the duration of the recruitment period, as provided in § 655.40(c). Once the recruitment period has concluded, the job order will be maintained on the registry in inactive status so that the information is available for a variety of purposes. It is expected, for example, that the continued accessibility of inactive orders will increase the transparency of the H-2B process and provide information, for example, for those currently seeking such information from the Department through Freedom of Information Act (FOIA) requests.

Posting job orders on the electronic job registry will serve as an effective, useable tool for alerting U.S. workers to jobs for which H-2B workers are being recruited. The electronic job registry will be accessible to the public through the Department's resources, including its One-Stop Career Centers, as well as through a link to the job registry on the OFLC's Web site <http://www.foreignlaborcert.doleta.gov/>.

#### 6. Section 655.35 Amendments to an Application or Job Order

The Department proposes to permit an employer to request to amend its *Application for Temporary Employment Certification* and/or job order to increase the number of workers, to change the period of employment, or to make other changes to the application, before the CO makes a final determination to grant or deny an *Application for Temporary Employment Certification*. The Department's proposed rule would permit an employer to seek amendments to the application and/or job order only before certification, not after certification. These provisions are being proposed to provide clarity to employers and workers alike of the limitations on and processes for amending an application and the need to inform any U.S. workers already

recruited of the changed job opportunity. The Department recognizes that employers can face changed circumstances from varying sources—from climactic conditions to cancelled contracts—and is providing some flexibility to assess and respond to such changes. At the same time, the Department proposes certain limitations to ensure that these job opportunities are not misrepresented as a result of such amendments.

Specifically, under the proposed rule, the employer may request an amendment of the *Application for Temporary Employment Certification* and/or job order to increase the number of workers initially requested. However, the Department is limiting such amendments to increase the number of workers to no more than 20 percent (50 percent for employers requesting fewer than 10 workers), consistent with § 655.11, that does not permit the use of an *H-2B Registration* in connection with the filing of an *Application for Temporary Employment Certification* if the number of workers required by the employer exceeds the number listed on the approved *H-2B Registration* by 20 percent.

In addition, the proposed rule permits minor changes to the period of employment at any time before the CO's final determination. However, the Department advises that such amendments to the period of employment may not exceed 14 days and may not cause the total period to exceed a total of 9 months, except in the event of a demonstrated one-time occurrence. This limitation to 14 days is consistent with the 14-day period in § 655.11 and is designed to ensure that the employer had a legitimate need before commencing the registration process and accurately estimated its date of need.

The regulation proposes that the employer may request an amendment of the *Application for Temporary Employment Certification* or job order at any time before the CO's final determination. The CO will approve these changes if the CO determines the proposed amendment(s) are justified and will not negatively affect the CO's ability to make a timely labor certification determination, as required under § 655.50, including the ability to thoroughly test the labor market. Changes will not be approved which affect the underlying approval for the job registration.

The proposed rule provides that the employer must request any amendment(s) to the *Application for Temporary Employment Certification* and/or job order in writing and that any

such amendment(s) will not be effective until approved by the CO. Once the CO approves an amendment to the *Application for Temporary Employment Certification* or job order, the CO will to submit to the SWA any necessary change to the job order or the amended job order and update the electronic job registry to reflect the approved amendment(s).

The Department's proposed rule allows amendments to the *Application for Temporary Employment Certification* and/or job order only before certification and does not permit the employer to request or the CO to amend a certified *Application for Temporary Employment Certification*. This provision strikes a balance between the employer's need for flexibility in the application process and the Department's intent to make a determination based on the employer's actual need.

#### F. Recruitment Requirements

##### 1. Section 655.40 Employer-Conducted Recruitment

Unlike the 2008 Final Rule, this proposal requires employers to conduct recruitment only after filing an *Application for Temporary Employment Certification* and receiving a Notice of Acceptance from the CO. The Department proposes this approach so that the employer must demonstrate rather than simply attest that there are not sufficient qualified U.S. workers who would be available to fill the job opportunities for which the employer seeks to hire H-2B workers.

The Department proposes that the employer conduct such recruitment of U.S. workers within 14 calendar days from the date of the Notice of Acceptance, unless the CO provides different instructions to the employer in the Notice. This allows the employer time within which to initiate and complete required recruitment as well as ensures that U.S. workers are notified of job opportunities as they become available. The Department further proposes that the employer offer employment to all U.S. applicants who meet the requirements of the job opportunity and will be available to fill the positions.

An employer is obligated to accept all qualified U.S. applicants referred for employment by the SWA until the third day preceding the employer's date of need or the date the last foreign worker departs for the employment, whichever is later. This timeframe increases the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer.

Where applicable, the employer must inform the appropriate SWA(s) in writing of a later date of departure so that the SWA knows when to stop referring potential U.S. workers to the employer. Where the employer neglects to inform the SWA of the date of departure of its H-2B workers as required, the employer may be subject to debarment, and/or other remedies.

The Department is considering whether employers must inform the Department not only of the date of the last departure, but also of the actual number of H-2B workers hired under the approved *Application for Temporary Employment Certification*. In addition, the Department is interested in knowing whether the H-2B workers were hired from a foreign country or were already present in the U.S. This will provide the Department and other Federal agencies with essential information on actual utilization of the program.

Like the 2008 Final Rule, the proposed rule clarifies that employers are not required to conduct employment interviews. However, where the employer wishes to conduct interviews with U.S. workers, it must do so by telephone or at a location where workers can participate at little or no cost to the workers. This ensures that employers do not use the interview process to discourage U.S. workers from applying.

Finally, the Department proposes to require the employer to list in its recruitment report filed in accordance with § 655.48, the names of all U.S. applicants referred for employment, whether the applicant was accepted or rejected, and the reason why the applicant was rejected, if applicable.

## 2. Section 655.41 Advertising Requirements

The employer's advertisements and recruitment activities are essential to providing U.S. workers with sufficient information to make informed employment decisions. In order to ensure a fair test of the labor market, the Department proposes to require that all employer advertisements contain terms and conditions of employment no less favorable than those offered to the H-2B workers and reflect, at a minimum, the terms and conditions in the job order.

The remainder of this proposed section sets out the minimum content requirements for all advertisements. In addition to the requirements outlined in the 2008 Final Rule, the Department proposes to require that the advertisements include the assurances and obligations in the job order. These requirements include, but are not

limited to: a statement referring to the three-fourths guarantee in § 655.20(f); a statement that transportation and subsistence to and from the place from which the employee has come to work for the employer will be provided; a statement that work tools, supplies, and equipment will be provided to the worker without charge; and if applicable, a statement that the employer is providing daily transportation to and from the worksite. In addition, the Department proposes that an employer with multiple wage offers, such as one in an itinerant or other occupation for which special procedures apply, must list the range of applicable wage offers in its advertisements/recruitment. The inclusion of such information will ensure that employers disclose all pertinent wage information and that U.S. workers are adequately informed about the wage rate for each job opportunity.

Sections 655.42 through 655.46 of the proposed rule outline the required recruitment steps. In addition to the involvement of the SWAs and the placement of two newspaper advertisements required under the 2008 Final Rule, the Department proposes to require the employer contact former U.S. employees, contact labor organizations in traditionally unionized occupations and industries, and post the availability of the job opportunity at the place of anticipated employment. These additional requirements will increase the likelihood that U.S. workers will learn of and potentially apply for the available job opportunities.

Additionally, many of these recruitment steps are aimed to increase the exposure of the job to the audience most likely to include, or to be able to locate, qualified workers—those closely associated to the job opportunity, either through direct contact with the employer (*i.e.*, former workers) or through secondary contact (*i.e.*, persons who hear about the job from current employees who see the posting notice at the worksite or from a community-based organization or a labor organization in the particular industry or occupation of the job opportunity). Employers using the H-2B program have consistently noted that U.S. workers do not seek out the jobs for which they must then seek foreign labor. Particularly in an economy in which the national unemployment rate has consistently exceeded 9 percent over the past two years, the Department assumes that some group of these available jobs would be taken by U.S. workers but for adequate notification of their existence. The concomitant downturn in the use of

H-2B visas reflects the accuracy of the Department's assumption; even with recruitment far less than proposed by this NPRM, H-2B visa usage has been significantly decreased, as U.S. workers seek out these jobs.

## 3. Section 655.42 Newspaper Advertisements

Newspapers remain an important means to recruit U.S. workers. The Department is seeking comments on alternative advertising media that will reach the greatest number of U.S. workers.

The Department is continuing to require the employer to advertise in a newspaper of general circulation for the area of intended employment that is appropriate to the occupation and the workers likely to apply for the job opportunity. The employer's advertisements must run on 2 separate days, which may be consecutive, one of which must be a Sunday, unless the job opportunity is located in a rural area in which there is no newspaper with a Sunday edition. In such cases, the CO may permit the employer to substitute the Sunday advertisement with an advertisement in a newspaper with a regularly published daily edition that has the widest circulation in the area of intended employment. The Department further proposes to require that the content of each newspaper advertisement comply with the advertising requirements in § 655.41. The employer will be required to maintain copies of the newspaper pages, tear sheets or other proof of publication for 3 years after final determination to grant or deny the *Application for Temporary Employment Certification*, consistent with document retention requirements under § 655.56.

The Department proposes to no longer allow the employer to replace one of the newspaper advertisements with an advertisement in a professional, trade, or ethnic newspaper. The Department has concluded that newspapers of general circulation are more likely to reach the broader audiences who are more apt to be interested in most H-2B job opportunities and thus would be more appropriate as a recruitment requirement for all employers. However, the Department recognizes that advertisements in professional, trade, or ethnic newspapers may be appropriate for some applications, depending for instance, on the particular occupation and area of employment. Accordingly, the Department is instead proposing to permit the CO to require the employer to advertise in such publication(s) as part of any required additional

employer-conducted recruitment under § 655.46 of this subpart.

#### 4. Section 655.43 Contact With Former U.S. Employees

In this section, the Department proposes to require the employer to contact by mail or other effective means its former U.S. workers who were employed by the employer in the same occupation and the place of employment during the previous year to that listed in the *Application for Temporary Employment Certification*. This expands the 2008 Final Rule requirement beyond former U.S. workers that have been laid off within 120 days of the employer's date of need. Employers will not be required to contact those U.S. workers who were dismissed for cause or who abandoned the worksite prior to the completion of the last employment period. Each employer must provide its former U.S. employees a full disclosure of the terms and conditions of the job order, and solicit their return to the job. Employers will be required to maintain documentation to be submitted in the event of an audit or investigation sufficient to prove contact with its former employees consistent with document retention requirements under § 655.56. This documentation may consist of a copy of a form letter sent to all former employees, along with evidence of its transmission (postage account, address list, etc.)

Since under the current regulations, most employers have a period of need of 10 months, the employer's former U.S. workers would be the same group of workers as those who were laid off at the end of work period. While the proposed requirement focuses on a longer period of time than the current requirement, it is unlikely that it will impose a significantly greater burden on employers. If an employer hires workers throughout the year to work for the period of its temporary need, it is unlikely that it will lay those workers off until the period of temporary need ends. Most, if not all workers who leave during the period of temporary need will have either quit or been terminated for cause, and the employer is not required to contact those workers. If for some reason, the employer did lay off some workers who were hired to work during the employer's period of temporary need, before the end of the period of need—*e.g.*, additional workers who were hired for a period of peakload need within the longer period of temporary need, the Department believes that it would be most appropriate to give those workers the first opportunity to take the jobs.

Generally, however, there will be little practical difference between the operation of the current regulation and the operation of the proposed regulation except perhaps for seasonal jobs. In a seasonal program, reaching back to contact former employees who were employed over a cycle of a full year would be the minimum amount of time necessary to capture all of the seasonal activities for which H-2B workers are sought. For example, an oceanfront resort employer hires workers at the start of its season in May and releases them in September. The employer then seeks H-2B workers the following March, more than 60 days before the usual date of need. Reaching that particular workforce requires the employer to reach back to the time those employees were hired—the previous May—to ensure that the group of employees most likely to return to the employment are given the opportunity to do so.

#### 5. Section 655.44 Contact With Labor Organizations

Where union representation is prevalent in the occupation or industry, the proposed rule would require the employer to formally contact the local union to inquire about the availability of qualified U.S. workers to fill the job opportunities for which the employer seeks to hire H-2B workers. The Department proposes to return to the long-standing practice of the CO directing employers to seek union assistance to fill H-2B jobs, because unions have traditionally been recognized as a reliable source for referrals of U.S. workers. While the Department has significant experience with occupations and industries that are typically unionized, we seek in particular comment on the circumstances or criteria that would trigger an employer's obligation to contact the local union to seek U.S. workers.

The employer must maintain documentation to be submitted in the event of an audit or investigation, consistent with document retention requirements under § 655.56, demonstrating that it contacted the applicable organization and that the union either did or did not respond to the employer's request for referrals. Such documentation may consist of a copy of the letter sent to the organization and an attestation from the contacting employee of the employer documenting the lack of a response, or the contents of any response received. If the union did respond to the employer's request, the employer's recruitment report must also include the number

and disposition of U.S. workers who were referred.

#### 6. Section 655.45 Contact With Bargaining Representative and Posting Requirements and Other Contact Requirements

The proposed rule requires all employers that are party to a CBA to provide written notice to the bargaining representative(s) of the employer's employees in the job classification in the area of intended employment. Where the employees in an occupation have a bargaining representative, the representative should be made aware of any job opportunities in that occupation. Seeking union assistance will help the employer in finding qualified U.S. workers who are available for the job opportunity for which the employer seeks to employ H-2B workers.

The Department proposes requiring the employer to maintain documentation demonstrating compliance with this requirement, consistent with document retention requirements under § 655.56. Additionally, the employer's recruitment report must confirm that the employer contacted the bargaining representative(s), including whether the organization referred qualified U.S. worker(s) and if so, how many workers were referred and their disposition.

Where there is no bargaining representative(s) of the employer's employees, the proposed rule requires the employer to provide notice to the employer's employees of the job opportunities by posting their availability for at least 10 consecutive business days in at least 2 conspicuous locations at the place(s) of anticipated employment, or in some other manner that provides reasonable notice. This requirement is new under the proposed rule, and is intended to ensure that each employer's existing U.S. workers receive timely notice of the job opportunities, therefore increasing the likelihood that those workers will apply for the available positions for the subsequent temporary period of need and that other U.S. workers, including former workers, will be more likely to learn of the job opportunities through word of mouth. The Department seeks comment on whether this requirement will maximize the number of U.S. workers who will be recruited to fill the vacancies for which H-2B workers are sought and other ways such notification may be effective.

The Department is also proposing to have employers contact community-based organizations to be designated by the CO in the Notice of Acceptance, to disseminate the notice of the job

opportunity. Community-based organizations are an effective means of reaching out to domestic workers interested in specific occupations. The contact is to be performed when designated specifically by the CO, as appropriate to the job opportunity and the area of intended employment.

The Department proposes to require that the employer to maintain documentation consistent with document retention requirements under § 655.56, sufficient to prove compliance with this requirement. The documentation may consist of a copy of the posted notice and a statement identifying where and when the notice was posted.

#### 7. Section 655.46 Additional Employer-Conducted Recruitment

Where the CO determines that the employer-conducted recruitment, described in §§ 655.42 through 655.45, is not sufficient to attract qualified U.S. workers who would be available to accept employment, the proposed rule authorizes the CO to require the employer to engage in additional recruitment activities. The Department believes that such additional recruitment may be necessary in such areas to ensure that unemployed U.S. workers, who may be capable of (and desirous of) performing the job duties, are afforded maximum access to those opportunities. The Department's intention in requiring additional recruitment including, where appropriate, in areas of substantial unemployment (ASU), is predicated on the belief that more recruitment will result in more opportunities for U.S. workers. Areas of substantial unemployment by their nature have a higher likelihood of worker availability; the Department's recognition of worker availability in these areas is a strong indicator that these open job opportunities may have a more receptive potential populations. This recruitment will be conducted in addition to and occur within the same time period as the circulation of the job order and other mandatory employer-conducted recruitment described above and would not by itself result in any delay in certification.

The Department is not limiting additional recruitment only to job opportunities located in ASUs because additional recruitment might also be necessary where local employment patterns indicate a sudden increase in worker availability—e.g., a plant closure. The Department also is not making additional recruitment an absolute requirement, even in situations where the job opportunity is located in

an ASU. This is essential to permit the Department to be able to determine the appropriate level of recruitment based on the specific situation. The Certifying Officers, with advice from the SWAs who are familiar with local employment patterns and real-time market conditions, are well-positioned to judge where additional recruitment may or may not be required.

For example, it may be reasonable to require additional recruitment for a job that requires little training or experience in an ASU, since a larger group of available workers would be qualified for the job. However, it may not be reasonable to require additional recruitment where the employer is unlikely to find qualified workers among the unemployed U.S. worker population, for example where the job is specialized and the local population is not known to have that expertise. The CO may have cause to require additional recruitment in other situations as well. This may depend upon area-specific conditions, natural disasters, or similar events that give rise to additional workers being available. For example, workers may be available as the result of a plant closure or change in a seasonal event. While the CO will not have time to review and determine a course of action in every single application, it is expected that the existence of such situations, known to the SWA and made known to the CO, would be used as factors in determining whether to impose such additional recruitment and what type of recruitment would best reach the population known to be available for H-2B job opportunities.

The CO will describe in the Notice of Acceptance the types of additional recruitment efforts the employer will be required to undertake. Additional recruitment methods may include, but will not be limited to: additional print advertising; advertising on the employer's Web site or another Web site; contact with community-based organizations that have contact with potential worker populations; additional contact with labor unions; contact with faith-based organizations; and radio advertisements. In recognition of the invaluable SWA experience and expertise with local labor markets, the CO will consult with the SWA to determine the types of additional recruitment that may be appropriate for a particular job opportunity in the area of employment.

The Department invites stakeholders and other interested members of the public to provide comments on these proposed additional recruitment methods, and provide the Department

with examples of the types of recruitment typically conducted in specific industries, occupations, or job classifications. This information will assist the Department in developing appropriate additional recruitment sources and criteria.

The Department is also proposing that the CO specify in the Notice of Acceptance the documentation or other supporting evidence the employer will be required to maintain as proof that the employer satisfied any additional recruitment requirements, consistent with document retention requirements under § 655.56.

#### 8. Section 655.47 Referrals of U.S. Workers

The Department proposes to require SWAs to refer for employment individuals who have been informed of the details of the job opportunity and indicate that they are qualified and will be available for employment. Unlike under the 2008 Final Rule, which permitted potential applicants access to job order entries in each SWA's electronic system and self-referral to a specific job opportunity, SWA staff will provide all material terms and conditions contained in the job order to each applicant in order to ensure that the U.S. worker understands the job requirements and duties as well as the employer's obligations, including the additional worker protections proposed by this NPRM.

#### 9. Section 655.48 Recruitment Report

Consistent with the requirements of the 2008 Final Rule, the Department proposes to continue to require the employer to submit to the NPC a written, signed recruitment report. However, the Department proposes requiring the employer to send the recruitment report on a date specified by the CO in the Notice of Acceptance instead of at the time of filing the *Application for Temporary Employment Certification*. This change is in line with the proposed recruitment model under which the employer does not begin its recruitment until directed by the CO in the Notice of Acceptance.

The remainder of this section sets out the information that the employer must include in the recruitment report. The Department proposes to require the employer to report on recruitment steps undertaken and their results. The proposed rule provides a detailed list of the specific information that must be included in the employer's recruitment report.

The Department proposes to require the employer to update the recruitment report throughout the recruitment



period to ensure that the employer accounts for contact with each prospective U.S. worker. The employer does not need to submit the updated recruitment report but is required to retain it and make it available in the event of a post-certification audit, another Federal agency investigation, or upon request by DOL.

#### G. Labor Certification Determinations

##### 1. Section 655.50 Determinations

The Department proposes to retain the same requirements under this provision as provided in the 2008 Final Rule.

##### 2. Section 655.51 Criteria for Certification

The Department anticipates that the determination process for approving or denying each *Application for Temporary Employment Certification* will be simplified under the proposed rule through the pre-filing determination of temporary need. In the majority of cases, the Department's determination should rest on a finding that the employer has a valid *H-2B Registration* and has demonstrated full compliance with the requirements of this subpart. As under the 2008 Final Rule, in ensuring that the employer met its recruitment obligations with respect to U.S. workers, the CO will treat as available all those individuals who were rejected by the employer for any reason other than a lawful, job-related reason. Additionally, the Department proposes to clarify that it will not grant certifications to employers that have failed to comply with final agency orders under the program.

##### 3. Section 655.52 Approved Certification

The Department proposes that the CO use next day delivery methods, and preferably, electronic mail, to send the Final Determination letter to the employer. The Department is doing so in an effort to expedite the transmittal of information and introduce efficiency and cost savings into the application determination process. The proposed rule provides that the CO will send the approved certification to the employer, with a copy to the employer's attorney or agent, if applicable. This is a departure from the 2008 Final Rule, which calls for the delivery of the original certification to the employer's attorney. The Department's proposed change in procedure is the result of years of OFLC program experience evidencing complications in the relationship between employers and their agents or attorneys. The Department does not intend to be

involved in, or interfere with, the employer's relationship with its attorney or agent. However, the Department believes that because it is the employer that must attest to the assurances and obligations contained in the *Application for Temporary Employment Certification* and be ultimately responsible for upholding those assurances and obligations, the employer should receive and maintain the original approved certification.

##### 4. Section 655.53 Denied Certification

The proposed rule retains the general provisions for denying certifications from the 2008 Final Rule, except that the Department proposes that the CO will send the Final Determination letter by means guaranteeing next day delivery to the employer, with a copy to the employer's attorney or agent. Otherwise, the proposed rule continues to require the Final Determination letter to state the reason(s) that the certification was denied, cite the relevant regulatory provisions and/or special procedures that govern, and provide the applicant with information sufficient to appeal the determination.

##### 5. Section 655.54 Partial Certification

The proposed rule retains the 2008 Final Rule provision explicitly providing that the CO may issue a partial certification, reducing either the period of need or the number of H-2B workers requested, or both. The proposed rule clarifies that the CO may reduce the number of workers certified by subtracting the number of qualified and available U.S. workers who have not been rejected for lawful job-related reasons from the total number of workers requested.

The proposed rule also continues to permit the employer to request administrative review.

##### 6. Section 655.55 Validity of Temporary Employment Certification

The Department proposes to retain the provision that a temporary employment certification is only valid for the period specified. While the proposed rule continues to prohibit the employer from transferring the labor certification to another employer, the Department proposes to allow the employer to transfer the approved labor certification to a successor in interest in case of a merger or acquisition where the new employer is willing to continue to employ the workers certified and take on all of the legal obligations associated with the labor certification.

##### 7. Section 655.56 Document Retention Requirements of H-2B Employers

The Department proposes to add a section that delineates document retention requirements, including the period of time during which documents must be retained. Adding this section provides a single place in which to find all document retention requirements, thus eliminating the need to search for them in various sections of the regulatory text as currently necessary under the 2008 Final Rule.

These document retention requirements apply to all employers filing an *Application for Temporary Employment Certification*, regardless of whether such applications have been certified, denied, or withdrawn. These records are invaluable to the Department in evaluating future applications filed by the employer as to whether it has demonstrated that no U.S. workers are available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers. In many such instances, the documents would allow the employer to demonstrate that it has met its obligations with respect to US workers that may have been recruited as well as other program requirements.

#### H. Post Certification Activities

Proposed §§ 655.60 through 655.63 concern actions an employer may take after an *Application for Temporary Employment Certification* has been adjudicated, including making a request for extension of certification, appealing a decision of the CO, and withdrawing an *Application for Temporary Employment Certification*. The Department also proposes to institute a new publicly-accessible electronic database of employers that have applied for H-2B certification that the Department will maintain.

##### 1. Section 655.60 Extensions

In this proposed section, the Department proposes to allow an employer to request an extension of the period of employment under limited circumstances involving weather conditions or other factors beyond the control of the employer. Under the proposed rule, there will be instances when an employer will have a reasonable need for an extension of the time period that was not foreseen at the time the employer originally filed the *Application for Temporary Employment Certification*. This provision will provide flexibility to the employer in the event of unforeseen circumstances while maintaining the integrity of the

certification and the preliminary determination of temporary need.

The Department proposes that the employer would make its request to the CO in writing and would submit documentation showing that the extension is needed and that the employer could not have reasonably foreseen the need. Extensions would be available only to employers whose original certified period of employment is less than the maximum period allowable in this subpart and under DHS H-2B regulations. The extension may not result in a total work period exceeding 9 months under the proposed definition of temporary need for employers whose recurring need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need, except in extraordinary circumstances. Extensions will only be granted if the employer demonstrates that the need for the extension arose from unforeseeable circumstances, such as weather conditions or other factors beyond the control of the employer (including unforeseen changes in market conditions).

Upon receipt of the employer's request, the CO will inform the employer of its decision to grant or deny the request in writing. The employer may appeal the CO's denial of an extension under the administrative review provision of the proposed rule.

The employer's assurances and obligations under the original approved temporary employment certification will continue to apply to workers recruited in connection with the *Application for Temporary Employment Certification* during the extended period of employment. The employer must meet its obligations which are based on the workers' partial or full completion of the extended work period.

The Department proposes to require that the employer provide all its H-2B and corresponding U.S. workers a copy of the extension immediately upon approval. This requirement is intended to ensure that workers remain informed of all aspects of the job opportunity with the employer. Obtaining such an extension may require the employer to file an amended petition with USCIS to cover any additional periods of time granted.

## 2. Section 655.61 Administrative Review

This proposed section sets forth the procedures for BALCA review of a decision of a CO. The substance of this section is the same as that in the 2008 Final Rule. However, the proposed section does not refer to the particular

decision of the CO that may be appealed, such as the denial of the temporary labor certification. Rather, the proposed rule refers generally to the decisions of the CO that may be appealed, where authorized in this subpart. These decisions are identified in the sections of the rule that discuss the CO's authority and procedure for making that particular decision. Additionally, the proposed rule increases from 5 business days to 7 business days: The time in which the CO will assemble and submit the appeal file in § 655.61(b); the time in which the CO may file in § 655.61(c); and the time BALCA should provide a decision upon the submission of the CO's brief in § 655.61(f).

## 3. Section 655.62 Withdrawal of an Application for Temporary Employment Certification

Under the proposed rule, an employer may withdraw an *Application for Temporary Employment Certification* before it is adjudicated.

## 4. Section 655.63 Public Disclosure

This proposed section would codify the Department's practice of maintaining, apart from the electronic job registry, an electronic database accessible to the public containing information on all employers that apply for H-2B labor certifications. The database will continue to include information such as the number of workers the employer requests on an application, the date an application is filed, and the final disposition of an application. The continued accessibility of such information will increase the transparency of the H-2B program and process and provide information for those currently seeking such information from the Department through Freedom of Information Act (FOIA) requests.

### I. Integrity Measures

Proposed §§ 655.70 through 655.73 have been grouped together under the heading Integrity Measures, describing those actions the Department proposes to take to ensure that an *Application for Temporary Employment Certification* filed with the Department in fact complies with the requirements of this subpart.

## 1. Section 655.70 Audits

This section outlines the proposed process under which the Department will conduct audits of adjudicated applications. These provisions are similar to the 2008 Final Rule. The Department's regulatory mandate to ensure that qualified workers in the

United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed U.S. workers serves as the basis for the Department's authority to audit adjudicated applications, even if the employer's application was ultimately withdrawn or denied. Adjudicated applications include those that have been certified, denied, or withdrawn after certification. There is real value in the Department's ability to audit those applications because they could be used to establish a record of employer compliance or non-compliance with program requirements and to better inform the Department in its determinations to investigate or debar an employer or its agent or attorney.

Under the proposed rule, the OFLC has the discretion to choose which *Application for Temporary Employment Certification* will be audited. When an *Application for Temporary Employment Certification* is selected for audit, the proposed rule calls for the CO to send a letter to the employer and if appropriate, its attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO.

An employer's failure to comply with the audit process may result in the revocation of its certification or in debarment, under proposed §§ 655.72 and 655.73, or require assisted recruitment in future filings of an *Application for Temporary Employment Certification*, as set forth in § 655.71. The CO may provide any findings made or documents received in the course of the audit to DHS or other enforcement agencies, as well as WHD. The CO may also refer any findings that an employer 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.

## 2. Section 655.71 CO-Ordered Assisted Recruitment

The proposed rule permits the OFLC to determine that a violation that does not warrant debarment has occurred and, as a result, require the employer to participate in assisted recruitment. This provision will also assist those employers that due to either program inexperience or confusion, have made mistakes in their *Application for Temporary Employment Certification* that indicate a need for further assistance from the Department.

Under this provision the CO will notify the employer (and its attorney or agent, if applicable) in writing of the requirement to participate in assisted

recruitment for any future filed *Application for Temporary Employment Certification* for a period of up to 2 years. The assisted recruitment will be at the discretion of the CO, determined upon the unique circumstances of the employer.

The assisted recruitment may consist of, but is not limited to, requiring the employer to conduct additional recruitment, reviewing the employer's advertisements before posting and directing the employer where such advertisements are to be placed and for how long, requesting and reviewing copies of all advertisements after they have been posted, proof of contact with past U.S. workers, and proof of SWA referrals of U.S. workers. If an employer fails to comply with the requirements of this section, the employer's application will be denied and the employer may be debarred from future program participation.

The Department invites stakeholders and other interested members of the public to provide comments and suggestions of industry specific recruitment and advertising sources to be used by the CO in administering assisted recruitment in the H-2B program under this section.

### 3. Section 655.72 Revocation

The Department proposes to include a provision which would allow the Administrator, OFLC to revoke an approved H-2B temporary labor certification. Under the proposed section, the Administrator, OFLC may revoke certification if he/she finds that the issuance of the temporary employment certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in proposed § 655.73(d). The Administrator, OFLC may also revoke certification if he/she finds that the employer substantially failed to comply with any term or condition of the approved temporary employment certification, as further defined in proposed § 655.73(d) and (e). Last, the Administrator, OFLC may also revoke certification if he/she finds that the employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit, or law enforcement function, or that the employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary, with respect to the H-2B program.

The proposed procedures for revocation begin with the Administrator, OFLC sending the employer a Notice of Revocation. Upon

receiving the Notice of Revocation, the employer has two options: it may submit rebuttal evidence to the CO or appeal the revocation under the procedures in proposed § 655.61. If the employer does not file rebuttal evidence or an appeal within 10 business days of the date of the Notice of Revocation, the Notice will be deemed final agency action and will take effect immediately at the end of the 10-day period.

If the employer chooses to file rebuttal evidence, and the employer timely files that evidence, the Administrator, OFLC will review it and inform the employer of his final determination on revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal under proposed § 655.61. The employer must file the appeal of the Administrator, OFLC's determination within 10 business days, or the Administrator, OFLC's decision becomes the final decision of the Secretary and will take effect immediately after the 10-day period.

If the employer chooses to appeal either in lieu of submitting rebuttal evidence, or after the Administrator, OFLC makes a determination on the rebuttal evidence, the appeal will be conducted under the procedures contained in proposed § 655.61. The timely filing of either the rebuttal evidence or an administrative appeal stays the revocation pending the outcome of those proceedings. If the labor certification is ultimately revoked, the Administrator, OFLC will notify DHS and the Department of State.

Proposed § 655.72(c) lists an employer's continuing obligations if the employer's H-2B certification is revoked. The obligations include reimbursement of actual inbound transportation, visa, and other expenses (if they have not been paid), the worker's outbound transportation expenses, payment to the worker of the amount due under the three-fourths guarantee as required by proposed § 655.20(f), and any other wages, benefits, and working conditions due or owing to the worker under this subpart.

### 4. Section 655.73 Debarment

The Department proposes to revise the existing debarment provision to strengthen the enforcement of H-2B labor certification requirements and to clarify the basis under which debarment may be applied. Proposed § 655.73(a) states that the Administrator, OFLC may debar an employer if s/he finds that the employer: willfully misrepresented a material fact in its *H-2B Registration*,

approved *Application for Temporary Employment Certification*, or *H-2B Petition*; substantially failed to meet any of the terms and conditions of *H-2B Registration*, approved *Application for Temporary Employment Certification*, or *H-2B Petition*; or willfully misrepresented a material fact to the Department of State during the visa application process. Proposed § 655.73(a) defines a "substantial failure" to mean a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents. The Administrator, OFLC may not issue future labor certifications to an employer represented by an agent or attorney who the Administrator, OFLC finds has participated in an employer's substantial violation. The Department is proposing that the Administrator, OFLC may not debar an employer, attorney, or agent for less than 1 year or more than 5 years from the date of the Department's final debarment decision.

Proposed § 655.73(d) provides the standard for determining whether a violation was willful. Proposed § 655.73(e) describes the factors that the Administrator, OFLC may consider in determining whether a violation constitutes a significant deviation from the terms and conditions of the *H-2B Registration*, approved *Application for Temporary Employment Certification*, or *H-2B Petition*.

This list of factors is not exclusive, but it offers some guidance as to what the Administrator, OFLC generally considers when determining whether a violation would warrant debarment. The factors are the same factors used by WHD to determine whether a violation is significant under 29 CFR 503.19(c).

Proposed § 655.73(f) provides a comprehensive but not exhaustive list of violations that would meet the standards in §§ 655.73(d)-(e) and therefore warrant debarment. The text of proposed § 655.73(f) is a modified list of debarable violations from the 2008 Final Rule. The most significant differences are that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment and that the following violations would be considered debarable:

- Improper layoff or displacement of U.S. workers or workers in corresponding employment at § 655.73(f)(4);
- A violation of the requirements of § 655.20(o) or (p) concerning fee shifting and related matters at § 655.73(f)(10);
- A violation of any of the anti-discrimination provisions listed in 29 CFR 503.16 and § 655.73(f)(11);

- Failure to comply with the assisted recruitment period; and
- A material misrepresentation of fact during the registration or application process.

Although many of the debarable violations in the 2008 Final Rule are described as “significant failures,” while many of the violations listed under proposed § 655.73(f) are simply described as “failures,” the Administrator, OFLC will consider whether all violations are sufficiently significant to warrant debarment based on the criteria in proposed § 655.73(e) or meet the definition of willful at § 655.73(d).

The independent debarment authority of the WHD is a new feature of the proposed rule. See proposed 29 CFR 503.24 and the corresponding preamble. Because OFLC and WHD have concurrent debarment authority, some changes have been proposed to the OFLC debarment procedures to ensure that the procedures are consistent with the WHD debarment procedures. However, an important distinction between the OFLC and WHD debarment procedures is that the WHD debarment procedures do not provide for a 30-day rebuttal period because WHD debarments arise from investigations during which the employer has ample opportunity to submit any evidence and arguments in its favor.

Proposed § 655.73(g) describes the procedures that will be followed in the event of an OFLC debarment. These procedures are substantively the same as the debarment procedures contained in the 2008 Final Rule, with the following exceptions:

In § 655.73(g)(2), the Department proposes that an employer be provided 30 calendar days from the date the Notice is issued to submit rebuttal evidence and that the Administrator, OFLC be provided 30 calendar days from the date of receiving the rebuttal evidence to issue a final determination.

In § 655.73(g)(4), the Department proposes that the ALJ will prepare his or her decision following a debarment hearing within 60 days after completion of the hearing and closing of the record. This time constraint is consistent with the proposed debarment hearing procedures of WHD.

In § 655.73(g)(6), the Department proposes to remove the language that provides that “[i]f the [Administrative Review Board (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.” Given the serious consequences of debarment, the Department did not want to eliminate a

party’s appeal rights simply because the ARB failed to act in the time frame provided.

Proposed § 655.73(h) clarifies that while WHD and OFLC will have concurrent debarment jurisdiction, the two agencies will coordinate their activities so that a specific violation for which debarment is imposed will be cited in a single debarment proceeding.

Last, proposed § 655.73(i) provides that an employer, agent, or attorney who is debarred by OFLC or WHD from the H–2B program will also be debarred from all other foreign labor certification programs administered by the Department for the time period in the final debarment decision. Many employers, agents and attorneys participate in more than one foreign labor certification program administered by the Department. However, under the current regulation, a party that is debarred under the H–2B program may continue to file applications under the Department’s other foreign labor programs. This proposal will allow the Department to refuse to accept applications filed by or on behalf of a debarred party under the H–2B program in any of the Department’s foreign labor certification programs.

#### **Addition of 29 CFR Part 503**

Effective January 18, 2009, pursuant to INA section 214(c)(14)(B), DHS transferred to the Secretary enforcement authority for the provisions in section 214(c)(14)(A)(i) of the INA which govern petitions to admit H–2B workers. The 2008 Final Rule contains the regulatory provisions governing ETA’s processing of the employer’s *Application for Temporary Employment Certification* and the WHD’s enforcement responsibilities in ensuring that the employer has not willfully misrepresented a material fact or substantially failed to meet a condition of such application.

The Department has carefully reviewed the 2008 Final Rule and proposes substantive changes to both the certification and enforcement processes to enhance protection of U.S. and H–2B workers.

This proposed rule would add a new part, 29 CFR part 503, to further define and clarify the protections for workers. This proposal and the proposed changes in 20 CFR part 655, subpart A add workers in corresponding employment to the protected worker group, impose additional recruitment obligations and employer obligations for laid off U.S. workers, and increase wage protections for H–2B workers and workers in corresponding employment. Additionally, the Department proposes

to enhance the WHD’s enforcement role in administrative proceedings following a WHD investigation.

To ensure consistency and clear delineation of responsibilities between Department agencies implementing and enforcing H–2B provisions, this new part 503 has been written in close collaboration with ETA and is being published concurrently with ETA’s proposals in 20 CFR part 655, subpart A to amend the employer certification process.

#### *A. General Provisions and Definitions*

Proposed §§ 503.0 through 503.8 provide general background information about the H–2B program and its operation. Proposed §§ 503.1 and 503.2 are similar to the current regulations at 20 CFR 655.1 and 655.2. Proposed § 503.3 describes how the Department will coordinate both internally and with other agencies.

##### 1. Section 503.4 Definition of Terms

Under this proposed section, definitions are identical to those contained in proposed 20 CFR part 655, Subpart A, except that this proposed section contains only those definitions that are applicable to this part. The preamble to 20 CFR part 655, subpart A contains the relevant discussion of those definitions.

##### 2. Section 503.5 Temporary Need

Under this proposed section, the provision of temporary need is identical to the requirements set forth in proposed 20 CFR 655.6.

##### 3. Section 503.6 Waiver of Rights Prohibited

The Department proposes to add new language that would prohibit any employer from seeking to have workers waive or modify any rights granted them under these regulations. This proposed paragraph would, with limited exceptions, void any agreement purporting to waive or modify such rights. This proposed language is consistent with similar prohibitions against waiver of rights under other laws, such as the Family and Medical Leave Act, see 29 CFR 825.220(d), and the H–2A program, see 29 CFR 501.5.

##### 4. Section 503.7 Investigation Authority of Secretary

The Department proposes to retain the current authority established under 20 CFR 655.50, affirming WHD’s authority to investigate employer compliance with these regulations and WHD’s obligation to protect the confidentiality of complainants. This proposed section

also discusses the reporting of violations.

#### 5. Section 503.8 Accuracy of Information, Statements, Data

Under this proposed section, making false representations to the government would make an entity subject to penalties, including a fine of up to \$250,000 and/or up to 5 years in prison.

#### B. Enforcement Provisions

##### 1. Section 503.15 Enforcement

Under this proposed section, the type of workers entitled to protection by WHD enforcement is expanded to include workers in corresponding employment, including those hired outside the 10-day recruitment period as covered in the current rule. This is necessary to ensure that U.S. workers are not adversely affected by the employment of H-2B workers.

##### 2. Section 503.16 Assurances and Obligations of H-2B Employers

Under this section, the Department proposes requirements for employers seeking to participate in the H-2B program. These provisions are identical to those discussed in proposed 20 CFR 655.22, with the exception of an additional paragraph (aa), *Cooperation with Investigators*. In this proposed paragraph, the Department adds to the employer obligations the existing requirement in 20 CFR 655.50(c) that the employer cooperate in any administrative or enforcement proceedings. The provision states that the employer will cooperate with any employee of the Secretary exercising or attempting to exercise the authority delegated to the Department. Adding this provision to the list of employer obligations will facilitate enforcement if an employer fails to cooperate and this failure is determined to be a violation, consistent with the standards in § 503.19. The requirements for employer cooperation are set forth more fully in § 503.25.

The preamble to 20 CFR part 655, subpart A contains the relevant discussion of the other assurances and obligations for employers participating in the H-2B program.

##### 3. Section 503.17 Documentation Retention Requirements of H-2B Employers

The NPRM proposes to consolidate in § 503.17 the documentation retention requirements previously found throughout 20 CFR part 655, subpart A. This proposal requires the retention and availability of certain documentation demonstrating compliance with the program's requirements. Documents

must be retained in hard copy for a period of 3 years from the certification date if the *Application for Temporary Employment Certification* was approved, 3 years from the determination date if it was denied, or 3 years from the day the Department received the letter of withdrawal if it was withdrawn. The proposed rule contains several new document retention requirements.

Under paragraph (c)(2)(iii) of this section, employers are required to retain evidence of contact with former U.S. workers as specified under proposed 20 CFR 655.43. Under paragraph (c)(2)(v) of this section, employers are required to retain a copy of the posting of the job opportunity in circumstances where there is no bargaining representative, as specified in proposed 20 CFR 655.45(b).

Under paragraph (c)(2)(vi) of this section, employers are required to retain evidence of additional employer-conducted positive recruitment activities as specified in proposed 20 CFR 655.46.

Paragraph (c)(11) of this section requires employers to retain the approved *H-2B Petition*, as defined under proposed § 503.4, including all accompanying documents. Under paragraph (c)(5) of this section, employers are required to retain records of each worker's earnings, hours worked, and other information as specified under proposed § 503.16(i).

Paragraph (c)(7) of this section concerns proposed § 503.16(w), which requires that employers contact and offer the H-2B job opportunity to former U.S. workers employed during the previous year in the occupation and at the place of employment, including those laid off within 120 days of the date of need. The employer must retain evidence of contact with each U.S. worker, documentation that each U.S. worker had been offered the job, and documentation that each U.S. worker who was not hired either turned down the offer or was rejected for legal reasons.

Under paragraph (c)(8) of this section, employers are required to retain the written contract prohibiting a foreign labor contractor from receiving prohibited payments as specified in proposed § 503.16(p). Under paragraph (c)(9) of this section, employers are required to retain the written notice informing OFLC that an H-2B worker or worker in corresponding employment has separated from employment before the end date specified in the approved *Application for Temporary Employment Certification* (see proposed § 503.16(y)).

Proposed paragraph (c)(10) of this section keeps the requirement currently

found under 20 CFR 655.15(e) related to retaining a copy of the job order. The Department would also require employers to retain a copy of the *H-2B Registration and Application for Temporary Employment Certification*. The proposed rule retains the requirement currently in 20 CFR 655.50(c) that employers make all records available within 72 hours following notice from the Administrator, WHD.

The Department believes it is important to require that such records be maintained and made available, as in other enforcement programs, so that in the event of an investigation the Department is able to determine compliance or, in the event of violations, the nature and extent of the violations. The Department believes that this proposed rule would not be burdensome to employers as this section does not require employers to create any new documents but simply to preserve those documents that are already required for applying for participation in the H-2B program.

##### 4. Section 503.18 Validity of Temporary Employment Certification

The Department proposes to include clarifying edits to the current 20 CFR 655.34 (a) and (b), providing the time frame and scope for which an *Application for Temporary Employment Certification* is valid.

##### 5. Section 503.19 Violations

Under this proposed section, the Department specifies the violations it may cite as a result of an investigation. These violations are similar to those in 20 CFR 655.60, as they conform to the statutory provisions in 8 U.S.C. 1184(c)(14)(A). Specifically, proposed paragraph (a)(1) of this section retains the provision that the Department must determine whether a willful misrepresentation of a material fact occurred and specifies that such misrepresentation must have occurred on the *H-2B Registration*, the *Application for Temporary Employment Certification*, or the *H-2B Petition*. Similar to the current provisions at 20 CFR 655.60(b) and 655.65(d), proposed paragraph (a)(2) of this section specifies that the Department must determine whether the employer substantially failed to meet any of the conditions of the *H-2B Registration*, *Application for Temporary Employment Certification*, or *H-2B Petition*, and defines a "substantial failure" to mean a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents.

Under proposed paragraph (a)(3) of this section, the Department clarifies that a willful misrepresentation of a material fact to Department of State during the visa application process is also considered to be a violation, similar to 20 CFR 655.60(c). This corrects an inadvertent drafting error in the 2008 Final Rule.

Proposed paragraph (b) of this section sets out when a violation qualifies as willful. Proposed paragraph (c) of this section provides guidance on determining whether a failure to comply constitutes a significant deviation from the terms and conditions of the *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*, and provides a non-exhaustive list of factors that the Administrator, WHD may consider. The factors are the same factors used by OFLC to determine whether to initiate debarment under proposed 20 CFR 655.73 and are similar to the factors used by WHD to determine the amount of CMPs to be assessed under proposed § 503.23.

#### 6. Section 503.20 Sanctions and Remedies—General

The proposed rule addresses the Department's authority to pursue sanctions and remedies in response to an employer violation that meets the standards set forth in proposed § 503.19, and identifies actions the Department can take if the Administrator, WHD determines that a violation has occurred. Most remedies available to WHD have not changed. They include, but are not limited to, payment of back wages, including recovery of prohibited fees paid or impermissible deductions; enforcement of the provisions of the job order; assessment of CMPs; make-whole relief for any person who has been discriminated against; and reinstatement and make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced. In addition, this NPRM would give WHD concurrent debarment authority with ETA to prohibit employers, attorneys and agents from participating in the H-2B program for certain substantial and willful violations. This new authority is addressed in detail in proposed § 503.24 below. The minimum debarment period would be 1 year and the maximum would be 5 years. Finally, the proposed rule specifies that the employer or, if applicable, the successor in interest, is liable for all the remedies as a result of a violation.

#### 7. Section 503.21 Concurrent Actions

Under this proposed section, the Department clarifies the different roles

and responsibilities of OFLC and WHD, and notes that both agencies have concurrent jurisdiction to impose debarment. Section 503.3(c) is intended to protect the employer from being debarred by both entities for a single violation.

#### 8. Section 503.22 Representation of the Secretary

The proposed rule identifies the Solicitor of Labor and authorized representatives as the parties who would represent WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and these proposed regulations.

#### 9. Section 503.23 Civil Money Penalty Assessment

The Department proposes to retain most of the language currently in 20 CFR 655.65(b), (d) and (g) on CMP assessments and the maximum amount of penalties that may be assessed per violation, which remains unchanged at \$10,000, the statutory limit under 8 U.S.C. 1184(c)(14)(A). The assessment of the maximum penalties available would not be mandatory, but rather based on regulatory guidelines in proposed § 503.23(e) and the facts of each individual case. Higher penalty amounts would be reserved for willful failures resulting in harm to U.S. workers. The Department believes that its authority to assess CMPs will help ensure that employers meet their obligations under the H-2B program.

The NPRM also contains additional and clarifying language specifying the violations that are subject to CMP assessment if they meet the standards described in § 503.19. The Department proposes to include the following provisions:

Paragraph (a) of this section clarifies that WHD may find a separate violation for each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment;

Paragraph (b) of this section proposes that employers that violate wage requirements are subject to CMPs and defines the amount of wage-related penalties;

Paragraph (c) of this section proposes that WHD may assess CMPs for employers that improperly terminate or fail to hire qualified U.S. workers and defines the amount of these penalties;

Paragraph (d) of this section proposes that WHD may assess CMPs for any other violation that meets the standards described in § 503.19; and

Paragraph (e) of this section retains the language from 20 CFR 655.65(g) regarding the factors that would influence the amount of CMPs the

Department assesses. These factors continue to include, among others, the harm to U.S. workers; the number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants affected; the employer's commitment to future compliance; and whether the violation brought the employer financial gain.

#### 10. Section 503.24 Debarment

The NPRM proposes strengthening and streamlining the enforcement of the H-2B program's requirements by extending to WHD the authority already held by OFLC to debar H-2B employers. The independent debarment authority of WHD is a new feature of the proposed rule.

Proposed § 503.24(a) states that the Administrator, OFLC will not issue future labor certifications to an employer if the Administrator, WHD finds that the employer committed a violation that meets the standards of § 503.19. Proposed § 503.24 provides a comprehensive but not exhaustive list of violations that could warrant debarment where the standards set forth in § 503.19 are met, and is similar to the list of debarable violations from the 2008 Final Rule, at 20 CFR 655.31. The most significant differences are that the Department now proposes that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment and that the following violations may be considered debarable:

Improper layoff or displacement of U.S. workers or workers in corresponding employment (§ 503.24(a)(iv));

A violation of the requirements of § 503.16(o) and (p) concerning prohibited fees (§ 503.24(a)(viii));

A violation of any of the anti-discrimination provisions listed in § 503.16(r) (§ 503.24(a)(ix)); and

A willful misrepresentation of a material fact during the registration or application process.

Proposed § 503.24(b) provides that the Administrator, OFLC may not issue future labor certifications to an employer represented by an agent or attorney who the Administrator, WHD finds has participated in an employer's violation. The Department proposes in § 503.24(c) that the Administrator, OFLC may not debar an employer, attorney, or agent for less than 1 year or more than 5 years from the date of the Department's final debarment decision.

Proposed § 503.24(d) describes the procedures that will be followed in the event of WHD debarment, cross-referencing the administrative proceedings provided in Subpart C.

Proposed § 503.24(e) clarifies that while WHD and OFLC will have concurrent debarment jurisdiction, the two agencies may coordinate their activities so that a specific violation for which debarment is imposed will be cited in a single debarment proceeding. Because OFLC and WHD would have concurrent debarment jurisdiction, some changes have been proposed to OFLC's debarment procedures (see proposed language at 20 CFR 655.73 and the corresponding preamble) to ensure that OFLC's and WHD's debarment procedures are consistent with each other. However, an important distinction between the OFLC and WHD debarment procedures is that the WHD debarment procedures do not provide for a 30-day rebuttal period because WHD debarments arise from investigations during which the employer has ample opportunity to submit any evidence and arguments in its favor.

Last, proposed § 503.24(f) provides that an employer, agent, or attorney who is debarred by OFLC or WHD from the H-2B program will also be debarred from all other foreign labor programs administered by the Department for the same period of time set forth in the final debarment decision. Many employers, agents, and attorneys participate in more than one foreign labor certification program administered by the Department. However, under the current regulation, a party that is debarred under the H-2B program may continue to file applications under the Department's other foreign labor certification programs. This proposal will allow the Department to refuse to accept applications filed by or on behalf of a debarred party under the H-2B program in any of the Department's foreign labor certification programs.

#### 11. Section 503.25 Failure To Cooperate With Investigators

The proposed rule defines and expands the penalties for an employer's (or its agent's or attorney's) failure to cooperate with a WHD investigation. WHD's remedies for such a failure would include recommending revocation to OFLC of an employer's existing *Application for Temporary Employment Certification*, and/or debarring an employer from future certifications for up to 5 years, and/or assessing CMPs. The proposed debarment maximum of 5 years is an increase from the current maximum of 3 years.

#### 12. Section 503.26 Civil Money Penalties—Payment and Collection

The Department proposes to revise the language instructing employers how to submit payment of any CMPs owed. This section is administrative in nature and does not propose any substantive changes.

#### C. Administrative Proceedings

The NPRM proposes generally to adopt the applicable administrative proceedings in current 20 CFR 655.70–655.80. The NPRM proposes few significant changes to the administrative proceedings from the 2008 Final Rule. Many of the changes were made to bring clarity to the administrative proceedings that will govern H-2B hearings, and to achieve general consistency with the procedural requirements applicable to H-2A proceedings.

In § 503.50, the Department proposes that the ALJ will prepare a decision following a debarment hearing within 60 days after completion of the hearing and closing of the record. This time constraint is consistent with the newly-proposed debarment hearing procedures of the OFLC. In § 503.55 the Department proposes to remove the language from the 2008 Final Rule, 20 CFR 655.31(e)(5)(iii)(D), that provides that “[i]f 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.”

In proposed §§ 503.40, 503.41(a), 503.42(a), and 503.50(e), the term “unpaid wages” is replaced with the term “monetary relief” to reflect the fact that WHD may seek to recover other types of relief, such as if an employer requires an H-2B employee to pay his/her own visa fees and other related government-mandated fees.

Section 503.43(c) proposes to change the number of days an employer has to request an administrative hearing from 15 calendar days after the determination to 30 calendar days after the date of the determination. Under § 503.48(b) the NPRM proposes to change the time requirement for the ALJ to notify all parties of the date, time, and place of the hearing from 14 calendar days to 30 calendar days.

#### IV. Administrative Information

##### A. Executive Order 12866

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 to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines an economically significant regulatory

action as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this NPRM is not an economically significant regulatory action under section 3(f)(1) of E.O. 12866. Regardless of whether the benefits of a rule exceed its costs, the rule is still considered economically insignificant under E.O. 12866. This regulation would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. In fact, this NPRM is intended to provide employers with clear and consistent guidance on the requirements for participation in the H-2B worker program. The Department, however, has determined that this NPRM is a significant regulatory action under sec. 3(f)(4) of the E.O. and, accordingly, OMB has reviewed this NPRM.

##### 1. Need for Regulation

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H-2B program. The Department believes that the policy underpinnings of the 2008 Final Rule, e.g. streamlining the H-2B process to defer many determinations of program compliance until after an application has been adjudicated, does not provide an adequate level of protection for either U.S. or foreign workers.

The Department believes that there are insufficient worker protections in the current attestation-based model in which employers attest, but do not fully demonstrate, that they have performed an adequate test of the U.S. labor market. Even in the first year of the operation of the attestation-based system, it has come to the Department's attention that employers are attesting to compliance with program obligations with which they have not complied, and that employers are not recruiting U.S. workers in accordance with established

policies. The Department obtained this information in the processing and auditing of cases and in complaints from U.S. workers brought since the effective date of the 2008 Final Rule. The identified violations come from different geographical sectors and relate to both new and experienced filers. In light of such non-compliance, the Department has chosen to revisit the use of attestations, even with the use of post-certification program integrity measures. We would emphasize that the return to the certification model which was used in the program for its entire history until January 2009, and which was recently reintroduced into the H-2A program, creates no significant additional burdens on employers. It does not change the nature of the obligations with which employers must comply, or the documentation that employers must maintain, but merely adjusts the timing and circumstances under which that documentation, the evidence of compliance with those obligations, must be produced. While this change produces no additional burden on employers, it will substantially enhance overall program integrity by allowing the Department to identify potential problematic applications at the earliest possible time. It is also much less onerous on employers to be required to amend a deficient or incomplete application before it is certified, than to subject the employer to the potential for back pay, civil money penalties or debarment, if the deficiencies in the application are not identified and the job opportunity was not properly made available to U.S. workers.

For these reasons, discussed in more detail above, the Department is proposing the changes contained in the NPRM.

## 2. Alternatives

The Department has considered a number of alternatives: (1) To propose the policy changes contained in this NPRM; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to propose a number of other options discussed in more detail below. We believe that this NPRM retains the best features of the 2008 Final Rule and proposes additional provisions to best achieve the Department's policy objectives, consistent with its mandate under the H-2B program. We request comments from the public on the best alternatives that would balance the needs of businesses with providing adequate protections to U.S. and H-2B workers. We are also interested in any available information regarding the number of U.S. workers that would

benefit from increased opportunity for jobs.

The Department considered alternatives to a number of program proposals. First, the Department considered another alternative to the definition of full-time work (40 hours instead of the proposed 35 hours), as discussed in more detail in the preamble to proposed § 655.5.

Second, this NPRM allows certain deductions from a worker's earnings for the provision of items that are primarily for the benefit of the H-2B employer, as long as they do not bring the worker's actual wages paid below the H-2B required wage level. This is a departure from the rule under the FLSA, which specifies the Federal minimum wage as the floor beneath which such deductions cannot lower a worker's wages paid. In drafting this NPRM, the Department considered using the Federal minimum wage as the floor, but believes that the H-2B offered wage provides a stronger protection for U.S. workers. These protections are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers. Using the FLSA wage level would provide a disincentive to hire U.S. workers who earn a market-driven rate that is likely to be higher than the Federal minimum. This ultimately would contradict the Secretary's mandate under the H-2B program to protect the employment of U.S. workers and preserve their wages and working conditions. Therefore, the Department rejected this alternative because it does not achieve the policy objectives of the rule and undercuts the Secretary's fulfillment of her obligations under the program.

Third, this NPRM introduces a three-fourths guarantee requirement modeled generally on that used in the H-2A program. The Department considered retaining the language of the H-2A requirement, under which employers 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 length of the contract. The Department rejected this alternative because, while this would provide workers with significant protection, it would not be sufficient to discourage the submission of imprecise dates of need and/or imprecise numbers of employees needed and would therefore fail to protect U.S. and H-2B workers from periods of unforeseen underemployment.

The Department believes that the proposal, which calculates the hours of employment offered in 4-week periods, better ensures that workers'

commitment to a particular employer will result in real jobs that meet their reasonable expectations. We do not believe the proposal will create any additional burden on employers who have accurately represented their period of need and number of employees needed, and will provide an additional incentive for applicants to correctly state all of their needs on the Application for Temporary Employment Certification.

Finally, the Department considered omitting the proposed registrations of H-2B employers and instead retaining the current practice for the adjudication of the employer's temporary need and the labor market analysis to occur simultaneously. While this might be more advantageous for employers new to the program, it delays the vast majority of employers who are recurring users with relatively stable dates of need and who would benefit from separate adjudication of need and adequacy of recruitment. Moreover, all employers and potential workers benefit from a recruitment process close in time to the actual date of need which a registration process, by pre-determining temporary need, expressly permits. Therefore, the Department rejected the alternative of simultaneous adjudication because it undercuts the Secretary's fulfillment of her obligations under the program.

## 3. Economic Analysis

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 Final Rule, against the benefits and costs associated with the implementation of the provisions proposed in this NPRM. The benefits and costs of the provisions of this NPRM are estimated as incremental impacts relative to the baseline. Thus, benefits and costs attributable to the 2008 Final Rule are not considered as benefits and costs of this NPRM. We explain how the actions of workers, employers, and government agencies resulting from the NPRM are linked to the expected benefits and costs.

The Department sought to quantify and monetize the benefits and costs of this NPRM where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively. The analysis covers 10 years (2011 through 2020) to ensure it captures major benefits and costs that accrue over time.<sup>11</sup> We have sought to present benefits and costs both

<sup>11</sup> For the purposes of the cost-benefit analysis, the 10-year period starts on October 1, 2010.



undiscounted and discounted at 7 percent and 3 percent.

In addition, the Department provides an assessment of transfer payments associated with certain provisions of the proposed rule.<sup>12</sup> Transfer payments, as defined by OMB Circular A-4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect, but do not result in additional benefits or costs to society. The proposed rule would alter the transfer patterns and increase the transfers from employers to workers. The primary recipients of transfer payments reflected in this analysis are U.S. workers and H-2B workers. The primary payors of transfer payments reflected in this analysis are H-2B employers, and under the proposed rule, those employers who choose to participate are likely to be those that have the greatest need to access the H-2B program. When summarizing the benefits or costs of specific provisions of this proposed rule, we present the 10-year averages to reflect the typical annual effect.

Several provisions of the proposed rule extend to workers in corresponding employment, defined in the proposed rule as those non-H-2B workers who perform work for an H-2B employer, where such work is included in the job order that H-2B workers perform during the period of the job order and any other work performed by H-2B workers. Corresponding workers would be entitled to the same wages that the employer provides to H-2B workers, along with transportation and subsistence payments (for U.S. workers who cannot reasonably return to their residence each workday) and the disclosure of the job order. In addition, as a result of the enhanced recruiting proposed in this rule, including the new national job registry, certain costs may be avoided as employers are able to find U.S. workers in lieu of some H-2B workers. The Department believes that the costs associated with the employment of a U.S. worker would be relatively lower than the costs associated with the employment of an H-2B worker, as the costs of visa and border crossing fees will be avoided.

We cannot identify data on the number of corresponding workers at work sites on which H-2B workers are requested or the current hourly wages of those workers. The Department does not collect data regarding what we have

<sup>12</sup> The specific provisions associated with transfer payments are: Wages paid to corresponding U.S. workers, payments for transportation and subsistence to and from the place of employment, and visa-related fees.

defined as corresponding employees, and therefore cannot identify the numbers of workers to whom the obligation would attach.<sup>13</sup> Nor can the Department identify what such workers are currently being paid, and so cannot quantify what impacts, if any, the requirement to pay the prevailing wage would signify for such workers. Wages for such workers might not be changed because, on average, they likely earn the average wage for that particular occupation in that area of intended employment. However, the Department has been informed by employers that in many industries in which H-2B workers are sought, such as amusement and landscaping services, there are few if any corresponding employees—the very reason such employers seek H-2B workers to maintain an adequate workforce. The Department requests the public to propose possible sources of data or information on the number of corresponding workers at work sites for which H-2B workers are requested and the current hourly wages of those workers.

Employment in the H-2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the program. The H-2B program is capped at 66,000 visas issued per year (33,000 of which are made available biannually), which represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (130.9 million).<sup>14</sup> According to H-2B program data for FY 2007–2009, the average annual numbers of H-2B workers certified in the top five industries were as follows: Construction—30,242; Amusement, Gambling, and Recreation—14,041; Landscaping Services—78,027; Janitorial Services—30,902; and Food Services and Drinking Places—22,948. These employment numbers represent the following percentages of the total employment in each of these industries: Construction—0.4 percent (30,242/7,265,648); Amusement, Gambling, and Recreation—0.9 percent (14,041/1,506,120); Landscaping Services—13.2 percent (78,027/589,698); Janitorial Services—3.3 percent (30,902/933,245); and Food Services and Drinking Places—0.2 percent (22,948/

<sup>13</sup> The Department does not require employers to signify on an *H-2B Application for Temporary Employment Certification* the number of employees that they employ in that occupation in that area of intended employment. Nor does the Department have such information from concluded investigations.

<sup>14</sup> Source for total employment: <ftp://ftp.bls.gov/pub/suppl/empst.ceseeb1.txt>.

9,617,597).<sup>15</sup> These percentages decrease further when scaled to the actual number of entries permitted each year: Construction—0.2 percent (14,756/7,265,648); Amusement, Gambling, and Recreation—0.5 percent (6,851/1,506,120); Landscaping Services—6.5 percent (38,073/589,698); Janitorial Services—1.6 percent (15,079/933,245); and Food Services and Drinking Places—0.1 percent (11,197/9,617,597).<sup>16</sup> As these data illustrate, the H-2B program represents a small fraction of the total employment even in each of the top five industries in which H-2B workers are found. As a result of the limited magnitude of the H-2B program, the Department believes that the proposed rule does not rise to the level of an economically significant regulatory action.

#### 4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the proposed NPRM provisions against the baseline (*i.e.*, the 2008 Final Rule). Sections "a" through "c" below represent additional compensation for both H-2B and workers in corresponding employment including the application of H-2B wages to corresponding U.S. workers, transportation and subsistence to and from the place of employment, and payment of visa and border crossing fees. Sections "d" through "g" represent provisions aimed at expanding efforts to recruit U.S. workers. These provisions include an enhanced U.S. worker referral period, additional recruiting directed by the Certifying Officer (CO), contacting labor organizations, and an electronic job registry. Sections "h" through "k" represent provisions to enhance transparency and worker protections. These provisions include disclosure of the job order, enhancing worker protections through the elimination of attestation-based certifications, document retention, departure time notification, job posting requirements, and notice of worker rights. Section "l" is a proposed provision aimed at reducing the administrative burden on State Workforce Agencies (SWAs) by eliminating employment verification.

<sup>15</sup> Source for total employment by industry: 2007 Economic Census.

<sup>16</sup> The number of visas available under the H-2B program is 66,000, assuming no statutory increases in the number of visas available for entry in a given year. We also assume that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H-2B workers in a given year. The scale factor was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706).

For each of these subjects, the relevant benefits, costs, and transfers that may apply are discussed.<sup>17</sup>

#### a. Application of H–2B Wages to Corresponding Workers

The NPRM requires that workers in corresponding employment are paid the same wages as paid to foreign workers under the H–2B program. However, the Department cannot identify a reliable source of data to estimate the number of corresponding workers at work sites on which H–2B workers are requested, nor can it identify the current hourly wages of those workers. Therefore, the Department cannot quantify the impacts, if any, associated with this provision. The Department requests the public to propose possible sources of data or information on the number of corresponding workers at work sites for which H–2B workers are requested and the current hourly wages of those workers.

In standard economic models of labor supply and demand, any possible increase in wages paid to corresponding workers under this provision would result in a transfer from participating employers to corresponding workers. In addition, standard models show that the higher labor costs would lead to a reduction in the quantity of labor demanded. However, in a practical sense, the macroeconomic effect of reductions in the demand for corresponding workers is expected to be minimal. Because employers cannot replace U.S. workers laid off 120 days before the date of need or through the period of certification with H–2B workers, the Department concludes that there would be no reduction in the employment of corresponding workers among participating employers. When employers supplement their usual workforce levels with H–2B workers, this hiring activity leaves the employment levels of similarly employed U.S. workers unaffected.

#### b. Transportation and Subsistence to and From the Place of Employment Transfers

The NPRM proposes to require H–2B employers to provide workers—both H–2B workers and workers in corresponding employment who are unable to return to their permanent residences—with transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer must also provide the worker

with the cost of return transportation and daily subsistence from the worker's place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. These impacts represent transfers from H–2B employers to workers because they represent distributional effects, not a change in society's resources.

To estimate the transfer related to transportation, we first calculate the weighted average cost of transportation for the top ten countries of origin, by estimated number of certified H–2B workers who were new entrants.<sup>18</sup> For workers from Mexico and Canada, we assume that they travel to and from the place of employment by bus. For the remainder of the H–2B workers, we assume air travel. We estimate the weighted average one-way travel cost per employee to be approximately \$286 per H–2B worker.<sup>19</sup> We estimate the roundtrip transportation costs by multiplying the weighted average one-way cost by two and by the annual number of H–2B workers entering the U.S. (66,000). The Department estimates average annual transfer of transportation expenditures to be approximately \$37.8 million. We do not know to what extent employers are currently paying for this cost in order to secure these workers or because of their obligations under the Fair Labor Standards Act. To the extent that this is the case, this transportation transfer estimate is an upper-bound estimate.

We estimate the transfer related to subsistence payments by multiplying the annual number of H–2B workers

<sup>18</sup> The top 10 countries of origin and the number of certified H–2B workers during FY 2007–2009 were as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251; South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577. The H–2B visa program is capped at 66,000 new visas per year. To estimate the number of new entrants from each country, we scaled the total number of certified workers from each country by the total number of new visas allowed from FY 2007 to FY 2009 (66,000 new visas × 3 years) divided by the total number of H–2B workers certified from FY 2007 to FY 2009.

<sup>19</sup> The one-way travel costs used for each country are as follows: Mexico, \$179; Jamaica, \$285; Guatemala, \$484; Philippines, \$973; Romania, \$1,147; South Africa, \$1,168; United Kingdom, \$726; Canada, \$165; Israel, \$908; and Australia, \$1,648. The transportation cost for Mexico is based on the cost of a bus trip from Mexico City, Mexico, to Ciudad Juarez, Mexico (source: <http://www.ticketbus.com.mx>) and a bus trip from El Paso, Texas, to St. Louis, Missouri (source: <http://www.greyhound.com>). The transportation cost for Canada is based on the cost of a bus trip from Ottawa, Ontario, to St. Louis, Missouri (source: <http://www.greyhound.com>). The airfare costs for the remaining countries are based on the cost of a flight from the capital city of the country in question to St. Louis, Missouri (source: <http://www.kayak.com>).

entering the U.S. (66,000) by the subsistence per diem (\$10.64), the weighted average one-way travel time for the top ten H–2B countries (1,055 days), and the number of one-way trips per worker (two).<sup>20</sup> The Department estimates the average annual transfer induced by subsistence payments to be approximately \$1.5 million.

This provision applies not only to H–2B workers, but also to workers in corresponding employment on H–2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. We were unable to identify adequate data to estimate the number of corresponding workers and, thus, we are unable to quantify this transfer. DOL would appreciate public input that would help to quantify these costs.

#### c. Visa and Border Crossing Fees

Under the 2008 Final Rule, visa-related fees—including fees required by the Department of State for scheduling and/or conducting an interview at the consular post—are permitted to be paid by the temporary worker. The NPRM, however, proposes to require visa fees to be paid by the employer. Requiring employers to bear the full cost of their decision to hire foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on U.S. workers. Government-mandated fees, such as visa-related fees and border crossing fees, are integral to the employer's choice to use the H–2B program to bring temporary foreign workers into the U.S.

#### Transfers

The reimbursement of visa application fees, fees for scheduling and/or conducting an interview at the consular post, and border crossing fees by employers is a transfer from employers to H–2B workers. The Department estimates the cost of visa fees by adding the cost per H–2B visa (\$150) and the weighted average consular fee (\$27.15)<sup>21</sup> and multiplying the resulting sum by the annual number

<sup>20</sup> Source: 20 CFR 655. The one-way travel days applied to each country of origin is as follows: Mexico, 1; Jamaica, 1; Guatemala, 1; Philippines, 2; Romania, 1; South Africa, 2; United Kingdom, 1; Canada, 1; Israel, 1; and Australia, 2.

<sup>21</sup> The top 10 countries of origin and the number of certified H–2B workers during FY 2007–2009 were as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251; South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577. We use these values to weight the country-specific consular fees to obtain the weighted average consular fee of \$27.15.

<sup>17</sup> For the purpose of this analysis, H–2B workers are considered temporary residents of the U.S.

of H-2B workers entering the U.S. (66,000).<sup>22</sup> The annual average transfer of visa-related fees from H-2B employers to H-2B workers is \$11.7 million.

#### d. Enhanced U.S. Worker Referral Period

Under the NPRM, employers must continue to accept SWA referrals of qualified and available U.S. workers. Employers must hire any qualified U.S. worker referred up until the later of 3 days before the date of need or when the employer's last H-2B worker departs for the employer's place of business.

#### i. Benefits

This NPRM proposes to increase the amount of time that employers must accept referrals for temporary non-agricultural opportunities from qualified U.S. workers. The NPRM also proposes to increase the types of recruitment to ensure that U.S. workers are provided with a more robust opportunity to have access to the job opportunities that are the subject of labor certification applications. These include a greater number of ads than is required under the current regulation; the posting of jobs on an electronic job registry; contact with union representation where the industry of job classification is traditionally unionized; notice to the current workforce or to current union members where one is in place in the workforce; and contact with the former U.S. workforce. The enhanced referral period expands the time during which jobs are available to U.S. workers. Therefore, taken along with the other provisions of the rule, it improves the information between employers and workers about available jobs, increasing the likelihood that U.S. workers can be hired for those jobs. As more U.S. workers are hired as a result of this NPRM, employers would avoid visa-related costs for H-2B positions that would now be filled with U.S. workers. H-2B employers would minimize additional costs of international recruitment.<sup>23</sup> The Department is not able to quantify this effect, however, due to a lack of adequate data.

These benefits also apply to sections "e" through "g" below, which discuss

<sup>22</sup> The visa fee of \$150 went into effect on June 4, 2010. Source: <http://www.state.gov/r/pa/prs/ps/2010/05/142155.htm>.

<sup>23</sup> In this NPRM, cost savings are defined as costs that would be incurred under the 2008 Final Rule that will not be incurred as a result of this NPRM because its provisions increase the likelihood that U.S. workers will be hired for these jobs. Because the provisions of this NPRM could increase the cost of recruiting and transporting a foreign worker to the U.S. job site relative to a U.S. worker, these are avoided costs from the perspective of the employer.

additional provisions aimed at improving the recruitment of U.S. workers.

#### ii. Costs

The extension of the referral period proposed in this NPRM will likely result in more U.S. workers being interested in the jobs, which will require more SWA staff time to process additional referrals. The Department does not have estimates of the additional number of U.S. workers who will be interested in the jobs and, thus, is unable to estimate the costs associated with this provision.

#### iii. Transfers

If more U.S. workers are hired as a result of the NPRM (because employers who previously applied for H-2B visas choose to hire U.S. workers rather than participate in the H-2B program, or because H-2B employers can attract more U.S. workers as a result of enhanced recruitment measures), those workers who were previously unemployed will no longer make claims for new or continued unemployment insurance benefits.<sup>24</sup> Other things constant, we expect the States to experience a reduction in unemployment insurance expenditures as a consequence of more U.S. workers being hired. This reduction in unemployment insurance benefits will be passed on to employers to a certain extent. The Department, however, is not able to quantify these transfer payments due to an inability to estimate the likely increase in number of U.S. workers employed in jobs that would otherwise have been held by H-2B workers.

The Department believes that the costs associated with the employment of a U.S. worker will be lower than the costs associated with an H-2B worker, as the costs of transportation and subsistence will likely be reduced, if not avoided entirely. The cost of visa fees will be entirely avoided if U.S. workers are hired. We have not identified appropriate data to estimate any increase in the number of U.S. workers that might be hired as a result of the NPRM provisions.

#### e. Additional Recruiting Directed by the Certifying Officer

Under the proposed rule, the employer may be directed by the CO to conduct additional recruitment where the CO has determined that there may be available and qualified U.S. workers, including where the job opportunity is

<sup>24</sup> Similarly, when U.S. workers shift from current employment to fill jobs with H-2B employers, additional workers from the pool of the unemployed will inevitably fill the vacant positions.

located in an area of substantial unemployment. We estimate this cost by multiplying the number of employer applicants by the average cost of a newspaper advertisement (\$25.09) and by our estimate that 50 percent of H-2B employers can be expected to be directed by the CO to conduct additional recruitment for a total annual average cost for additional job advertisement of approximately \$0.06 million.<sup>25</sup>

We also add the labor cost to post the advertisement. We estimate this cost by multiplying the number of employer applicants by the estimated time required to post the advertisement (0.08 hours, or 5 minutes), the scaled hourly compensation rate of an administrative assistant/executive secretary (\$28.64),<sup>26</sup> and our estimate that 50 percent of H-2B employers can be expected to be directed by the CO to conduct additional recruiting for a total annual average labor cost of \$0.01 million. Thus, we estimate the total average annual cost of CO-directed recruiting at approximately \$0.07 million.<sup>27</sup>

#### f. Contacting Labor Organizations

The NPRM proposes to require the employer to contact the local union to locate able, willing, and qualified U.S. workers when the employer seeks to hire for a position in an occupation or industry where union representation is prevalent. The employer must provide written notice of the job opportunity to the representative(s) of any of the employer's employees in the job classification and geographic area in which the work will be performed. This provision of the proposed rule expands the requirement from the baseline established by the 2008 Final Rule because it requires the employer to contact the local union if the job is

<sup>25</sup> To obtain the average cost of a newspaper advertisement, we averaged the advertisement rates for the following newspapers: the Augusta Chronicle, the Austin Chronicle, the Huntsville Times, the Los Alamos Monitor, the San Diego Union-Tribune, and the Advertiser Times (Detroit, Michigan). Other means of recruiting are possible under this NPRM (such as listings on Monster.com and Career Builder), but they may be more costly.

<sup>26</sup> The hourly compensation rate for an administrative assistant/executive secretary is calculated by multiplying the hourly wage of \$20.03 (as published by the Department's OES survey, O\*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for an administrative assistant/executive secretary is \$28.64.

<sup>27</sup> It is possible that there will be additional costs incurred by employers from interviewing additional applicants that are referred to H-2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and, thus, is unable to quantify this impact.

customarily unionized, even if there is no union or CBA with the employer.

We estimate two components of the cost to contact labor organizations: labor and materials. We estimate the labor cost by multiplying the number of employer applicants by the scaled hourly labor compensation of an administrative assistant/executive secretary (\$28.64), the time needed to type, print, and mail out the letter (0.25 hours, or 15 minutes), and the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent).<sup>28</sup> We estimate the average annual labor costs of writing and mailing letters to be \$0.01 million.

The second cost component of contacting labor organizations is the material costs. We calculate this cost by summing the cost of a sheet of paper (\$0.02), an envelope (\$0.04), and postage (\$0.44), and multiplying the resulting sum by the number of employer applicants and the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent). We estimate the total average annual material cost to be less than \$1,000.

In total, the Department estimates the average annual cost of contacting labor organizations to be \$0.01 million per year.

#### g. Electronic Job Registry

Under the proposed rule, the Department will post and maintain employers' H-2B job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The job registry will serve as a public repository of H-2B job orders for the duration of the referral period. The job orders will be posted in the registry by the CO upon the acceptance of each submission. The posting of the job orders will not require any additional effort on the part of H-2B employers or SWAs.

#### i. Benefits

The job registry will improve the visibility of H-2B jobs to U.S. workers. In conjunction with the longer referral period under the proposed rule, the job registry will expand the availability of information about these jobs to U.S. workers and, therefore, improve their

<sup>28</sup> Unionization data for the following occupations were used: Arts, entertainment, sports, and media; food preparation and serving related; building and grounds cleaning and maintenance; personal care and service; farming, fishing, and forestry; construction and extraction; and installation, maintenance, and repair. These occupational categories represent the majority of H-2B occupations. Source: <http://www.bls.gov/webapps/legacy/cpslutab3.htm>.

employment opportunities. In addition, the establishment of a job registry will provide greater transparency with respect to the Department's administration of the H-2B program to the public, members of Congress, and other stakeholders. Transferring these job orders into electronic records for the job registry will result in an improved and more complete record of job opportunities for which H-2B workers are sought. Employers seeking temporary workers, in turn, will likely experience an increase in job applications from U.S. workers and would not need to incur additional expenses, including visa and border crossing fees, of hiring H-2B workers. The Department, however, is not able to estimate the increase in job applications resulting from the job registry and, thus, is unable to quantify this benefit.

#### ii. Costs

The establishment of an electronic job registry in this NPRM represents an increased cost to the Department for maintaining the job registry.<sup>29</sup> We estimate average annual costs of maintaining an electronic job registry to be approximately \$0.5 million.<sup>30</sup>

#### h. Disclosure of Job Order

The NPRM proposes to require an employer to provide a copy of the job order to an H-2B worker outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day that work starts. The job order must be translated to a language understood by the worker. For an H-2B worker changing employment from an H-2B employer to a subsequent

<sup>29</sup> Our analysis accounts for the fact that the cost of development and implementation has been incurred by the electronic job registry developed for the H-2A Program.

<sup>30</sup> For registry maintenance activities, the Department assumes that 376 hours will be required for the following labor categories: Program Manager, Computer Systems Analyst II & III, Computer Programmer III & IV, Computer Programmer Manager, Data Architect, Web Designer, Database Analyst, Technical Writer II, Help Desk Support Analyst, and Production Support Manager. Finally, the Department uses the following loaded rates based on an Independent Government Cost Estimate (ICGE) produced by OFLC and inclusive of direct labor and overhead costs for each labor category: Program Manager, \$138.34; Computer Systems Analyst II, \$92.14; Computer Systems Analyst III, \$109.84; Computer Programmer III, \$89.63; Computer Programmer IV, \$107.72; Computer Programmer Manager, \$123.88; Data Architect, \$104.99; Web Designer, \$124.76; Database Analyst, \$77.80; Technical Writer II, \$84.81; Help Desk Support Analyst, \$55.28; Production Support Manager, \$125.76. The Department multiplies the assumed number of hours by the appropriate labor rates to obtain a first-year cost of \$561,364 and a cost in subsequent years of \$464,341. We average the costs over the 10-year analysis period to obtain an average annual cost of \$474,044.

H-2B employer, the copy must be provided no later than the time the subsequent H-2B employer makes an offer of employment.

We estimate two cost components for the disclosure of job orders: the cost of reproducing the document containing the terms and conditions of employment, and the cost of translation. We obtain the cost of reproducing the terms and conditions document by multiplying the number of H-2B workers (66,000) by the number of pages to be photocopied (3), the cost per photocopy (\$0.12), and the percent of certified H-2B workers that are not involved in reforestation (88.3 percent).<sup>31</sup> The Department estimates average annual costs of reproducing the document containing the terms and conditions of employment to be approximately \$0.02 million.

For the cost of translation, the Department assumes that an employer hires all of its H-2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is necessary per employer needing translation. We obtain the cost of translation by multiplying the number of H-2B employers by the percent of H-2B workers who do not speak English (83.92 percent, for the top ten countries of origin), the number of pages of the terms and conditions (3), and the translation cost per page (\$21.00).<sup>32</sup> We estimate average annual translation costs of approximately \$0.2 million.

#### i. Elimination of Attestation-Based Model

The 2008 Final Rule used an attestation-based model: employers conducted the required recruitment in advance of application filing and, based on the results of that effort, applied for certification from the Department for a number of foreign workers to fill the remaining openings. Employers simply attested that they had undertaken the necessary activities and made the required assurances to workers. The Department has determined that there are insufficient worker protections in the attestation-based model. In

<sup>31</sup> The new cost of disclosure of job orders does not apply to reforestation employers because the Migrant and Seasonal Agricultural Worker Protection Act presently requires reforestation employers to make this disclosure. According to H-2B program data for FY 2000-FY2007, 88.3 percent of H-2B workers work in an industry other than reforestation.

<sup>32</sup> The source of the percentage of H-2B workers who do not speak English is the "Yearbook of Immigration Statistics", 2007-2009 (<http://www.dhs.gov/xlibrary/assets/statistics/yearbook/>). The source for the translation cost per page is <http://www.languagescape.com>.

eliminating the attestation-based model, the NPRM shifts the recruitment process to after the application is filed so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of eliminating the attestation based-model is a change in the timing of recruitment more so than a change in substantive requirements.

#### i. Benefits

The return to a certification model in which employers demonstrate compliance with program obligations prior to certification will improve worker protections. Greater compliance will, in turn, provide improved administration of the program and conserve Government resources at both the State and Federal levels. It will also result in cost savings to employers, subjecting them to fewer requests for additional information and denials of applications and saving them both time and the expense of responding to such inquiries. It will also result in the intangible benefit of more H-2B visas being available to those employers who have conducted bona fide recruitment around an actual date of need. The Department, however, is not able to estimate the impacts resulting from the elimination of the attestation-based model and is unable to quantify these benefits.

#### ii. Costs

The elimination of the attestation-based model will impose minimal costs on employers because they will only need to include additional information in their recruitment report, including information on additional recruitment conducted, means of posting, contact with former U.S. workers, and contact with labor organizations where the occupation is customarily unionized. We estimate two costs for the elimination of the attestation-based model: the material cost of reproducing and mailing the documents, and the labor cost to reproduce and mail the documents. To estimate the cost of reproducing and mailing the documents, we multiply the number of H-2B employers (3,966) by the additional number of pages that must be submitted (3) and the additional postage required to ship those pages (\$0.17). We estimate this cost to be less than \$0.01 million (or  $3,966 \times 3 \times \$0.17 = \$2,023$ ) per year. To estimate the labor cost of reproducing and mailing the documents, we multiply the number of H-2B employers (3,966) by the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes)

and the scaled hourly labor compensation of an administrative assistant/executive secretary (\$28.64). We estimate this cost to be less than \$0.01 million (or  $3,966 \times 0.08 \times \$28.64 = \$9,087$ ) per year.

#### j. Document Retention

Under the NPRM, H-2B employers must retain documentation in addition to that required by the 2008 Final Rule. The Department assumes that each H-2B employer will purchase a filing cabinet (\$21.99) in which to store the additional documents starting in the first year of the rule.<sup>33</sup> To obtain the cost of storing documents, we multiply the number of H-2B employers by the cost per drawer for a total one-time cost of \$0.09 million.

#### k. Departure Time Determination

The NPRM proposes to require employers to provide notice to the local SWA of the time at which the last H-2B worker departs for the place of employment, if the last worker has not departed by 3 days before the date of need. The cost of this provision is the sum of the time required for the employer to place a phone call to the H-2B workers' representative to verify when the last H-2B worker will depart for the place of employment, the cost of the long-distance phone call, the time required to prepare and mail a letter to the SWA (one call per employer), and the cost of paper, an envelope, and postage.

To estimate the cost of placing the phone calls, we multiply the number of H-2B employers by the time needed to contact an H-2B worker representative (0.08 hours, or 5 minutes) and the scaled hourly compensation rate of an administrative assistant/executive secretary (\$28.64). To this product, we add the product of the number of H-2B employers and the average cost of a long distance phone call to the top 10 countries (\$3.23) to obtain total average annual costs of contacting H-2B workers equal to \$0.02 million.<sup>34</sup>

Once the H-2B employer has determined when the last H-2B worker will depart his or her home, the employer must notify the local SWA in writing, but only if the last worker has not departed by three days prior to the date of need. The Department estimates the cost of preparing and mailing a letter to the SWA by summing the labor costs

to prepare and mail a letter and the cost of paper, an envelope, and postage. We estimate the labor cost by multiplying the number of H-2B employers by the percentage of H-2B applicants that will be required under this provision to ensure the contact with the SWA (10 percent), the scaled hourly labor compensation of an administrative assistant/executive secretary, and the sum of the time needed to draft the main content of a letter (0.25 hours, or 15 minutes) and the time needed to type the letter and prepare it for mailing (0.08 hours, or 5 minutes). This calculation yields average annual labor costs of \$0.01 million.

We estimate the material costs of contacting the SWA by multiplying the number of H-2B employers by the percentage of H-2B employers that we assume will be required to contact the SWA (10 percent) and by the sum of the cost of a sheet of paper (\$0.02), the cost of an envelope (\$0.04), and the postage per envelope (\$0.44). We estimate the total annual average material costs to be less than \$1,000 per year.

In total, the Department estimates the total average annual costs of departure time determination to be approximately \$0.03 million per year.

#### l. Reduced SWA Administrative Burden by Eliminating Employment Verification

Under this NPRM, SWAs will no longer be responsible for conducting employment eligibility verification activities. These activities include completion of Form I-9 and vetting of application documents by SWA personnel.

#### i. Benefits

Under the 2008 Final Rule, SWAs are required to complete Form I-9 for non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this NPRM, SWAs will no longer be required to complete this process, resulting in cost savings. Due to a lack of data on the number of SWA referrals, we are not able to quantify this benefit.

#### m. Other

During the first year that the rule would be in effect, employers would need to learn about the new processes and requirements. We estimate this cost by multiplying the number of H-2B employer applicants by the time required to read the new rule and any educational and outreach materials that explain the H-2B application process under the rule (3 hours) by the average compensation of a human resources

<sup>33</sup> Source: <http://www.staples.com>.

<sup>34</sup> We collected long distance call charges from both AT&T and Verizon and averaged them. Source: <http://www.wireless.att.com/learn/international/long-distance/in-the-us.jsp> and [http://www22.verizon.com/longdistance/business\\_east/plan\\_ttw\\_brates.jsp](http://www22.verizon.com/longdistance/business_east/plan_ttw_brates.jsp).

manager (\$61.42).<sup>35</sup> In the first year of the rule, this amounts to approximately \$1.2 million in labor costs for an average annual cost of \$0.12 million.

The NPRM proposes to require employers to post the availability of the job opportunity in two conspicuous locations at the place of anticipated employment (where there is no union representative) for at least 10 consecutive days. This provision entails additional reproduction costs. To obtain the total cost incurred due to the job posting requirement, we multiply the number of employer applicants by the cost per photocopy (\$0.12) and the number of postings per place of employment (2), which amounts to approximately \$2,000 per year.

In addition, the NPRM proposes to require employers to post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary which sets out the rights and protections for workers. Employers must post the poster in English and, to the extent necessary and as provided by the Secretary, foreign language(s) common to a significant portion of the workers if they are not fluent in English. To estimate the cost of producing workers' rights posters, we multiply the number of H-2B employers by the cost per poster (\$0.12). In total, the cost of producing workers' rights posters is less than \$1,000 per year.

5. Summary of Cost-Benefit Analysis

Exhibit 1 presents a summary of the costs associated with this NPRM. Because of data limitations on the number of corresponding workers and U.S. workers expected to fill positions currently held by H-2B workers, the Department was not able to monetize any costs to the rule that would arise as a result of deadweight losses associated with higher employment costs under the proposed rule. However, because the size of the H-2B program is limited, the Department expects that any deadweight loss would be small. The monetized costs displayed are the yearly summations of the calculations described above.

EXHIBIT 1—SUMMARY OF MONETIZED COSTS

Year	Monetized costs (\$millions/year)
1 2011 .....	2.10
2 2012 .....	0.81
3 2013 .....	0.81
4 2014 .....	0.81
5 2015 .....	0.81
6 2016 .....	0.81
7 2017 .....	0.81
8 2018 .....	0.81
9 2019 .....	0.81
10 2020 .....	0.81
Undiscounted total .....	9.35
Total with 7 percent discounting .....	6.42
Total with 3 percent discounting .....	7.89

Totals may not sum due to rounding.

The 10-year monetized costs of this NPRM range from \$6.87 million to \$8.04 million (with 7 percent and 3 percent discounting, respectively).

Because the Department was not able to monetize any benefits for this NPRM due to the lack of adequate data, the monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate.

The Department did not identify data to provide monetary estimates of several important benefits to society, including increased employment opportunities for U.S. workers and enhancement of worker protections for U.S. and H-2B workers. These important benefits result from the following provisions of this NPRM: Transportation to and from the place of employment, payment of visa and border crossing fees, the enhanced U.S. worker referral period, additional recruiting directed by the CO, contacting labor organizations, the electronic job registry, and the job posting requirement.

Because the enhanced referral period expands the time during which jobs are available to U.S. workers, it increases the likelihood that U.S. workers are hired for those jobs. In addition, the job registry will improve the visibility of H-2B jobs to U.S. workers. Thus, the job registry will benefit U.S. workers by expanding the period during which these jobs are available to U.S. workers and, therefore, improving their employment opportunities. In addition, the establishment of a job registry will provide greater transparency with respect to the Department's administration of the H-2B program to the public, members of Congress, and other stakeholders. These benefits,

however, are difficult to quantify due to data limitations.

Several unquantifiable benefits result in the form of cost savings. As more U.S. workers are hired as a result of this NPRM, employers will experience cost savings in the form of avoided visa and border crossing fees for H-2B positions that are now filled with U.S. workers. Under the 2008 Final Rule, SWAs are required to complete Form I-9 for non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this NPRM, SWAs will no longer be required to complete this process, resulting in cost savings to SWAs. We were not able to quantify these cost savings due to a lack of data regarding the number of I-9 verifications SWAs have been performing for H-2B referrals.

The Department has concluded that after consideration of both the quantitative and qualitative impacts of this NPRM, the societal benefits of the rule justify the societal costs.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, as amended (RFA), requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. See 5 U.S.C. 605. For the reasons explained in this section, the Department believes this NPRM is not likely to impact a substantial number of small entities and, therefore, an Initial Regulatory Flexibility Analysis is not required by the RFA.

However, in the interest of transparency and to provide a full opportunity for public comment, we have prepared the following Initial Regulatory Flexibility Analysis to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards. We specifically request comments on the following burden estimates, including the number of small entities affected by the requirements, and whether alternatives exist that will reduce the burden on small entities. The Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this rule upon submission of the rule to OMB under E.O. 12866, as amended, "Regulatory Planning and Review"

<sup>35</sup>The hourly compensation rate for a human resources manager is calculated by multiplying the hourly wage of \$42.95 (as published by the Department's OES survey, O\*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for a human resources manager is \$61.42.

(58 FR 51735, Oct. 4, 1993; 67 FR 9385, Feb. 28, 2002; 72 FR 2763, Jan. 23, 2007).

Because employers seeking to participate in the H-2B program are derived from virtually all segments of the economy and across industries, those participating businesses are a small portion of the national economy overall. A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20 (“the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall”). Accordingly, the Department believes that the rule will not impact a substantial number of small entities in a particular industry or segment of the economy.

Employment in the H-2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H-2B program. The H-2B program is capped at 66,000 visas issued per year, which represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (130.9 million).<sup>36</sup> According to H-2B program data for FY 2007–2009, the average annual numbers of H-2B workers certified in the top five industries were as follows: Construction—30,242; Amusement, Gambling, and Recreation—14,041; Landscaping Services—78,027; Janitorial Services—30,902; and Food Services and Drinking Places—22,948. These employment numbers represent the following percentages of the total employment in each of these industries: Construction—0.4 percent (30,242/7,265,648); Amusement, Gambling, and Recreation—0.9 percent (14,041/1,506,120); Landscaping Services—13.2 percent (78,027/589,698); Janitorial Services—3.3 percent (30,902/933,245); and Food Services and Drinking Places—0.2 percent (22,948/9,617,597).<sup>37</sup> These percentages decrease further when scaled to the actual number of entries permitted each year: Construction—0.2 percent (14,756/7,265,648); Amusement, Gambling, and Recreation—0.5 percent (6,851/1,506,120); Landscaping Services—6.5 percent (38,073/589,698); Janitorial Services—1.6 percent (15,079/933,245); and Food Services and Drinking Places—0.1 percent (11,197/9,617,597).<sup>38</sup> As these data illustrate, the

H-2B program represents a small fraction of the total employment even in each of the top five industries in which H-2B workers are found.<sup>39</sup>

1. Description of the reasons that action by the agency is being considered.

As discussed in more detail earlier in this preamble, the Department has determined that a new rulemaking effort is necessary for the H-2B program because the policy underpinnings of the 2008 Final Rule, *e.g.*, streamlining the H-2B process to defer determinations of program compliance until after an application has been adjudicated, do not provide an adequate level of protection for either U.S. or foreign workers. The proposed protections are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers, including measures to ensure access to jobs for U.S. workers through enhanced recruitment in order to satisfy the statutory requirement that certifications be granted only if no U.S. workers are available.

Additionally, the NPRM seeks to help employers meet legitimate short-term temporary labor needs where and when there are no available U.S. workers. Over the years as the program has evolved, stakeholders in diverse industries throughout the country repeatedly have expressed concerns that some employers were inappropriately using H-2B workers for job opportunities that were permanent, thereby denying U.S. workers the opportunity for long-term employment. These employers' actions are to the detriment of other employers with a legitimate temporary need that are ultimately denied access to the program due to the annual cap on available visas. By preventing employers with a long-term permanent need from participating in the H-2B program, the Department would provide employers with genuine unmet temporary needs with a greater

in the number of visas available for entry in a given year. We also assume that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H-2B workers in a given year. The scale factor was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706).

<sup>39</sup> H-2B workers are not the only workers affected by this NPRM. Rather, certain provisions of the NPRM also extend to workers in corresponding employment, as addressed in section 4 of this analysis. While including the number of workers in corresponding employment would produce a more accurate determination of the portion of total employment affected by the H-2B program, the Department has not identified a reliable source of data to estimate the number of workers in corresponding employment at work sites on which H-2B workers are requested.

opportunity to participate in the program.

2. Succinct statement of the objectives of, and legal basis for, the proposed rule.

The Department seeks to help employers meet their legitimate short-term temporary labor needs where and when there are no available U.S. workers and to increase worker protections and strengthen program integrity under the H-2B labor certification program. The legal basis for the proposed rule is the Department's authority, as delegated from DHS under its regulations at 8 CFR 214.2(h)(6), to grant temporary labor certifications under the H-2B program.

3. Description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply.

#### Definition of a Small Business

A small entity is one that is independently owned and operated and that is not dominant in its field of operation. The definition of small business varies from industry to industry to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry. The Department has conducted a small entity impact analysis on small businesses in the five industries with the largest number of H-2B workers and for which data were available, as mentioned above: Landscaping Services; Janitorial Services (includes housekeeping services); Food Services and Drinking Places; Amusement, Gambling, and Recreation; and Construction. These top five industries accounted for almost 75 percent of the total number of H-2B workers certified during FY 2007–2009.<sup>40</sup>

One industry, Forest Services, made the initial top-five list but is not included in this analysis because the only data available for forestry also include various agriculture, fishing, and hunting activities. Relevant data for Forestry only were not available. The Department requests the public to propose possible sources of data or information on the revenues and average number of workers of a typical small Forestry firm so that the

<sup>40</sup> According to H-2B program data, the average annual number of firms (of all sizes) and H-2B workers certified for these industries during FY2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027; Janitorial Services, Firms—788, Workers—30,902; Food Services and Drinking Places, Firms—851, Workers—22,948; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041; and Construction, Firms—860, Workers—30,242.

<sup>36</sup> Source: <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt>.

<sup>37</sup> Source for total employment by industry: 2007 Economic Census.

<sup>38</sup> The number of visas available under the H-2B program is 66,000, assuming no statutory increases

Department can better account for any impacts on this industry.

We have adopted the SBA small business size standard for each of the five industries, which is a firm with annual revenues equal to or less than the following: Landscaping Services, \$7 million; Janitorial Services, \$16.5 million; Food Services and Drinking Places, \$7 million; Amusement, Gambling, and Recreation, \$7 million; and Construction, \$20.7 million.<sup>41</sup>

4. Description of the projected reporting, recordkeeping and other compliance.

The Department has estimated the incremental costs for small businesses from the baseline. For this proposed rule, the baseline is the 2008 Final Rule.<sup>42</sup> This analysis reflects the incremental cost of this rule as it adds to the requirements in the 2008 Final Rule. Using available data, we have estimated the costs of the payment of transportation and subsistence to workers, visa and border crossing fees, the disclosure of job orders, additional recruiting directed by the CO, the time required to read and review the Final Rule, contacting H-2B workers to determine their time of departure, contacting labor organizations, and other impacts.

Several provisions of the proposed rule extend to workers in “corresponding employment,” defined in the NPRM as those non-H-2B workers who perform work included in the job order that H-2B workers perform during the period of the job order and any other work performed by H-2B workers. These provisions include the application of H-2B wages to workers in corresponding employment, the transportation and subsistence payments (for workers who cannot reasonably return to their residence each workday), and the disclosure of the job order.

The Department receives an average of 8,717 applications annually (which is not necessarily the same as the number of applicants, because one employer may file more than one application) for the H-2B program, and the Department

estimates that an average of 6,980 of those applications result in petitions for H-2B workers that are approved by DHS. Even if all 6,980 applications are filed by unique small entities, all of which were in the top 5 industries, the percentage of small entities authorized to employ temporary non-agricultural workers will be less than 1 percent of the total number of small entities in these industries.<sup>43</sup> Based on this analysis, the Department estimates that the rule will impact less than 1 percent of the total number of small businesses. A detailed industry-by-industry analysis is provided below.

To examine the impact of this proposed rule on small entities, the Department evaluates the impact of the incremental costs on a hypothetical small entity of average size, in terms of the total number of both U.S. and foreign workers, in each industry if it were to fill 50 percent of its workforce with H-2B workers. There are no available data to estimate the breakdown of the workforce into U.S. and foreign workers. Based on Economic Census data, the total number of workers (including both U.S. and foreign workers) for this hypothetical small business is as follows: Landscaping Services, 2.3 workers; Janitorial Services, 11.3 workers; Food Services and Drinking Places, 6.3 workers; Amusement, Gambling, and Recreation, 5.0 workers; and Construction, 6.3 workers.<sup>44</sup>

Also using Economic Census data, we derived the annual revenues for small entities in each of the top five industries by multiplying the average number of workers by the average revenue per worker for each of the industries. The Department estimates that small businesses in the top five industries have the following annual revenues: Landscaping Services, \$0.181 million;

Janitorial Services, \$0.336 million; Food Services and Drinking Places, \$0.223 million; Amusement, Gambling, and Recreation, \$0.209 million, and Construction, \$0.884 million.

The following sections present the impacts that this NPRM is estimated to have on a small business that chooses to hire H-2B workers: these include impacts on the application of H-2B wages to workers in corresponding employment, transportation and subsistence costs, visa-related and border crossing fees, disclosure of job orders, additional recruiting that may be directed by the CO, reading and reviewing the new processes and requirements, contacting labor organizations, and other impacts. Note that the costs estimated below are not costs to all small businesses or to the average small business in an industry. Most small businesses in the relevant industry do not hire H-2B workers and, therefore, incur no cost burden from the proposed rule. The costs estimated apply only to the relatively small number of firms that are expected to hire H-2B workers. In the estimates below, the hypothetical firm that chooses to hire H-2B workers is assumed to be of the average total employment and revenue size for small businesses in its industry.

#### a. Application of H-2B Wages to Workers in Corresponding Employment

The NPRM requires that workers in corresponding employment are paid the same wages paid to foreign workers under the H-2B program. However, the Department has not identified a reliable source of data to estimate the number of workers in corresponding employment at work sites on which H-2B workers are requested, and thus, cannot identify the current hourly wages of those workers. Therefore, the Department cannot quantify the impacts, if any, associated with this provision. The Department requests the public to propose possible sources of data or information on the number of workers in corresponding employment at work sites for which H-2B workers are requested and the current hourly wages of those workers.

The NPRM will result in additional opportunities for U.S. workers to obtain a job and is therefore expected to result in lower government expenditures on unemployment insurance benefit claims. The lower unemployment insurance benefits reduce government expenditures, and these cost reductions are passed on to employers as a whole to a certain extent. The Department, however, is not able to quantify these transfer payments with precision.

<sup>41</sup> The SBA small business size standards for construction range from \$7 million (land subdivision) to \$33.5 million (general building and heavy construction). However, because employers representing all types of construction businesses may apply for certification to employ H-2B workers, the Department used an average of \$20.7 million as the size standard for construction.

<sup>42</sup> The Department published a revised final rule modifying the methodology by which prevailing wage rates are calculated for the H-2B program. 76 FR 3452, Jan. 10, 2011. However, because that final rule is limited to the prevailing wage rate issue, the baseline for this proposal remains the 2008 Final Rule with regard to the non-prevailing wage rate issues in this NPRM.

<sup>43</sup> The total number of firms classified as small entities in these industries is as follows: Landscaping Services, 63,210; Janitorial Services, 45,495; Food Services and Drinking Places, 293,373; Amusement, Gambling, and Recreation, 43,726; and Construction, 689,040.

<sup>44</sup> Source: 2002 County Business Patterns and 2002 Economic Census. These data do not distinguish between U.S. workers and foreign workers. Compare to data obtained from H-2B program data for FY 2007–2009, which indicated that the average annual number of firms (of all sizes) and H-2B workers certified for these industries during FY 2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027, an average of 28 workers per firm; Janitorial Services, Firms—788, Workers—30,902, an average of 39 workers per firm; Food Services and Drinking Places, Firms—851, Workers—22,948, and average of 27 workers per firm; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041, an average of 62 workers per firm; and Construction, Firms—860, Workers—30,242, an average of 35 workers per firm.



Difficulty in calculating these transfer payments arises primarily from uncertainty about the number of U.S. workers who will become employed as a result of this rule.

b. Transportation and Subsistence to and From the Place of Employment

The NPRM proposes to require H-2B employers to provide workers—both H-2B workers and workers in corresponding employment unable to return each day to their permanent residence—with transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer must also provide the worker with the cost of return transportation and daily subsistence from the worker's place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer.

To estimate the cost of transportation, we first calculate the weighted average cost of transportation for the top ten countries of origin, by the estimated number of certified H-2B workers who were new entrants.<sup>45 46</sup> For workers from Mexico and Canada, we assume that they travel to and from the place of employment by bus. For the remainder of the H-2B workers, we assume air travel.

We estimate the weighted average one-way travel cost per employee to be approximately \$286 per H-2B worker.<sup>47</sup> We estimate the roundtrip transportation costs by multiplying the

<sup>45</sup> The H-2B visa program is capped at 66,000 new visas per year. To estimate the number of new entrants from each country, we scaled the total number of certified workers from each country by the total number of new visas allowed from FY 2007 to FY 2009 (66,000 new visas  $\times$  3 years, or 198,000 workers) divided by the total number of workers from FY 2007 to FY 2009.

<sup>46</sup> The top 10 countries of origin by the number of certified H-2B workers who entered during FY 2007–2009 are as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251; South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577.

<sup>47</sup> The one-way travel costs used for each country are as follows: Mexico, \$179; Jamaica, \$285; Guatemala, \$484; Philippines, \$973; Romania, \$1,147; South Africa, \$1,168; United Kingdom, \$726; Canada, \$165; Israel, \$908; and Australia, \$1,648. The transportation cost for Mexico is based on the cost of a bus trip from Mexico City, Mexico, to Ciudad Juarez, Mexico (source: <http://www.ticketbus.com.mx>) and a bus trip from El Paso, Texas, to St. Louis, Missouri (source: <http://www.greyhound.com>). The transportation cost for Canada is based on the cost of a bus trip from Ottawa, Ontario, to St. Louis, Missouri (source: <http://www.greyhound.com>). The airfare costs for the remaining countries are based on the cost of a flight from the capital city of the country in question to St. Louis, Missouri (source: <http://www.kayak.com>).

weighted average one-way cost by two, by the number of H-2B workers per average small entity and the probability that the worker is a new entrant to the country (57 percent).<sup>48</sup> The total annual average roundtrip transportation costs incurred by the average small employer in the top five industries are as follows: Landscaping Services, \$375.89 ( $\$286 \times 2 \times 1.2 \times 0.57$ ); Janitorial Services, \$1,846.74 ( $\$286 \times 2 \times 5.7 \times 0.57$ ); Food Services and Drinking Places, \$1,029.60 ( $\$286 \times 2 \times 3.2 \times 0.57$ ); Amusement, Gambling, and Recreation, \$817.14 ( $\$286 \times 2 \times 2.5 \times 0.57$ ); and Construction, \$1,029.60 ( $\$286 \times 2 \times 3.2 \times 0.57$ ). We do not know to what extent employers are currently paying for this cost in order to secure these workers or because of their obligations under the Fair Labor Standards Act. To the extent that this is the case, these transportation cost estimates are upper-bound estimates.

We estimate the per-worker cost of subsistence by multiplying the subsistence per diem (\$10.64) by the weighted average one-way travel time for the top ten H-2B countries (1.055 days), the number of one-way trips (two), and the probability that the worker is a new entrant to the country (57 percent).<sup>49</sup> We estimate the average annual cost of subsistence to be approximately \$12.83 ( $\$10.64 \times 1.055 \times 2 \times 0.57$ ) per H-2B worker.

This provision applies not only to H-2B workers, but also to workers in corresponding employment on H-2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. We were unable to identify adequate data to estimate the number of corresponding workers and, thus, we are unable to quantify this impact.

c. Visa-Related and Border Crossing Fees

Under the 2008 Final Rule, visa fees are permitted to be paid by the temporary worker. The NPRM, however, proposes to require visa fees to be paid by the employer. Requiring employers to bear the full cost of hiring foreign

<sup>48</sup> The H-2B program is capped at 66,000 new visas per year. We estimate the probability that the worker is a new entrant by dividing 66,000 by the total number of H-2B workers (115,500), which includes both new entrants and H-2B workers who entered in the previous 2 years. We assume that 33,000 of the 66,000 workers stay one additional year and 16,500 workers stay two additional years, for a total of 115,500 H-2B workers in any given year.

<sup>49</sup> Source: 20 CFR 655. The one-way travel days applied to each country of origin is as follows: Mexico, 1; Jamaica, 1; Guatemala, 1; Philippines, 2; Romania, 1; South Africa, 2; United Kingdom, 1; Canada, 1; Israel, 1; and Australia, 2.

workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on domestic workers.

The Department estimates the cost of visa fees by adding the cost per H-2B visa (\$150) and the weighted average consular fee (\$27.15)<sup>50</sup> by the average number of H-2B employees in small entities in each of the top five industries and the probability that the worker is a new entrant to the country (57 percent).<sup>51</sup> The total annual average visa fee costs incurred by the average small employer in the top five industries are as follows: Landscaping Services, \$121.17 ( $\$177.15 \times 1.2 \times 0.57$ ); Janitorial Services, \$575.56 ( $\$177.15 \times 5.7 \times 0.57$ ); Food Services and Drinking Places, \$323.12 ( $\$177.15 \times 3.2 \times 0.57$ ); Amusement, Gambling, and Recreation, \$252.44 ( $\$177.15 \times 2.5 \times 0.57$ ); and Construction, \$323.12 ( $\$177.15 \times 3.2 \times 0.57$ ).<sup>52</sup>

d. Disclosure of Job Order

The NPRM proposes to require an employer to provide a copy of the job order to an H-2B worker no later than the time at which the worker outside of the U.S. applies for the H-2B visa or to a worker in corresponding employment no later than on the day that work starts. The job order must be translated to a language understood by the worker. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B employer, the copy must be provided no later than the time the subsequent H-2B employer makes an offer of employment.

We estimate two cost components of the disclosure of job orders: The cost of reproducing the document containing the terms and conditions of employment, and the cost of translation. We obtain the cost of reproducing the terms and conditions by multiplying the number of pages to be photocopied (3) by the cost per photocopy (\$0.12) and the percent of certified H-2B workers that are not involved in reforestation

<sup>50</sup> The top 10 countries of origin and the number of certified H-2B workers during FY 2007–2009 were as follows: Mexico, 134,226; Jamaica, 17,068; Guatemala, 6,530; Philippines, 4,963; Romania, 3,251; South Africa, 3,239; United Kingdom, 2,511; Canada, 2,371; Israel, 1,784; and Australia, 1,577. We use these values to weight the country-specific consular costs to obtain the weighted average consular fee of \$27.15.

<sup>51</sup> The visa fee of \$150 went into effect on June 4, 2010. Source: <http://www.state.gov/r/pa/prs/ps/2010/05/142155.htm>.

<sup>52</sup> Similar to the transportation and subsistence cost discussed in the previous section, this analysis accounts for the annual 66,000-person cap on the issuance of H-2B visas.

(88.3 percent).<sup>53</sup> We estimate average annual reproduction costs per H-2B employee per small H-2B employer of \$0.32 per year ( $3 \times \$0.12 \times 0.883$ ). We then multiply this product by the average number of H-2B workers in the top five industries to obtain the following average annual costs per small employer: Landscaping Services, \$0.37 ( $\$0.32 \times 1.2$ ); Janitorial Services, \$1.80 ( $\$0.32 \times 5.7$ ); Food Services and Drinking Places, \$1.00 ( $\$0.32 \times 3.2$ ); Amusement, Gambling, and Recreation, \$0.79 ( $\$0.32 \times 2.5$ ); and Construction, \$1.00 ( $\$0.32 \times 3.2$ ).

For the cost of translation, the Department assumes that an employer hires all of its H-2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is necessary per employer needing translation. Using DHS data, we determined that approximately 83.92 percent of H-2B workers from the top ten countries of origin do not speak English. We use this as a proxy for the probability that an H-2B employer will need to translate the job order. We obtain the cost of translation by multiplying the percent of H-2B workers who do not speak English (83.92) by the number of pages of the terms and conditions (3) and by the translation cost per page (\$21.00).<sup>54</sup> We estimate average annual translation costs of \$52.87 per employer ( $0.8392 \times 3 \times \$21.00$ ).

#### e. Additional Recruiting Directed by the Certifying Officer

Under the proposed rule, the employer may be directed by the CO to conduct additional recruitment of the CO has determined that there may be available and qualified U.S. workers, including where the job opportunity is located in an area of substantial unemployment. There is no such provision in the 2008 Final Rule.

We estimate this cost by multiplying the average cost of a newspaper advertisement (\$25.09) by 0.5 based on our estimate that 50 percent of H-2B employers can be expected to be directed by the CO to conduct additional recruitment for a total cost of

<sup>53</sup> The requirement to disclose the job order does not result in a new cost to reforestation employers because the Migrant and Seasonal Agricultural Worker Protection Act presently requires reforestation employers to make this disclosure. According to H-2B program data for FY2000–FY2009, 88.3 percent of H-2B workers work in an industry other than reforestation.

<sup>54</sup> The source of the percentage of H-2B workers who do not speak English is the “Yearbook of Immigration Statistics”, 2007–2009 (<http://www.dhs.gov/xlibrary/assets/statistics/yearbook/>). The source for the translation cost per page is <http://www.languagescape.com>.

\$12.55 ( $\$25.09 \times 0.50$ ) per employer.<sup>55</sup> We also add the labor cost to prepare the advertisement. The latter cost is calculated by multiplying the estimated time required to post the advertisement (0.08 hours, or 5 minutes) by the scaled hourly compensation rate of an administrative assistant/executive secretary (\$28.64)<sup>56</sup> and our estimate that 50 percent of H-2B employers can be expected to be directed by the CO to conduct additional recruiting for a total labor cost of \$1.15 ( $0.08 \times \$28.64 \times 0.50$ ) per employer. Thus, the total annual cost of CO-directed recruiting is estimated to be \$13.69 ( $\$12.55 + \$1.15$ ) per employer.<sup>57</sup>

#### f. Reading and Reviewing the New Processes and Requirements

During the first year that this rule would be in effect, employers would need to learn about the new processes and requirements. We estimate this cost for a hypothetical small entity which is interested in applying for H-2B workers by multiplying the time required to read the new rule and any educational and outreach materials that explain the H-2B application process under the rule by the average compensation of a human resources manager.<sup>58</sup> In the first year of the rule, the Department estimates that the average small business participating in the program will spend approximately 3 hours of staff time to read and review the new processes and requirements, which amounts to approximately \$184.26

<sup>55</sup> To obtain the average cost of a newspaper advertisement, we averaged the advertisement rates for the following newspapers: The Augusta Chronicle, the Austin Chronicle, the Huntsville Times, the Los Alamos Monitor, the San Diego Union-Tribune, and the Advertiser Times (Detroit, Michigan). Other means of recruiting are possible under this NPRM (such as listings on Monster.com and Career Builder), but they may be more costly, while other recruiting means (such as contacting community-based organizations) may be less costly.

<sup>56</sup> It is possible that there will be additional costs incurred by small employers due to interviewing additional applicants who are referred to H-2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and, thus, is unable to quantify this impact.

<sup>57</sup> It is possible that there will be additional costs incurred by small employers due to interviewing additional applicants who are referred to H-2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and, thus, is unable to quantify this impact.

<sup>58</sup> The hourly compensation rate for a human resources manager is calculated by multiplying the hourly wage of \$42.95 (as published by the Department’s OES survey, O\*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for a human resources manager is \$61.42.

( $\$61.42 \times 3$ ) in labor costs in the first year.<sup>59</sup>

#### g. Departure Time Determination

The NPRM proposes to require employers to provide notice to the local SWA of the time at which the last H-2B worker departs for the place of employment, if the last worker has not departed by 3 days before the date of need. The cost of this provision is the sum of the time required to place a phone call by the employer to the H-2B workers’ representative to verify when the last H-2B worker will depart for the place of employment, the cost of the long-distance phone call (one call per employer), the time required to prepare and mail a letter to the SWA, and the cost of paper, an envelope, and postage.

To estimate the cost of placing the phone calls, we multiply the time needed to contact a representative of the H-2B workers (0.08 hours, or 5 minutes) by the scaled hourly compensation rate; of an administrative assistant/executive secretary (\$28.64), which totals \$2.39 ( $0.08 \times \$28.64$ ).<sup>60</sup> To this product, we add the weighted average cost of a long distance phone call to the top 10 countries (\$3.23) to obtain total average annual costs of contacting H-2B workers equal to \$5.62 ( $\$2.39 + \$3.23$ ).<sup>61</sup>

Once the H-2B employer has determined when the last H-2B worker will depart his or her home, if the last worker has not departed by three days before the date of need, the employer must notify the local SWA in writing. We estimate the cost of preparing and mailing a letter to the SWA by summing the labor costs to prepare and mail a letter and the cost of paper, an envelope, and postage.

We estimate the labor cost by multiplying the scaled hourly labor compensation of an administrative assistant/executive secretary (\$28.64) by the percentage of H-2B applicants that will be required under this provision to ensure contact with the SWA (10 percent) and the sum of the time needed to draft the main content of a letter (0.25

<sup>59</sup> The number of small businesses that will read and review the Final Rule is likely to include some that will not apply for the program. There are no available data to quantify this possible effect.

<sup>60</sup> The hourly compensation rate for an administrative assistant/executive secretary is calculated by multiplying the hourly wage of \$20.03 (as published by the Department’s OES survey, O\*NET Online) by 1.43 to account for private-sector employee benefits (Source: BLS). Thus, the loaded hourly compensation rate for an administrative assistant/executive secretary is \$28.64.

<sup>61</sup> We collected long distance call charges from both AT&T and Verizon and averaged them. Source: <http://www.wireless.att.com/learn/international/long-distance/in-the-us.jsp> and [http://www22.verizon.com/longdistance/business\\_east/plan\\_tw\\_brates.jsp](http://www22.verizon.com/longdistance/business_east/plan_tw_brates.jsp).

hours, or 15 minutes), and the time needed to type the letter and prepare it for mailing (0.08 hours, or 5 minutes). This calculation yields average annual labor costs of \$0.95 ( $\$28.64 \times 0.10 \times (0.25 + 0.08)$ ). We estimate the material costs of contacting the SWA by multiplying the percentage of H-2B employer applicants that we assume will be requested to contact the SWA (10 percent) by the sum of the cost of a sheet of paper (\$0.02), the cost of an envelope (\$0.04), and the postage per envelope (\$0.44). We estimate the total material costs at \$0.05 ( $0.10 \times (\$0.02 + \$0.04 + \$0.44)$ ) per letter.

In total, the Department estimates the total average annual costs of departure time determination to be approximately \$6.62 ( $\$5.62 + \$0.95 + \$0.05$ ) per year.

#### h. Contacting Labor Organizations

The NPRM proposes to require the employer to contact the local union to locate able, willing, and qualified U.S. workers where union representation is prevalent in the occupation or where the position is currently governed by a collective bargaining agreement. The employer must provide written notice of the job opportunity to the representative(s) of any of the employer's employees in the job classification and geographic area in which the work will be performed. This provision of the proposed rule expands the requirement from the baseline established by the 2008 Final Rule because it requires the employer to contact the local union if the job is customarily unionized even if there is no union or CBA with the employer.

We estimate two components of the cost to contact labor organizations: labor and materials. We estimate the labor cost by multiplying the scaled hourly labor compensation of an administrative assistant/executive secretary (\$28.64) by the time needed to draft, type, print, and mail out the letter (0.25 hours, or 15 minutes, to draft, type, and print the letter, and 0.08 hours, or 5 minutes, to mail the letter) and the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent).<sup>62</sup> We estimate the annual average labor costs per letter to be \$1.18 ( $\$28.64 \times (0.25 + 0.08) \times 0.123$ ).

<sup>62</sup> Unionization data for the following occupations were used: Arts, entertainment, sports, and media; food preparation and serving related; building and grounds cleaning and maintenance; personal care and service; farming, fishing, and forestry; construction and extraction; and installation, maintenance, and repair. These occupational categories represent the majority of H-2B occupations. Source: <http://www.bls.gov/webapps/legacy/cpslutab3.htm>.

The second cost component we estimate is the material costs. We calculate this cost by summing the cost of a sheet of paper (\$0.02), an envelope (\$0.04), and postage (\$0.44), and multiplying the resulting sum by the percent of workers in the relevant occupations that were represented by unions from 2007 to 2009 (12.3 percent). We estimate the total material costs at \$0.06 ( $(\$0.02 + \$0.04 + \$0.44) \times 0.123$ ) per letter.

In total, the Department estimates the cost of contacting labor organizations and bargaining representatives to be \$1.24 ( $\$1.18 + \$0.06$ ) per employer.

#### i. Document Retention

Under the NPRM, H-2B employers must retain documentation beyond that required by the 2008 Final Rule. The Department assumes that each H-2B employer will purchase a filing cabinet (\$21.99) in which to store the additional documents starting in the first year of the rule.<sup>63</sup>

#### j. Elimination of Attestation-Based Model

The 2008 Final Rule uses an attestation-based model: employers conduct the required recruitment in advance of application filing and, based on the results of that effort, apply for certification from the Department for a number of foreign workers to fill the remaining openings. Employers currently attest that they have undertaken the necessary activities and made the required assurances to workers. The Department has determined that there are insufficient worker protections in the attestation-based model. In eliminating the attestation based-model, the NPRM shifts the recruitment process to after the application is filed so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of eliminating the attestation based-model is a change in the timing of recruitment more so than a change in substantive requirements.

The elimination of the attestation-based model will impose minimal costs on employers because they will only need to include additional information in their recruitment report, including information on additional recruitment conducted, means of posting, contact with former U.S. workers, and contact with labor organizations where the union representation is prevalent in the occupation. We estimate two costs for the elimination of the attestation-based

<sup>63</sup> Source: <http://www.staples.com>.

model: The material cost to reproduce and mail the documents, and the labor cost to reproduce and mail the documents. To estimate the cost of reproducing and mailing the documents, we multiply the additional number of pages that must be submitted (3) by the additional postage required to ship those pages (\$0.17). We estimate this cost to be approximately \$0.51 per employer. To estimate the labor cost of reproducing and mailing the documents, we multiply the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) by the scaled hourly labor compensation of an administrative assistant/executive secretary (\$28.64). We estimate this cost to be approximately \$2.39 per employer.

#### k. Other

The NPRM proposes to require employers to post the availability of the job opportunity in at least two conspicuous locations at the place of anticipated employment for at least 10 consecutive days. This provision entails additional reproduction costs. For the job posting requirement, the total cost to photocopy the additional job postings (two) is \$0.24 per employer.

#### 3. Total Cost Burden for Small Entities

The Department's calculations indicate that for a hypothetical small entity in the top five industries that applies for one worker (representing the smallest of the small entities that hire H-2B workers), the total average annual cost of the NPRM is \$539. The average annual costs for employers in the top five industries that hire the average number of employees for their respective industries are as follows: Landscaping Services, \$614; Janitorial Services, \$2,851; Food Services and Drinking Places, \$1,608; Amusement, Gambling, and Recreation, \$1,285, and Construction, \$1,608.

The proposed rule is not expected to have a significant economic impact on a hypothetical small entity that applied for enough workers to fill 50 percent of its workforce. To evaluate this impact, the Department calculates the total cost burden as a percent of revenue for each of the top five industries. The estimated revenues for small entities in the top five industries that hire one employee are as follows: Landscaping Services, \$79,315; Janitorial Services, \$29,839; Food Services and Drinking Places, \$35,365; Amusement, Gambling, and Recreation, \$41,644; and Construction, \$140,306.<sup>64</sup> The Department then

<sup>64</sup> Source: 2002 County Business Patterns and 2002 Economic Census. <http://www.census.gov/econ/subs/data/subs2002.html>.

divides the total cost burden for small entities hiring one worker by the total estimated revenue for small entities in each of the top five industries. The total costs as a percent of revenues for the top five industries are as follows:

Landscaping Services, 0.7 percent (\$539/\$79,315); Janitorial Services, 1.8 percent (\$539/\$29,839); Food Services and Drinking Places, 1.5 percent (\$539/\$35,365); Amusement, Gambling, and Recreation, 1.3 percent (\$539/\$41,644); and Construction, 0.4 percent (\$539/\$140,306).

To estimate the revenues for small entities hiring the average number of employees, the Department multiplies the average revenue per employee for small entities in the top five industries by the average number of employees per small entity. The estimated revenues for small entities in the top five industries that hire the average number of employees are as follows: Landscaping Services, \$182,425 ( $\$79,315 \times 2.3$ ); Janitorial Services, \$337,181 ( $\$29,839 \times 11.3$ ); Food Services and Drinking Places, \$222,800 ( $\$35,365 \times 6.3$ ); Amusement, Gambling, and Recreation, \$208,220 ( $\$41,644 \times 5$ ); and Construction, \$883,928 ( $\$140,306 \times 6.3$ ). The total cost burden as a percent of revenue for small entities hiring the average number of workers in the top five industries are as follows:

Landscaping Services, 0.3 percent ( $\$614/\$182,425$ ); Janitorial Services, 0.9 percent ( $\$2,851/\$337,181$ ); Food Services and Drinking Places, 0.7 percent ( $\$1,608/\$222,800$ ); Amusement, Gambling, and Recreation, 0.6 percent ( $\$1,285/\$208,220$ ); and Construction, 0.2 percent ( $\$1,608/\$883,928$ ).

Moreover, the small entities that have historically applied for H-2B workers represent very small proportions of all small businesses. The following are the percentages of firms that were certified for H-2B workers among all small U.S. businesses in their respective industries: Landscaping Services, 2.2 percent [ $(2,754 \times 0.50)/63,210$ ]; Janitorial Services, 0.9 percent [ $(788 \times 0.50)/45,595$ ]; Food Services and Drinking Places, 0.1 percent [ $(851 \times 0.50)/293,373$ ]; Amusement, Gambling, and Recreation, 0.3 percent [ $(227 \times 0.50)/43,726$ ], and Construction, 0.1 percent [ $(860 \times 0.50)/689,040$ ].<sup>65</sup> Due to the statutory annual cap on available visas,

<sup>65</sup> The source of the numerator (*i.e.*, the number of certified H-2B employers) is H-2B program data for FY 2007-2009. The source of the denominator (*i.e.*, the total number of U.S. businesses meeting the SBA small-size criteria) is the 2002 County Business Patterns and 2002 Economic Census. <http://www.census.gov/econ/susb/data/susb2002.html>. We multiply the numerator by 0.50 to reflect our assumption that 50 percent of H-2B employers are small businesses.

the percentage of small entities receiving H-2B visas, to which the full cost burden would apply, would be even lower.

Therefore, the Department believes that this proposed rule is expected to have a net direct cost impact on a very limited number of small non-agricultural employers above the baseline of the current costs incurred by the program as it is currently implemented under the 2008 Final Rule. Accordingly, the proposed rule is not expected to impact a substantial number of small entities.

#### 5. Identification of All Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

The Department is not aware of any relevant Federal rules that duplicate, overlap or conflict with the proposed rule.

#### 6. Alternatives Considered as Options for Small Businesses

While we have concluded that this proposed regulation will not have a significant economic impact on a substantial number of small entities, we have made every effort to minimize the cost burden on the relatively small number of businesses that do use the program. The Department's mandate under the H-2B program is to set requirements for employers that wish to hire temporary foreign non-agricultural workers. Those requirements are designed to ensure that foreign workers are used only if qualified domestic workers are not available and that the hiring of H-2B workers will not adversely affect the wages and working conditions of similarly employed domestic workers. These regulations set those minimum standards. To create different and likely lower standards for one class of employers (*e.g.*, small businesses) would essentially sanction the very adverse effect that the Department is compelled to prevent.

The Department considered a number of alternatives: (1) To propose the policy changes contained in this NPRM; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to propose a number of other options discussed in more detail below. We believe that this NPRM retains the best features of the 2008 Final Rule and proposes additional provisions to best achieve the Department's policy objectives, consistent with its mandate under the H-2B program. We request comments from the public on the best alternatives that would balance the needs of small businesses with providing adequate protections to U.S. and H-2B workers. We are also interested in any available

information about the number of U.S. workers that would benefit from increased opportunity for jobs.

The Department considered alternatives to a number of program proposals. First, the Department considered defining full-time as 40 hours a week instead of the proposed 35 hours a week, as discussed in more detail in the preamble to proposed § 655.5. The Department concluded that defining full-time as 35 hours is more consistent with the Department's historical practice for the H-2B program, and should therefore not pose difficulty for the regulated community. Nevertheless the Department has asked for comments as to whether extending the definition of a full-time workweek to at least 40 hours is more protective of U.S. workers and whether it conforms better to employer standards and needs.

Second, while the Department proposed to allow certain deductions from a worker's earnings for the provision of items that are primarily for the benefit of the H-2B employer, as long as they do not bring the worker's actual wages paid below the H-2B required wage level, the Department considered as an alternative using the rule under the FLSA, which specifies the Federal minimum wage as the floor beneath which such deductions cannot lower a worker's wages paid. The Department rejected this alternative because using the H-2B required wage level as the floor rather than the Federal minimum wage offers greater protection to U.S. workers from adverse effect by preserving the integrity of the offered wage. Otherwise, the employer, who is obligated to pay the "offered wage" which is generally higher than the FLSA minimum wage, could take deductions from wages that could reduce the effective wage to the FLSA minimum.

Third, this NPRM introduces a three-fourths guarantee requirement modeled generally on that used in the H-2A program. The Department considered retaining the language of the H-2A requirement, under which employers 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 length of the contract. The Department rejected this alternative because, while this would provide workers with significant protection, it would not be sufficient to discourage the submission of imprecise dates of need and/or imprecise numbers of employees needed and would therefore fail to protect U.S. and H-2B workers from periods of unforeseen underemployment.

The Department believes that the proposal, which calculates the hours of

employment offered in 4-week periods, better ensures that workers' commitment to a particular employer will result in real jobs that meet their reasonable expectations. We do not believe the proposal will create any additional burden on employers who have accurately represented their period of need and number of workers needed, and will provide an additional incentive for applicants to correctly state ALL OF their needs on the Application for Temporary Employment Certification.

Finally, the Department considered not including a separate registration process under which H-2B employers first file a registration application with the Department. This registration process, as proposed, is intended to resolve the question of whether the employer's need is temporary before the employer is required to begin recruitment. The Department considered instead retaining the current practice for the adjudication of the employer's temporary need and the labor market analysis to occur simultaneously. While this might be more advantageous for employers new to the program, it delays the vast majority of employers who are recurring users with relatively stable dates of need and who would benefit from separate adjudication of need and adequacy of recruitment. Moreover, all employers and potential workers benefit from a recruitment process close in time to the actual date of need which a registration process, by pre-determining temporary need, expressly permits. Therefore, the Department rejected the alternative of simultaneous adjudication because it undercuts the Secretary's fulfillment of her obligations under the program.

Ultimately, the decision of an employer to apply for H-2B workers is a voluntary choice. That is, any individual employer can avoid the costs associated with the NPRM by not applying for H-2B workers.

#### *C. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. The proposed rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity

to obtain an H-2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

SWAs are mandated to perform certain activities for the Federal Government under the H-2B program, and receive grants to support the performance of these activities. Under the 2008 Final Rule the SWA role was changed to accommodate the attestation-based process. The current regulation requires SWAs to accept and place job orders into intra and interstate clearance, review referrals, and verify employment eligibility of the applicants who apply to the SWA to be referred to the job opportunity. Under the proposed rule the SWA would continue to play a significant and active role. The Department is proposing to continue the requirement that employers submit their job orders to the SWA having jurisdiction over the area of intended employment as is the case in the current regulation. In addition to providing the job order the Department proposes that the employer will provide a copy of the *Application for Temporary Employment Certification* to the SWA; however, this is simply a copy for disclosure purposes and would require no additional information collection or review activities by the SWA. The Department is also proposing to continue to require SWAs to place job orders into clearance, as well as provide employers with referrals received in connection with the job opportunity. The Department recognizes that based on the extended recruitment times and the possibility that the CO could require additional interstate recruitment under this proposed rule, SWAs may experience a slight increase in their workload. However, the Department is proposing to eliminate the employment verification responsibilities the SWA has under the current regulations. With the elimination of workload created by the employment verification requirement SWAs can now apply those resources to the additional recruitment requirements proposed under this rule.

SWA activities under the H-2B program are currently funded by the Department through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this NPRM and the publication of a final regulation, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.

#### *D. Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)*

The Department has determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA; therefore, the Department is not required to produce any compliance guides for small entities as mandated by the SBREFA. The Department has similarly concluded that this proposed rule is not a major rule requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### *E. Executive Order 13132—Federalism*

The Department has reviewed this proposed rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The proposed rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government as described by E.O. 13132. Therefore, the Department has determined that this proposed rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

#### *F. Executive Order 13175—Indian Tribal Governments*

This proposed rule was reviewed under the terms of E.O. 13175 and determined not to have tribal implications. The proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. As a result, no tribal summary impact statement has been prepared.

#### *G. Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of

1999 (Pub. L. 105–277, 112 Stat. 2681) requires the Department to assess the impact of this proposed rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this proposed rule and determines that it will not have a negative effect on families.

#### *H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights*

The proposed rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

#### *I. Executive Order 12988—Civil Justice*

The proposed rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has developed the proposed rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the proposed rule carefully to eliminate drafting errors and ambiguities.

#### *J. Plain Language*

The Department drafted this NPRM in plain language.

#### *K. Paperwork Reduction Act*

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This process helps to ensure that the public understands the Department's collection instructions; respondents provide requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department properly assesses the impact of collection requirements on respondents.

The PRA requires all Federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions within the proposed regulations that require the submission of information.

These information collection (IC) requirements must be submitted to OMB for approval. 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) or it is exempt from the PRA.

The majority of the IC requirements for the current H–2B program are approved under OMB control number 1205–0466 (which includes ETA Form 9141 and ETA Form 9142). The Department is proposing to add a new IC to the same OMB control number, specifically, the ETA Form 9155. In addition, the IC for the ETA Form 9142 will need to be modified to account for new requirements under the proposed regulation.

A number of the provisions under this proposed rule are exempt from a burden analysis. Below is a section-by-section analysis of the PRA burden. Any necessary adjustments to the burden calculations have been submitted to OMB for review under sec. 3507(d) of the PRA. For an additional explanation of how the Department calculated the burden hours and related costs, the PRA package for IC 1205–0466 may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>.

PRA Addressee: Sherril Hurd, Office of Policy Development and Research, U.S. Department of Labor, Employment & Training Administration, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210. Telephone: 202–693–3700 (this is not a toll-free number).

Comments regarding the IC should be sent to (1) the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employment and Training Administration; and a copy to (2) Office of Foreign Labor Certification, Room C–4312, 200 Constitution Ave., NW., Washington, DC 20210 or fax: 202–693–2768. Comments to OMB may be submitted by using the Federal eRulemaking portal at <http://www.regulations.gov> (follow instructions for submission of comments) or by fax: 202–395–5806. OMB requests that comments be received within 60 days of publication of the Proposed Rule to ensure their consideration. Please note that comments submitted to OMB are a matter of public record.

When submitting comments on the information collection, your comments

should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

#### Summary

The information collection is required by Title 8 CFR 214.2(h)(6) of the DHS regulations. Title 8 CFR 214.2(h)(6)(b)(iii)(A) and (iv)(A) require the Secretary to certify, among other things, that any foreign worker seeking to enter the U.S. for the purpose of performing certain temporary nonagricultural labor will not, by doing so, adversely affect wages and working conditions of U.S. workers similarly employed. The Secretary must also certify that qualified workers in the U.S. are not available for the job opportunity. Before any employer may petition for any temporary nonagricultural foreign workers, it must submit a request for certification to the Secretary containing the elements prescribed by the DHS regulations.

This proposed rule is designed to obtain the necessary information for the Secretary to make an informed decision in meeting the Department's obligations. The information collected will be used, among other things: To inform U.S. workers of the job opportunity thereby testing the labor market; to determine whether or not the employer is offering the proper wage to all employees; to ensure that the employer (and its agent) is eligible to employ foreign workers under the H–2B program; to have written assurances from the employer of its intent to comply with program requirements; and to ensure program integrity.

**BILLING CODE 4510–FP–P**

Hourly Burden

NPRM Section	IC Action	Obligation to Respond <sup>66</sup>	Covered under OMB#	Total # Resp.	Hourly Burden	Total Hours
655.8(a)	Proof of agent relationship.	M	1205-0466	1,875	30 min.	938
655.8(b)	Agent's proof of MSPA license.	M	1205-0466	12	5 min.	1
655.9	Foreign recruitment contracts.	M	1205-0466	3,966	5 min.	331
655.11	Fill out 9155.	M	1205-0466	8,717	1 hour	8,717
655.11(g)	Respond to RFI.	R	1205-0466	2,711	1 hour	2,711
655.12	Fill out 9141.	M	1205-0466	8,717	1 hour	8,717
655.13(a)	Written request for Center Director review.	R	1205-0466	110	30 min.	55
655.13(c)	Written request for BALCA review.	R	1205-0466	5	30 min.	3
655.15	Fill out 9142.	M	1205-0466	8,717	1 hour	8,717
655.16	Employer review of Job Order.	M	1205-0466	8,717	1 hour	8,717
655.17	Request waiver of filing deadline.	R	1205-0466	111	30 min.	56
655.20(i)/503.16(f)	Provide copy of Job Order to workers.	M	1205-0466	236,706	5 min.	19,726
655.20(m)/503.16(m)	Workers' rights poster.	M	Exempt <sup>67</sup>			
655.20(p)/503.16(p)	Inform of fee prohibition.	M	1205-0466	3,966	15 min.	992
655.20(y)/503.16(y)	Notify of abscondment or termination.	M	1205-0466	2,500	10 min.	417
655.32	Modify application.	R	1205-0466	2,711	1 hour	2,711
655.33(b)(3)	Notify SWA if H-2B workers early or late.	M	1205-0466	653	20 min.	218
655.33(b)(4)-(7)	SWA posts, refers, and distributes.	M	Exempt <sup>68</sup>			
655.35	Amend application.	R	1205-0466	522	30 min.	261
655.40, 42, & 46	Advertising.	R	Exempt <sup>69</sup>			
655.43	Contact old employees.	R	1205-0466	8,717	1 hour	8,717
655.44, 45	Contact union.	R	1205-0466	8,717	15 min	2,179
655.45	Creating and posting notice of job vacancy.	R	1205-0466	8,717	30 min.	4,359
655.45(c), 46	Additional recruitment.	R	1205-0466	1,983	5 min.	165
655.46(c)	Proof of recruitment.	M	Exempt <sup>70</sup>			
655.47	SWA informs applicants of requirements.	M	1205-0466	60,000	5 min.	5,000
655.48	Recruitment report.	R	1205-0466	8,717	1 hour	8,717
655.56/503.17	Document retention.	M	1205-0466	8,717	10 min.	1,453
655.60	Extension application.	R	1205-0466	326	30 min.	163
655.61(a)	Notice of Appeal.	R	1205-0466	110	1 hour	110
655.62	Request withdrawal.	R	1205-0466	184	10 min.	31
655.70, 71, 72, & 73	Audit, revocation, debarment.	R	Exempt <sup>71</sup>			
503.16(aa)	Compliance with investigation.	R	Exempt <sup>72</sup>			
503.43	Request for hearing with ALJ	R	1205-0466	2	2 hour	4
503.51	Request for hearing with ARB	R	1205-0466	1	30 min.	1
<b>Total Responses: 396,907</b>						<b>Total Hrs: 94,187</b>

### Annual Hourly Burden

In order to estimate the potential hourly burden of the information collection required to apply for a labor certification as described in this proposed rule, the Department relied upon program experience and program data from FY 2000–2009. Based on information on program usage from these years, the Department estimates that it will receive an average of 8,717 applications requesting approximately 236,706 foreign workers. This is a decrease from the 12,000 applications estimated in the previous submission used to calculate the original burden in 1205–0466 and is in part due to the fluctuating U.S. economy over the years. Specifically, the methodology used to arrive at the current lower estimate includes periods in which the U.S. economy grew and periods in which the U.S. economy contracted.

For the number of appeals, modifications, requests for waivers of the filing time, extensions, and other program components requiring information collection under the PRA, the Department based its estimates on program experience in the current program and its other programs with similar procedures to determine annual hourly burdens described in the chart above.

The total annual hourly burden for the IC in this NPRM is 94,187 hours.

### Monetized Hourly Burden

Employers filing applications for temporary alien employment certification represent a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars, where the corporate executive office of a large company performs some or all of these functions itself. However, the Department recognizes that in most companies a Human Resources Manager will perform these activities. Therefore, in estimating employer staff time and costs, the Department used the hourly wage rate for a Human Resources

Manager (\$42.95), as published by the U.S. Department of Labor's Occupational Employment Statistics OnLine,<sup>73</sup> and increased by a factor of 1.43 to account for employee benefits and other compensation for a total hourly cost of \$61.42. Total annual respondent hour costs for the information collection is estimated as follows:

1205–0466 94,187 hours × \$61.42 = \$5,784,966

### Cost Burden to Respondents

The proposed rule does not alter any out-of-pocket expenses such as filing fees to participate in the program. There is also no capital investment required to participate.

*Affected Public:* Farms, business or other for-profit; not-for-profit institutions.

*Estimated Number of Respondents:* 3,966.

*Estimated Number of Responses:* 396,984.

*Frequency of Response:* Annually; occasionally.

*Estimated Annual Burden Hours:* 94,187.

*Estimated Annual Hourly Burden Cost:* \$5,784,966.

*Estimated Annual Cost Burden:* \$0.

### List of Subjects

#### 20 CFR Part 655

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

#### 29 CFR Part 503

Administrative practice and procedure, Employment, Foreign Workers, Housing, Housing standards, Immigration, Labor, Nonimmigrant workers, Penalties, Transportation, Wages.

### Title 20—Employees' Benefits

#### PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

1. The authority citation for part 655 continues to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i)

<sup>73</sup> Source: Bureau of Labor Statistics 2009 OES wage data for Washington, DC.

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. In subpart A, revise §§ 655.1 through 655.6 to read as follows:

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

Sec.

655.1 Scope and purpose of subpart A.

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

655.3 Territory of Guam.

655.4 Special procedures.

655.5 Definition of terms.

655.6 Temporary need.

\* \* \* \* \*

#### § 655.1 Scope and purpose of subpart A.

The Immigration and Nationality Act (INA) at 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H–2B workers. DHS regulations at 8 CFR 214.2(h)(6)(iv) provide that an employer's petition to employ nonimmigrant workers on H–2B visas for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary employment certification from the Secretary of Labor (Secretary).

(a) *Purpose.* The temporary employment certification reflects a determination by the Secretary that:

<sup>66</sup> Obligation to respond to this information collection is mandatory (M), required for benefit (R), or voluntary (V).

<sup>67</sup> See 5 CFR 1320.3(c)(2).

<sup>68</sup> See 5 CFR 1320.3(b)(3); this is a normal function of SWAs.

<sup>69</sup> See 5 CFR 1320.3(b)(2).

<sup>70</sup> See 29 CFR 1602.14 (OMB 3046–0040); 29 CFR 1627.3(B)(3) (OMB 3046–0018); 29 CFR 1627.3(b)(3).

<sup>71</sup> See 5 CFR 1320.3(h)(6) & (9) and 5 CFR 1320.4(a)(2).

<sup>72</sup> See 5 CFR 1320.4(a)(2).



(1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to import foreign workers, and that

(2) The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the H-2B visa category, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b). It also establishes obligations with respect to the terms and conditions of the temporary employment certification with which H-2B employers must comply, as well as their obligations to H-2B workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the temporary employment certification.

#### **§ 655.2 Authority of the agencies, offices, and divisions in the Department of Labor.**

(a) *Authority and role of the Office of Foreign Labor Certification (OFLC).* The Secretary has delegated her authority to make determinations under this subpart, pursuant to 8 CFR 214.2(h)(6)(iv), to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to OFLC. Determinations on an *Application for Temporary Employment Certification* in the H-2B program are made by the Administrator, OFLC who, in turn, may delegate this responsibility to designated staff members, e.g., a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division (WHD).* Pursuant to its authority under the INA, 8 U.S.C. 1184(c)(14)(B), DHS has delegated to the Secretary certain investigatory and law enforcement functions with respect to terms and conditions of employment in the H-2B program. The Secretary has, in turn, delegated that authority to WHD. The regulations governing WHD investigation and enforcement functions, including those related to the enforcement of temporary employment certifications, issued under this subpart, may be found in 29 CFR part 503.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy under § 655.73 or under 29 CFR 503.24.

#### **§ 655.3 Territory of Guam.**

Subpart A of this part does not apply to temporary employment in the

Territory of Guam, except that an applicant seeking certification for a job opportunity on Guam must obtain a prevailing wage from the Department in accordance with § 655.10 of this subpart. The Department of Labor (Department or DOL) does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H-2B visas, or enforce compliance with the provisions of the H-2B visa program, in the Territory of Guam. Under DHS regulations, administration of the H-2B temporary employment certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

#### **§ 655.4 Special procedures.**

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities, the Administrator, OFLC has the authority to establish, continue, revise, or revoke special procedures in the form of variances for processing certain H-2B applications. Employers must demonstrate in writing to the Administrator, OFLC that special procedures are necessary. Before making determinations under this section, the Administrator, OFLC may consult with affected employers and worker representatives. Special procedures in place on the effective date of this regulation, including special procedures currently in effect for handling applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers, will remain in force until modified or withdrawn by the Administrator, OFLC.

#### **§ 655.5 Definition of terms.**

For purposes of this subpart:

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

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

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

*Administrator, Wage and Hour Division (WHD)* means the primary official of the WHD, or the Administrator's designee.

*Agent* means a legal entity or person who:

(1)(i) Is authorized to act on behalf of an employer for temporary

nonagricultural labor certification purposes;

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

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

*Agricultural labor or services* means those duties and occupations defined in subpart B of this part.

*Applicant* means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (Form ETA 9142 and the appropriate appendices).

*Application for Temporary Employment Certification* means the Office of Management and Budget (OMB)-approved Form ETA 9142 and the appropriate appendices, a valid wage determination, as required by § 655.12, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary employment certification determination from DOL.

*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 that 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, or quality of the regional transportation network). 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.

*Area of substantial unemployment* means a contiguous area with a population of at least 10,000 in which there is an average unemployment rate equal to or exceeding 6.5 percent for the 12 months preceding the determination of such areas made by the ETA.

*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. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

*Board of Alien Labor Certification Appeals (BALCA or Board)* means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge, and consisting of ALJs assigned to the Department and designated by the Chief ALJ to be members of BALCA. The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

*Certifying Officer (CO)* means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H-2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under this subpart.

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

*Corresponding employment* means the employment of workers who are not H-2B workers by an employer that has an accepted H-2B *Application for Temporary Employment Certification* in any work included in the job order or in any work performed by the H-2B workers. To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

*Date of need* means the first date the employer requires services of the H-2B workers as listed on the *Application for Temporary Employment Certification*.

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

*Employee* means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to

perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms "employee" and "worker" are used interchangeably in this subpart.

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

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

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and

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

*Employment and Training Administration (ETA)* means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

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

*Full time* means 35 or more hours of work per week for the purposes of the H-2B program.

*H-2B Petition* means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2B nonimmigrant workers. The *H-2B Petition* includes the approved *Application for Temporary Employment Certification* and the Final Determination letter.

*H-2B Registration* means the OMB-approved Form ETA 9155, submitted by an employer to register its intent to hire H-2B workers and to file an *Application for Temporary Employment Certification*.

*H-2B worker* means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

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

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

*Job opportunity* means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

*Job order* means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including all obligations and assurances under 29 CFR part 503 and this subpart that is posted between and among the State Workforce Agencies (SWAs) on their inter- and intra-State job clearance systems.

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

*Layoff* means any involuntary separation of one or more U.S. employees without cause.

*Metropolitan Statistical Area (MSA)* means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

*National Prevailing Wage Center (NPWC)* means that office within OFLC

from which employers, agents, or attorneys who wish to file an *Application for Temporary Employment Certification* receive a prevailing wage determination.

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

*National Processing Center (NPC)* means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications. For purposes of this subpart, the NPC receiving a request for an *H-2B Registration* and an *Application for Temporary Employment Certification* will be the Chicago NPC whose address is published in the **Federal Register**.

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

*Non-agricultural labor and services* means any labor or services not considered to be agricultural labor or services as defined in subpart B of this part. It does not include the provision of services as members of the medical profession by graduates of medical schools.

*Occupational employment statistics (OES) survey* means the program under the jurisdiction of the BLS that provides annual wage estimates for occupations at the State and MSA levels.

*Offered wage* means the wage that equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage.

*Office of Foreign Labor Certification (OFLC)* means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

*Prevailing wage determination (PWD)* means the prevailing wage for the position, as described in § 655.12, that is the subject of the *Application for Temporary Employment Certification*.

*Professional athlete* is defined in 8 U.S.C. 1182(a)(5)(A)(iii)(II), and means an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

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

*Secretary of Homeland Security* means the chief official of the U.S. Department of Homeland Security or the Secretary of Homeland Security's designee.

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

*State Workforce Agency (SWA)* means a State government agency that receives funds under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

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

*Successor in interest* means

(1) Where an employer has violated 29 CFR part 503, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

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

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

(viii) Similarity of products and services; and

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

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

*United States (U.S.)* means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the

territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

*United States Citizenship and Immigration Services (USCIS)* means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H-2B workers to perform temporary nonagricultural work in the U.S.

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

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

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

*Wage and Hour Division (WHD)* means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

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

#### § 655.6 Temporary need.

(a) An employer seeking certification under this subpart must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). The need of a job contractor is inherently permanent in nature and the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer is a job contractor.

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B). Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.

3. In subpart A, add §§ 655.7 through 655.9 to read as follows:

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

\* \* \* \* \*

Sec.

655.7 Persons and entities authorized to file.

655.8 Requirements for agents.

655.9 Disclosure of foreign worker recruitment.

\* \* \* \* \*

**§ 655.7 Persons and entities authorized to file.**

(a) *Persons authorized to file.* In addition to the employer applicant, a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* may be filed by an attorney or agent, as defined under § 655.5.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *H–2B Registration* and *Application for Temporary Employment Certification* and all documentation submitted to the Department.

**§ 655.8 Requirements for agents.**

An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide:

(a) A copy of the agent agreement or other document demonstrating the agent's authority to represent the employer; and

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration, if the agent is required under MSPA, at 29 U.S.C. 1801 *et seq.*, to have such a certificate, identifying the specific farm labor contracting activities the agent is authorized to perform.

**§ 655.9 Disclosure of foreign worker recruitment.**

(a) The employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers under this *Application for Temporary Employment Certification*.

(b) The Department will maintain a publicly available list of agents and recruiters who are party to such agreements.

4a. In subpart A add an undesignated center heading before § 655.10 to read as follows:

**Prefiling Procedures**

4b. In § 655.10, revise paragraphs (a) and (c) through (g), and add paragraphs (h) and (i) to read as follows:

**§ 655.10 Prevailing wage.**

(a) *Offered wage.* The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H–2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

\* \* \* \* \*

(c) *Request for PWD.* (1) The employer must request a PWD from the NPWC before filing the job order with the SWA.

(2) The PWD must be valid on the date the posting of the job order begins.

(d) *Multiple worksites.* If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the opportunity within the area of intended employment, the prevailing wage is the highest applicable wage among all the worksites. The provisions of this paragraph do not apply to occupations that are covered under special procedures.

(e) *NPWC action.* The NPWC will provide the PWD, indicate the source, and return the form with its endorsement to the employer.

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

(g) *Professional athletes.* In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage. See 8 U.S.C. 1182(p)(2).

(h) *Retention of documentation.* The employer must retain the PWD for 3 years from the date of issuance or the date of a final determination on the Application, whichever is later, and submit it to a CO if requested by a Notice of Deficiency, described in § 655.31, or audit, as described in § 655.70, or to a WHD representative during a WHD investigation.

(i) *Guam.* The requirements of this paragraph shall apply to any request filed for an H–2B job opportunity on Guam.

5. Revise § 655.11 to read as follows:

**§ 655.11 Registration of H–2B employers.**

All employers that desire to hire H–2B workers must establish their need for services or labor is temporary by filing an *H–2B Registration* with the NPC.

(a) *Registration filing.* An employer must file an *H–2B Registration*. The *H–2B Registration* must be accompanied by documentation evidencing:

(1) The number of positions that will be sought in the first year of registration;

(2) The time period of need for the workers requested; and

(3) That the nature of the employer's need for the services or labor to be performed is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined at 8 CFR 214.2(h)(6)(ii)(B) and § 655.6.

(b) *Original signature.* The *H–2B Registration* must bear the original signature of the employer (and that of the employer's attorney or agent if applicable).

(c) *Timeliness of registration filing.* A completed request for an *H–2B Registration* must be received by no less than 120 calendar days and no more than 150 calendar days before the employer's date of need.

(d) *Temporary need.* (1) The employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A).

(2) The employer's need will be assessed in accordance with the definitions provided by the Secretary of DHS and as further defined in § 655.6.

(e) *NPC review.* The CO will review the *H–2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors:

(1) The job classification and duties qualify as nonagricultural;

(2) The employer's need for the services or labor to be performed is temporary in nature;

(3) The number of worker positions and period of need are justified; and

(4) The request represents a bona fide job opportunity.

(f) *Mailing and postmark requirements.* Any notice or request pertaining to *H–2B Registration* sent by the CO to an employer requiring a response will be mailed using the provided address using methods to assure next day delivery, including electronic mail. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date specified by the CO or by the next

business day if the due date falls on a Saturday, Sunday or Federal holiday.

(g) *Request for information (RFI)*. If the CO determines the *H-2B Registration* cannot be approved, the CO will issue an RFI. Normally the RFI will be issued within 7 business days of the CO's receipt of the *H-2B Registration*. The RFI will:

(1) State the reason(s) why the *H-2B Registration* cannot be approved and what supplemental information or documentation is needed to correct the deficiencies;

(2) Specify a date, no later than 7 business days from the date the RFI is issued, by which the supplemental information or documentation must be sent by the employer;

(3) State that, upon receipt of a response to the RFI, the CO will review the *H-2B Registration* as well as any supplemental information and documentation and issue a Notice of Decision on the *H-2B Registration*. The CO may, at her discretion, issue one or more additional RFIs before issuing a Notice of Decision on the *H-2B Registration*; and

(4) State that failure to comply with an RFI, including not responding in a timely manner or not providing all required documentation within the specified timeframe, will result in a denial of the *H-2B Registration*.

(h) *Notice of Decision*. The CO will notify the employer in writing of the final decision on the *H-2B Registration*.

(1) *Approved H-2B Registration*. If the *H-2B Registration* is approved, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will notify the employer that it is eligible to seek *H-2B* workers in the occupational classification for the anticipated number of positions and period of need stated on the approved *H-2B Registration*. The CO may approve the *H-2B Registration* for a period of up to 3 consecutive years.

(2) *Denied H-2B Registration*. If the *H-2B Registration* is denied, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will:

(i) State the reason(s) why the *H-2B Registration* is denied;

(ii) Offer the employer an opportunity to request administrative review under § 655.61; and

(iii) State that if the employer does not request administrative review in writing within 10 business days from the date the Notice of Decision is issued, the denial is final and the Department will not further consider the *H-2B Registration*.

(i) *Retention of documents*. All employers filing an *H-2B Registration* are required to retain any documents and records not otherwise submitted proving compliance with this subpart. Such records and documents must be retained for a period of 3 years from the final date of applicability of the *H-2B Registration*, if approved, or 3 years from the date the decision is issued if the *H-2B Registration* is denied or 3 years from the day the Department receives written notification from the employer withdrawing its pending *H-2B Registration*.

6. In subpart A, add §§ 655.12 and 655.13 to read as follows:

**§ 655.12 Use of registration of H-2B employers.**

(a) Upon approval of the *H-2B Registration*, the employer is authorized for the specified period of up to 3 consecutive years from the date the *H-2B Registration* is approved to file an *Application for Temporary Employment Certification*, unless:

(1) The number of workers to be employed has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers) from the initial year;

(2) The beginning or ending date of need for the job opportunity has changed by more than 14 days from the initial year;

(3) The nature of the job classification and/or duties has materially changed; or

(4) The temporary nature of the employer's need for services or labor to be performed has materially changed.

(b) If any of the changes in paragraphs (a)(1) through (4) of this section apply, the employer must file a new *H-2B Registration* in accordance with § 655.11.

**§ 655.13 Review of PWDs.**

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

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

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

(2) Modify the PWD.

(c) *Request for review by BALCA*. Any employer desiring review of the NPWC Director's decision on a PWD must make a written request for review of the determination by BALCA within 10 business days from the date the Final Determination letter is issued.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only the evidence that was within the record upon which the decision on the PWD was based.

(2) The request for BALCA review must be in writing and addressed to the NPWC Director who made the final determination. Upon receipt of a request for BALCA review, the NPWC will prepare an appeal file and submit it to BALCA.

(3) BALCA will handle appeals in accordance with § 655.61.

7. In subpart A, add an undesignated center heading above § 655.15 to read as follows:

**Application for Temporary Employment Certification Filing Procedures**

8. Revise § 655.15 to read as follows:

**§ 655.15 Application filing requirements.**

All registered employers that desire to hire *H-2B* workers must file an *Application for Temporary Employment Certification* with the NPC designated by the Administrator, OFLC. Except for employers that qualify for emergency procedures at § 655.17, employers that fail to register under the procedures in § 655.11 and/or that fail to submit a PWD obtained under § 655.10 will not be eligible to file an *Application for Temporary Employment Certification* and their applications will be returned without review.

(a) *What to file*. A registered employer seeking *H-2B* workers must file a completed *Application for Temporary Employment Certification* (Form ETA 9142 and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in § 655.16, and copies of all contracts and agreements with any agent or recruiter executed in connection with the job opportunities, as specified in § 655.9.

(b) *Timeliness*. A completed *Application for Temporary Employment Certification* must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.

(c) *Location and method of filing*. The employer must submit the *Application for Temporary Employment*

*Certification* and all required supporting documentation by U.S. Mail or private mail courier to the NPC. The Department may also require an *Application for Temporary Employment Certification*, at a future date, to be filed electronically in addition to or instead of by mail, notice of which will be published in the **Federal Register**.

(d) *Original signature*. The *Application for Temporary Employment Certification* must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is so represented).

(e) *Requests for multiple positions*. Certification of more than one position may be requested on the *Application for Temporary Employment Certification* as long as all H-2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(f) *Separate applications*. Except as otherwise permitted under § 655.4, a separate *Application for Temporary Employment Certification* must be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. Except where otherwise permitted under § 655.4, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H-2B program.

(g) *One-time occurrence*. Where a one-time occurrence lasts longer than 1 year, the CO will instruct the employer on any additional requirements with respect to the continuing validity of the labor market test or offered wage obligation.

(h) *Information dissemination*. Information received in the course of processing a request for an *H-2B Registration*, an *Application for Temporary Employment Certification* or program integrity measures such as audits may be forwarded from OFLC to WHD, or any other Federal agency as appropriate, for investigative and/or enforcement purposes.

9. Add § 655.16 to read as follows:

**§ 655.16 Filing of the job order at the SWA.**

(a) *Submission of the job order*. (1) The employer must submit the job order to the SWA serving the area of intended employment at the same time it submits the *Application for Temporary Employment Certification* and a copy of the job order to the NPC in accordance with § 655.15. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit the job order

to any one of the SWAs having jurisdiction over the anticipated worksites, but must identify the receiving SWA on the copy of the job order submitted to the NPC with its *Application for Temporary Employment Certification*. The employer must inform the SWA that the job order is being placed in connection with a concurrently submitted *Application for Temporary Employment Certification* for H-2B workers.

(2) The job order submitted to the SWA must satisfy the requirements set forth in § 655.18.

(b) *SWA review of the job order*. The SWA must review the job order and ensure that it complies with criteria set forth in § 655.18. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO at the NPC of the noted deficiencies within 4 business days of receipt of the job order.

(c) *Intrastate and interstate clearance*. Upon receipt of the Notice of Acceptance, the SWA must promptly place the job order in intrastate and interstate clearance.

(d) *Duration of job order posting and SWA referral of U.S. workers*. Upon receipt of the Notice of Acceptance, any SWA in receipt of the employer's job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.40(c), and must refer to the employer in a manner consistent with § 655.47 all U.S. workers who apply for the job opportunity or on whose behalf a job application is made.

(e) *Amendments to a job order*. The employer may amend the job order at any time before the CO makes a final determination, in accordance with procedures set forth in § 655.35.

10. Revise § 655.17 to read as follows:

**§ 655.17 Emergency situations.**

(a) *Waiver of time period*. The CO may waive the time period(s) for filing an *H-2B Registration* and/or an *Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.

(b) *Employer requirements*. The employer requesting a waiver of the required time period(s) must submit to the NPC a request for a waiver of the time period requirement, a completed *Application for Temporary Employment Certification* and the job order identifying the SWA serving the area of intended employment, and must

otherwise meet the requirements of § 655.15. If the employer did not previously apply for an *H-2B Registration*, the employer must also submit a completed *H-2B Registration* with all supporting documentation, as required by § 655.11. If the employer did not previously apply for a PWD, the employer must also submit a completed PWD request. The employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, unforeseen changes in market conditions, or pandemic health issues. A denial of a previously submitted *H-2B Registration* in accordance with the procedures set forth in § 655.11 does not constitute good and substantial cause necessitating a waiver under this section.

(c) *Processing of emergency applications*. The CO will process the emergency *H-2B Registration* and/or *Application for Temporary Employment Certification* and job order in a manner consistent with the provisions of this subpart and make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.50. If the CO grants the waiver request, the CO will forward a Notice of Acceptance and the approved job order to the SWA serving the area of intended employment identified by the employer in the job order. If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53.

11. Add § 655.18 to read as follows:

**§ 655.18 Contents of the job order.**

An employer must ensure that the job order contains the information about the job opportunity as required for the advertisements required in § 655.41 and the following assurances:

(a) *Prohibition against preferential treatment*. The employer's job order 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-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This

does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Bona fide job requirements.* Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers.

(c) *Minimum benefits, wages, and working conditions.* Every job order accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (k) of this section.

(d) *Rate of pay.* The wage listed in the job order must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage.

(e) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent.

(f) *Deductions.* The job order must specify that the employer will make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's paycheck.

(g) *Job opportunity is full-time.* The job order must clearly state that the job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek, and that the employer will use a single workweek as its standard for computing wages due.

(h) *Three-fourths guarantee.* The job order must clearly state the applicability of the three-fourths guarantee, offering the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period in accordance with § 655.20(f).

(i) *Transportation and visa fees.*

(1) The job order must detail how the worker will be provided with transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, consistent with

§ 655.20(j)(1)(i), and that the employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, consistent with § 655.20(j)(1)(ii). If applicable, the job order must state that the employer will provide the daily transportation to and from the worksite.

(2) The job order must state that the employer will reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees including those mandated by the government incurred by the H-2B worker (but not for passport expenses or other charges primarily for the benefit of the worker).

(j) *Employer-provided items.* The job order must specify that the employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.20(k).

(k) *Board, lodging, or facilities.* If the employer provides the worker with the option of board, lodging, or other facilities or intends to assist workers to secure such lodging, such provision of board, lodging, or other facilities must be listed in the job order. If the employer intends to make any wage deductions related to such provision of board, lodging or other facilities, they must be disclosed in the job order.

12. In subpart A, add an undesignated center heading before § 655.20 to read as follows:

#### **Assurances and Obligations**

13. Revise § 655.20 to read as follows:

#### **§ 655.20 Assurances and obligations of H-2B workers.**

An employer employing H-2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions:

(a) *Rate of pay.* (1) The offered wage set forth in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* accepted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-

rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and must be normal and usual for non-H-2B employers for the same occupation in the area of intended employment.

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

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

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those

required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter, including any agents or workers, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification*.

(d) *Job opportunity is full time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek, and the employer will use a single workweek as its standard for computing wages due. An employee's workweek will be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job order.

(f) *Three-fourths guarantee.* (1) 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 in each 4-week period beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any.

(2) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of

hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 4-week period during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date 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 job order and all extensions thereof are in effect.

(4) The 4-week periods to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 4-week period also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 4 weeks and 6 days). The final 4-week period includes any time remaining after the last full 4-week period ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 10-week period, during which a normal workweek is specified as 5 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 120 hours ( $4 \text{ weeks} \times 40 \text{ hours/week} = 160 \text{ hours} \times 75 \text{ percent} = 120$ ) in the first 4-week period, at least 120 hours in the second 4-week period, and at least 60 hours ( $2 \text{ weeks} \times 40 \text{ hours/week} = 80 \text{ hours} \times 75 \text{ percent} = 60$ ) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(7) 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. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 4-week period during the period of the job order the employer affords the U.S. or H-2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of

days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in a 4-week period if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) 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 work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 4-week period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, 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 job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H-2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: Records showing the nature



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

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

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

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

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

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

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

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

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

(j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide the worker transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer may arrange and pay for the transportation and subsistence directly, advance the reasonable cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker in the first workweek for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most

economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in § 655.173.

(ii) Transportation from the place of employment. If the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) *Employer-provided transportation.* All employer-provided 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 requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) *Disclosure.* All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

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

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

(l) *Disclosure of job order.* The employer must provide to an H-2B worker if outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent modifications. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B

employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H-2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language common to a significant portion of the workers if they are not fluent in English.

(n) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart, or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H-2B employment certification or employment, including payment of the employer's attorney or agent fees, visa or other application and H-2B Petition fees, recruitment costs, or any fees

falsely attributed to obtaining the approved *Application for Temporary Employment Certification*. 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. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2B workers to seek or receive payments or other compensation from prospective workers. This documentation must be made available upon request by the CO or another Federal party.

(q) *Prohibition against preferential treatment of foreign workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 655.56.

(s) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as determined by the CO, and as specified in §§ 655.40–.46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified, eligible U.S. worker who applies to the employer for the job opportunity, until the later of the date the last H-2B worker departs for the job opportunity or 3 days before the date of need. If the last H-2B worker has not departed by 3 days before the date of need, the employer is required to immediately inform the SWA in writing and notify the SWA of the new departure date as soon as available.

(u) *No strike or lockout.* There is no strike or lockout at the worksite for which the employer is requesting H-2B certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H-2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer will contact by mail or other effective means all of its former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. This includes, but is not limited to, those former U.S. workers who have been laid off within a period of 120 days before the date of need.

(x) *Area of intended employment and job opportunity.* The employer will not place any H-2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification*.

(y) *Abandonment/termination of employment.* Upon the separation from employment of H-2B worker(s)

employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification*, the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by DHS in the **Federal Register** or Code of Federal Regulations) of such separation of an H-2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H-2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 4-week period preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification*, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents.

#### §§ 655.21–655.24 [Reserved]

13. Remove and reserve §§ 655.21–655.24.

14. In subpart A, add an undesignated center heading before § 655.30 to read as follows:

#### **Processing of an Application for Temporary Employment Certification**

15. In subpart A, revise §§ 655.30 through 655.35 to read as follows:

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

\* \* \* \* \*

Sec.	
655.30	Processing of an application and job order.
655.31	Notice of deficiency.
655.32	Submission of a modified application or job order.
655.33	Notice of acceptance.
655.34	Electronic job registry.
655.35	Amendments to an application or job order.

\* \* \* \* \*

**§ 655.30 Processing of an application and job order.**

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO to an employer requiring a response will be mailed to the address provided in the *Application for Temporary Employment Certification* using methods to assure next day delivery, including electronic mail. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date or the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(c) *Information dissemination.* OFLC may forward information received in the course of processing *Applications for Temporary Employment Certification* and program integrity measures to WHD, or any other Federal agency, as appropriate, for investigation and/or enforcement purposes.

**§ 655.31 Notice of deficiency.**

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification*. If applicable, the Notice of Deficiency will include job order deficiencies identified by the SWA under § 655.16. The CO will send a copy of the Notice of Deficiency to the SWA serving the area of intended employment identified by the employer on its job order, and if applicable, to the employer's attorney or agent.

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

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 10 business days from the date of the Notice of Deficiency. The Notice will state the modification needed for the CO to issue a Notice of Acceptance;

(3) Offer the employer an opportunity to request administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61. The notice will inform the employer that it must submit a written request for review to the Chief ALJ of DOL within 10 business days from the date the Notice of Deficiency is issued by facsimile or other means normally assuring next day delivery 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

(4) State that if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the *Application for Temporary Employment Certification*. The notice will inform the employer that the denial of the *Application for Temporary Employment Certification* is final, and cannot be appealed. The Department will not further consider that *Application for Temporary Employment Certification*.

**§ 655.32 Submission of a modified application or job order.**

(a) *Review of a modified Application for Temporary Employment Certification or job order.* Upon receipt of a response to a Notice of Deficiency, including any modifications, the CO will review the response. The CO may, at her discretion, issue one or more additional Notices of Deficiency before issuing a Notice of Decision. The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application.

(b) *Acceptance of a modified Application for Temporary Employment Certification or job order.* If the CO accepts the modification(s) to the *Application for Temporary Employment Certification* and/or job order, the CO will issue a Notice of Acceptance. The

CO will send a copy of the Notice of Acceptance to the SWA instructing it to make any necessary modifications to the not yet posted job order and, if applicable, to the employer's attorney or agent and follow the procedure set forth in § 655.33.

(c) *Denial of a modified Application for Temporary Employment Certification or job order.* If the CO does not accept the modification(s) to the *Application for Temporary Employment Certification* and/or job order, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.50.

(d) *Appeal from denial of a modified Application for Temporary Employment Certification or job order.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* and/or job order are the same as for appealing the denial of a non-modified *Application for Temporary Employment Certification* outlined in § 655.61.

(e) *Post acceptance modifications.* The CO may require modifications to the job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions as set forth in § 655.20. Such modifications must be made by the employer or certification will be denied under § 655.53. The employer must provide all workers recruited in connection with the job opportunity in the *Application for Temporary Employment Certification* with a copy of the modified job order as approved by the CO.

**§ 655.33 Notice of acceptance.**

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and job order are complete and meet the requirements of this subpart, the CO will notify the employer in writing within 7 business days from the date the CO received the *Application for Temporary Employment Certification* and job order or modification thereof. A copy of the Notice of Acceptance will be sent to the SWA serving the area of intended employment identified by the employer on its job order and, if applicable, to the employer's attorney or agent.

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

(1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.40–655.47, including any

additional recruitment ordered by the CO under § 655.46;

(2) State that such employer-conducted recruitment is in addition to the job order being circulated by the SWA(s) and that the employer must conduct recruitment within 14 calendar days from the date the Notice of Acceptance is issued, consistent with § 655.40;

(3) Advise the employer that it must inform the SWA with which the employer has placed its job order in writing if the last H-2B worker has not departed for the place of employment by the third day preceding the employer's date of need, and that the employer must advise the SWA when the last H-2B worker has departed;

(4) Direct the SWA to place the job order into intra and interstate clearance as set forth in § 655.16 and to commence such clearance by:

(i) Sending a copy of the job order to other States listed as anticipated worksites in the *Application for Temporary Employment Certification* and job order, if applicable; and

(ii) Sending a copy of the job order to the SWAs for all States designated by the CO for interstate clearance;

(5) Instruct the SWA to keep the approved job order on its active file until the end of the recruitment period as defined in § 655.40(c), and to transmit the same instruction to other SWAs to which it circulates the job order in the course of interstate clearance;

(6) Where the occupation or industry is traditionally or customarily unionized, direct the SWA to circulate a copy of the job order to the following labor organizations;

(i) The central office of the State Federation of Labor in the State(s) in which work will be performed; and

(ii) The office(s) of local union(s) representing employees in the same or substantially equivalent job classification in the area(s) in which work will be performed;

(7) Advise the employer, as appropriate, that it must contact the appropriate community-based organization with notice of the job opportunity; and

(8) Require the employer to submit a report of its recruitment efforts as specified in § 655.48.

#### § 655.34 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.33, the CO will promptly place for public examination a copy of the job order posted by the SWA on the

Department's electronic job registry, including any amendments or required modifications approved by the CO.

(b) *Length of posting on electronic job registry.* The Department will keep the job order posted on the electronic job registry until the end of the recruitment period, as set forth in § 655.40(c).

(c) *Conclusion of active posting.* Once the recruitment period has concluded, the SWA will inform the CO and the job order will be placed in inactive status on the electronic job registry.

#### § 655.35 Amendments to an application or job order.

The *Application for Temporary Employment Certification* and/or job order may be amended by the employer before the CO makes a final determination to grant or deny the *Application for Temporary Employment Certification*. All U.S. workers hired under the original job order must be immediately provided copies of any approved amendments.

(a) *Increases in number of workers.* The employer may request to increase the number of workers noted in the initial *Application for Temporary Employment Certification* and listed on its job order by no more than 20 percent (50 percent for employers requesting fewer than 10 workers). All requests for increasing the number of workers must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry.

(b) *Minor changes to the period of employment.* The employer may request minor changes to the total period of employment listed on its initial *Application for Temporary Employment Certification* and job order, for a period of up to 14 days, but the period of employment may not exceed a total of 9 months, except in the event of a one-time occurrence. All requests for minor changes to the total period of employment must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry.

(c) *Other amendments to the Application for Temporary Employment Certification and job order.* The employer may request other amendments to the *Application for Temporary Employment Certification* and job order. All such requests must be made in writing and will not be effective until approved by the CO. In considering whether to approve the

request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry.

(d) *Amendments after certification.* The employer may not request an amendment to an *Application for Temporary Employment Certification* or job order and the CO may not amend an *Application for Temporary Employment Certification* after the CO has made a final determination to grant or deny the *Application for Temporary Employment Certification*.

#### §§ 655.36–655.39 [Reserved]

16. Add reserved §§ 655.36–655.39.

17. Add an undesignated center heading and §§ 655.40 through 655.48 to read as follows:

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

\* \* \* \* \*  
Sec.

#### Post-Acceptance Requirements

655.40 Employer-conducted recruitment.  
655.41 Advertising requirements.  
655.42 Newspaper advertisements.  
655.43 Contact with former U.S. employees.  
655.44 Contact with labor organizations.  
655.45 Contact with bargaining representative and posting and other contact requirements.  
655.46 Additional employer-conducted recruitment.  
655.47 Referrals of U.S. workers.  
655.48 Recruitment report.  
\* \* \* \* \*

#### Post-Acceptance Requirements

#### § 655.40 Employer-conducted recruitment.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers to ensure that there are not qualified workers who will be available for the positions listed in the *Application for Temporary Employment Certification*.

(b) *Employer-conducted recruitment period.* Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.41–655.47 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.

(c) *U.S. worker referrals.* Employers must continue to accept referrals of all

U.S. applicants interested in the position until the later of the date the last H-2B worker departs for the job opportunity or 3 days before the date of need. If the last H-2B worker has not departed by 3 days before the date of need, the employer is required to immediately inform the SWA in writing and notify the SWA of the new departure date as soon as available.

(d) *Interviewing U.S. workers.*

Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H-2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.

(e) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity. The employer must accept and hire any applicants who are qualified and who will be available.

(f) *Recruitment report.* The employer must prepare a recruitment report that lists all applicants and whether they were accepted or rejected. This report must include all reasons why an applicant was rejected in accordance with § 655.48.

**§ 655.41 Advertising requirements.**

(a) All recruitment conducted under § 655.40 must meet the requirements set forth in this section and must contain terms and conditions of employment that are not less favorable than those offered to the H-2B workers and reflect, at a minimum, those contained in the job order.

(b) In addition to those terms and conditions contained in the job order, all advertising must contain the following information:

(1) The employer's name and appropriate SWA contact information for applicants to inquire about the job opportunity or to send applications, indications of availability, and/or resumes directly to the SWA;

(2) The geographic area of intended 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;

(3) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work

hours and days, and the anticipated start and end dates of the job opportunity;

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

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

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

(7) The wage offer, or in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an employer), the range of applicable wage offers;

(8) A statement that transportation and subsistence from the place where the worker has come to work for the employer to the place of employment will be provided;

(9) If applicable, a statement that work tools, supplies, and equipment will be provided to the worker without charge;

(10) If applicable, a statement that daily transportation to and from the worksite will be provided by the employer;

(11) A statement summarizing the three-fourths guarantee as required by § 655.20(f); and

(12) A statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the State in which the advertisement appeared.

**§ 655.42 Newspaper advertisements.**

(a) The employer must place an advertisement (in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (b) of this section), in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity.

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

(c) The newspaper advertisements must satisfy the requirements in § 655.41.

(d) The employer must maintain copies of newspaper pages (with date of publication and full copy of the advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof

of publication furnished by the newspaper containing the text of the printed advertisements and the dates of publication, consistent with the document retention requirements in § 655.56.

**§ 655.43 Contact with former U.S. employees.**

The employer must contact by mail or other effective means, its former U.S. workers including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. The employer must maintain documentation sufficient to prove such contact in accordance with § 655.56.

**§ 655.44 Contact with labor organizations.**

Where the occupation or industry is customarily unionized, the employer must contact the local union in writing to seek U.S. workers who are qualified and who will be available. The employer must maintain documentation in accordance with § 655.56 demonstrating that such organization(s) were contacted and whether the organization(s) referred qualified U.S. workers, including the number of referrals, or were non-responsive to the employer's requests.

**§ 655.45 Contact with bargaining representative and posting and other contact requirements.**

(a) If there is a bargaining representative for any of the employer's employees in the occupation and area of intended employment, the employer must provide written notice of the job opportunity, by providing a copy of the *Application for Temporary Employment Certification* and the job order, and maintain documentation that it was sent to the bargaining representative(s). An employer governed by this paragraph must include information in its recruitment report that confirms that the bargaining representative(s) was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

(b) If there is no bargaining representative, the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in

which the work will be performed by the H-2B workers. The notice must meet the requirements under § 655.41 and be posted for at least 10 consecutive business days. The employer must maintain a copy of the posted notice and identify where and when it was posted in accordance with § 655.56.

(c) If appropriate to the occupation and area of intended employment, as indicated by the CO in the Notice of Acceptance, the employer must provide written notice of the job opportunity to a community-based organization, and maintain documentation that it was sent to the designated community-based organization. An employer governed by this paragraph must include information in its recruitment report that confirms that the community-based organization was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

**§ 655.46 Additional employer-conducted recruitment.**

(a) *Requirement to conduct additional recruitment.* The employer may be instructed by the CO to conduct additional recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there may be U.S. workers who are qualified and who will be available for the work, including but not limited to where the job opportunity is located in an area of substantial unemployment.

(b) *Nature of the additional employer-conducted recruitment.* The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but will not be limited to, posting on the employer's Web site or another Web site, contact with community-based organizations, contact with State One-Stop Career Centers, and other print advertising, such as using a professional, trade or ethnic publication where such a publication is appropriate for the occupation and the workers likely to apply for the job opportunity.

(c) *Proof of the additional employer-conducted recruitment.* The CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the additional recruitment requirements were met. Documentation must be maintained as required in § 655.56.

**§ 655.47 Referrals of U.S. workers.**

SWAs may only refer for employment individuals who have been apprised of

all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity that they are qualified and will be available for employment.

**§ 655.48 Recruitment report.**

(a) *Requirements of the recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must be mailed by a date specified by the CO in the Notice of Acceptance and contain the following information:

(1) The name of each recruitment activity or source (e.g., job order and the name of the newspaper);

(2) The name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;

(3) Confirmation that former U.S. employees were contacted, if applicable, and by what means;

(4) Confirmation that labor organizations were contacted, if applicable, and by what means. Such documentation must demonstrate that the organization was contacted and notified of the job openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests;

(5) Confirmation that the bargaining representative was contacted, if applicable, and by what means or that the employer posted the availability of the job opportunity to all employees;

(6) Confirmation that the community-based organization designated by the CO was contacted, if applicable;

(7) If applicable, confirmation that additional recruitment was conducted as directed by the CO; and

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

(b) *Duty to update recruitment report.* The employer must continue to update the recruitment report throughout the recruitment period. The updated report need not be submitted to the Department, but must be made available in the event of a post-certification audit or upon request by DOL.

**§ 655.49 [Reserved]**

18. Add reserved § 655.49.

19. Add an undesignated center heading before § 655.50 to read as follows:

**Labor Certification Determinations**

20. Revise § 655.50 to read as follows:

**§ 655.50 Determinations.**

(a) *Certifying Officers (COs).* The Administrator, OFLC is the Department's National CO. The Administrator, OFLC and the CO(s) by virtue of delegation from the Administrator, OFLC, have the authority to certify or deny *Applications for Temporary Employment Certification* under the H-2B nonimmigrant classification. If the Administrator, OFLC directs that certain types of temporary employment certification applications or a specific *Application for Temporary Employment Certification* under the H-2B nonimmigrant classification be handled by the OFLC's National Office, the Director of the NPC will refer such applications to the Administrator, OFLC.

(b) *Determination.* Except as otherwise provided in this paragraph, the CO will make a determination either to grant, partially grant, or deny the *Application for Temporary Employment Certification*. The CO will grant the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

21. In subpart A, add §§ 655.51 through 655.56 to read as follows:

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

*	*	*	*	*
Sec.				
655.51	Criteria for certification.			
655.52	Approved certification.			
655.53	Denied certification.			
655.54	Partial certification.			
655.55	Validity of temporary employment certification.			
655.56	Document retention requirements of H-2B employers.			
*	*	*	*	*

**§ 655.51 Criteria for certification.**

(a) The criteria for certification include whether the employer has a valid *H-2B Registration* to participate in the H-2B program and has complied with all of the requirements of this program.

(b) In making a determination whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason.

(c) Certifications will not be granted to employers that have failed to comply with one or more sanctions or remedies imposed by final agency actions under the H-2B program.

**§ 655.52 Approved certification.**

If temporary employment certification is granted, the CO will send the approved *Application for Temporary Employment Certification* and a Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if appropriate, to the employer's attorney or agent.

**§ 655.53 Denied certification.**

If temporary employment certification is denied, the CO will send the Final Determination letter to the employer by means normally assuring next day delivery and a copy, if appropriate, to the employer's attorney or agent. The Final Determination letter will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.61; and

(c) State that if the employer does not request administrative review in accordance with § 655.61, the denial is final and the Department will not further consider that *Application for Temporary Employment Certification*.

**§ 655.54 Partial certification.**

The CO may issue a partial certification, reducing either the period of need or the number of H-2B workers or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*. The number of workers certified will be reduced by one for each referred U.S. worker who is qualified and who will be available at the time and place needed and has not been rejected for lawful job-related reasons, to perform the services or labor. If a partial labor certification is issued, the CO will amend the *Application for Temporary Employment Certification* and then return it to the employer with a Final Determination letter, with a copy to the employer's

attorney or agent, if applicable. The Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H-2B workers requested has been reduced, citing the relevant regulatory standards and/or special procedures;

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

(c) Offer the employer an opportunity to request administrative review of the partial certification under § 655.61; and

(d) State that if the employer does not request administrative review in accordance with § 655.61, the partial certification is final and the Department will not further consider that *Application for Temporary Employment Certification*.

**§ 655.55 Validity of temporary employment certification.**

(a) *Validity period.* A temporary employment certification is valid only for the period of time between the beginning and ending dates of employment, as approved on the *Application for Temporary Employment Certification*. The certification expires on the last day of authorized employment.

(b) *Scope of validity.* A temporary employment certification is valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification*. The temporary employment certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

**§ 655.56 Document retention requirements of H-2B employers.**

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H-2B workers are required to retain the documents and records proving compliance with 29 CFR part 503 and this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention.* The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of adjudication if the *Application for Temporary Employment Certification* is denied or 3 years from the day the Department receives the letter of withdrawal provided in accordance with § 655.62.

(c) *Documents and records to be retained by all applicants.* All employers filing an *H-2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in § 655.16;

(ii) Advertising as specified in §§ 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in § 655.43;

(iv) Contact with labor organizations, if applicable, as specified in § 655.44;

(v) Contact with bargaining representative(s), or copy of the posting of the job opportunity, if applicable, as specified in § 655.45(a) or (b); and

(vi) Additional employer-conducted recruitment efforts as specified in § 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with § 655.48, such as evidence of nonapplicability of contact with former workers as specified in § 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in § 655.48;

(5) Records of each worker's earnings, hours offered and worked, and other information as specified in § 655.20(i);

(6) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification*, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.20(r);

(7) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment in the *Application for Temporary Employment Certification*, including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment Certification*, as specified § 655.20(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 655.20(r);

(8) The written contracts with agents or recruiters, including the written contract prohibiting an agent or recruiter from receiving payments, as specified in § 655.20(p);

(9) Written notice provided to and informing OFLC that an H-2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification*, as specified in § 655.20(y);

(10) The *H-2B Registration*, job order and a copy of the *Application for Temporary Employment Certification*; and

(11) The *H-2B Petition*, including all accompanying documents.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, OFLC within 72 hours following a request by the OFLC the documents and records required under 29 CFR part 503 and this section so that the Administrator, OFLC may copy, transcribe, or inspect them.

**§§ 655.57—655.59 [Reserved]**

22. Add reserved §§ 655.57–655.59.

23. Add an undesignated center heading before § 655.60 to read as follows:

**Post Certification Activities**

24. Revise § 655.60 to read as follows:

**§ 655.60 Extensions.**

An employer may apply for extensions of the period of employment in the following circumstances. Extensions are available only to employers whose approved period of employment, as listed on the *Application for Temporary Employment Certification*, does not exceed the maximum period of temporary need for a seasonal need, a peakload need, an intermittent need, or a one-time occurrence, in accordance with § 655.6, and DHS regulations at 8 CFR 214.2(h)(6)(ii)(B). Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing. The CO will not grant an extension where the total work period under that *Application for Temporary Employment Certification* and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need, except in extraordinary circumstances. The employer may

appeal a denial of a request for an extension by following the procedures in § 655.61. The H-2B employer's assurances and obligations under the temporary employment certification will continue to apply with respect to the workers recruited in connection with the *Application for Temporary Employment Certification* during the extended period of employment. For purposes of the assurances and obligations that are based on the workers' partial or full completion of the work period specified in the job order, the employer must continue to meet its obligations based on the extended work period listed in the approved *Application for Temporary Employment Certification*. The employer must immediately provide to its workers a copy of any approved extension.

25. In subpart A, add §§ 655.61 through 655.63 to read as follows:

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

*	*	*	*	*
Sec.				
655.61	Administrative review.			
655.62	Withdrawal of an Application for Temporary Employment Certification.			
655.63	Public disclosure.			
*	*	*	*	*

**§ 655.61 Administrative review.**

(a) *Request for review.* Where authorized in this subpart, employers may request an administrative review before the BALCA of a determination by the CO. In such cases, the request for review:

- (1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 business days from the date of determination;
- (2) Must clearly identify the particular determination for which review is sought;
- (3) Must set forth the particular grounds for the request;
- (4) Must include a copy of the CO's determination; and
- (5) May contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued.

(b) *Appeal file.* Upon the receipt of a request for review, the CO will, within 7 business days, assemble and submit the Appeal File using means to ensure same day or next day delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) *Briefing schedule.* Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or next day delivery, a brief in support of the CO's decision.

(d) *Assignment.* The Chief Administrative Law Judge may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) *Review.* The BALCA must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

(f) *Decision.* The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

**§ 655.62 Withdrawal of an Application for Temporary Employment Certification.**

Employers may withdraw an *Application for Temporary Employment Certification* after it has been accepted and before it is adjudicated.

**§ 655.63 Public disclosure.**

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

**§ 655.64 [Reserved]**

26. Add reserved § 655.64.

**§ 655.65 [Removed and Reserved]**

27. Remove and reserve § 655.65.

**§§ 655.66–655.69 [Reserved]**

28. Add reserved §§ 655.66 through 655.69.

29. Add an undesignated center heading before § 655.70 to read as follows:

**Integrity Measures**

30. In subpart A, revise §§ 655.70 through 655.73 to read as follows:

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

\* \* \* \* \*



Sec.	
655.70	Audits.
655.71	CO-ordered assisted recruitment.
655.72	Revocation.
655.73	Debarment.
*	*
*	*
*	*
*	*

### § 655.70 Audits.

The CO may conduct audits of adjudicated temporary employment certification applications.

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

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

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

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

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

(i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.71 in future filings of H-2B temporary employment certification applications for a period of up to 2 years, or

(ii) In a revocation of the certification and/or debarment from the H-2B program and any other foreign labor certification program administered by the Department.

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

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS, WHD, or other appropriate enforcement agencies. The CO will 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.

### § 655.71 CO-ordered assisted recruitment.

(a) *Requirement of assisted recruitment.* If, as a result of audit or otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require

the employer to engage in assisted recruitment for a defined period of time for any future *Application for Temporary Employment Certification*.

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a temporary employment certification, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.61 apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.41–.47 and may consist of, but is not limited to, one or more of the following:

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

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

(3) Extending the length of the placement of the advertisement and/or job order;

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

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

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO, in addition to providing a copy of the job order;

(7) Requiring the employer to provide proof of all SWA referrals made in response to the job order;

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

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

(d) *Failure to comply.* If an employer fails to comply with requirements ordered by the CO under this section, the certification will be denied and the

employer and/or its attorney or agent may be debarred under § 655.73.

### § 655.72 Revocation.

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

(1) The issuance of the temporary employment certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in § 655.73(d);

(2) The employer substantially failed to comply with any of the terms or conditions of the approved temporary employment certification. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in §§ 655.73(d) and (e);

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (under § 655.73), or law enforcement function under 29 CFR part 503 or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary with the respect to the H-2B program.

(b) *DOL procedures for revocation—*  
(1) *Notice of Revocation.* If the Administrator, OFLC makes a determination to revoke an employer's temporary employment certification, the Administrator, OFLC will send to the employer (and its attorney or agent) a Notice of Revocation. The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 10 business days from the date the Notice of Revocation is issued, the notice is the final agency action and will take effect immediately at the end of the 10-day period.

(2) *Rebuttal.* If the employer timely submits rebuttal evidence, the Administrator, OFLC will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal according to the procedures of § 655.61. If the employer does not appeal the final determination, it will become the final agency action.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final

determination of the Administrator, OFLC after the review of rebuttal evidence, according to the appeal procedures of § 655.61. The ALJ's decision is the final agency action.

(4) *Stay*. The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) *Decision*. If the temporary employment certification is revoked, the Administrator, OFLC will send a copy of the final agency action to DHS and the Department of State (DOS).

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

- (1) Reimbursement of actual inbound transportation and other expenses;
- (2) The workers' outbound transportation expenses;
- (3) Payment to the workers of the amount due under the three-fourths guarantee; and
- (4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

#### § 655.73 Debarment.

(a) *Debarment of an employer*. The Administrator, OFLC may not issue future labor certifications under this subpart to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, OFLC finds that the employer committed the following violations:

- (1) Willful misrepresentation of a material fact in its *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*;
- (2) Substantial failure to meet any of the terms and conditions of its *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or
- (3) Willful misrepresentation of a material fact to the Department of State during the visa application process.

(b) *Debarment of an agent or attorney*. If the Administrator, OFLC finds, under this section, that an attorney or agent participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment*. Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) *Determining whether a violation is willful*. A willful misrepresentation of a

material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(e) *Determining whether a violation is significant*. In determining whether a violation is a significant deviation from the terms and conditions of the *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*, the factors that the Administrator, OFLC may consider include, but are not limited to, the following:

- (1) Previous history of violation(s) under the H-2B program;
- (2) The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);
- (3) The gravity of the violation(s);
- (4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and
- (5) Whether U.S. workers have been harmed by the violation.

(f) *Violations*. Where the standards set forth in paragraphs (d) and (e) in this section are met, debarable violations would include but would not be limited to:

- (1) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2B workers and/or workers in corresponding employment;
- (2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
- (3) Failure to comply with the employer's obligations to recruit U.S. workers;
- (4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;
- (5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under this subpart or 29 CFR part 503;
- (6) Failure to comply with the Notice of Deficiency process under this subpart;
- (7) Failure to comply with the assisted recruitment process under this subpart;

(8) Impeding an investigation of an employer under 29 CFR part 503 or an audit under this subpart;

(9) Employing an H-2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(10) A violation of the requirements of § 655.20(o) or (p);

(11) A violation of any of the provisions listed in 29 CFR 503.16(r);

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

(13) Fraud involving the *H-2B Registration, Application for Temporary Employment Certification* or the *H-2B Petition*; or

(14) A material misrepresentation of fact during the registration or application process.

(g) *Debarment procedure*—(1) *Notice of Debarment*. If the Administrator, OFLC makes a determination to debar an employer, attorney, or agent, the Administrator, OFLC will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the Notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of any rebuttal evidence or a request for a hearing stays the debarment pending the outcome of the appeal as provided in paragraphs (g)(2)–(6) of this section.

(2) *Rebuttal*. The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 30 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the Administrator, OFLC will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the party should be debarred, the Administrator, OFLC will inform the party of its right to request a debarment hearing according to the procedures in this section. The party must request a hearing within 30 calendar days after the date of the Administrator, OFLC's final determination, or the Administrator

OFLC's determination will be the final agency order and the debarment will take effect at the end of the 30-day period.

(3) *Hearing.* The recipient of a Notice of Debarment seeking to challenge the debarment must request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the Administrator, OFLC after review of rebuttal evidence submitted under paragraph (g)(2) of this section. To obtain a debarment hearing, the recipient must, within 30 days of the date of the Notice or the final determination, file a written request with 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 on the Administrator, OFLC. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is timely filed. Within 10 business 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 ALJ by means normally assuring next day delivery. The Chief ALJ 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.

(4) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided to the parties to the debarment hearing by means normally assuring next day delivery. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is the final agency action. If a petition for

review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

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

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

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

(h) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to debar under this section or under 29 CFR 503.24. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(i) *Debarment from other foreign labor programs.* Upon debarment under this subpart or 29 CFR 503.24, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

#### §§ 655.74–655.81 [Removed and Reserved]

31. In subpart A, remove §§ 655.74 through 655.81.

#### §§ 655.82–655.99 [Reserved]

32. Add reserved §§ 655.82 through 655.99.

#### TITLE 29

33. Add part 503 to read as follows:

### PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY NONIMMIGRANT NON-AGRICULTURAL WORKERS ADMITTED UNDER SECTION 214(c)(1) OF THE IMMIGRATION AND NATIONALITY ACT

#### Subpart A—General Provisions

##### Sec.

- 503.0 Introduction.
- 503.1 Scope and purpose.
- 503.2 Territory of Guam.

- 503.3 Coordination among Governmental agencies.
- 503.4 Definition of terms.
- 503.5 Temporary need.
- 503.6 Waiver of rights prohibited.
- 503.7 Investigation authority of Secretary.
- 503.8 Accuracy of information, statements, data.

#### Subpart B—Enforcement

- 503.15 Enforcement.
- 503.16 Assurances and obligations of H-2B employers.
- 503.17 Documentation retention requirements of H-2B employers.
- 503.18 Validity of temporary employment certification.
- 503.19 Violations.
- 503.20 Sanctions and remedies—general.
- 503.21 Concurrent actions.
- 503.22 Representation of the Secretary.
- 503.23 Civil money penalty assessment.
- 503.24 Debarment.
- 503.25 Failure to cooperate with investigators.
- 503.26 Civil money penalties—payment and collection.

#### Subpart C—Administrative Proceedings

- 503.40 Applicability of procedures and rules.

#### Procedures Related to Hearing

- 503.41 Administrator, WHD's determination.
- 503.42 Contents of notice of determination.
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#### Rules of Practice

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**Authority:** Section 503 is issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c), and 8 CFR 214.2(h).

#### Subpart A—General Provisions

##### § 503.0 Introduction.

These regulations cover the enforcement of all statutory and regulatory obligations, including

requirements under 8 U.S.C. 1184(c) and 20 CFR part 655, subpart A, applicable to the employment of H-2B workers admitted under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by these regulations or 20 CFR part 655, subpart A.

#### § 503.1 Scope and purpose.

(a) *Statutory standard.* 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H-2B workers. DHS regulations 8 CFR 214.2(h)(6)(iv) provide that a petition to bring nonimmigrant workers on H-2B visas into the U.S. for temporary nonagricultural employment may not be approved by the Secretary of Homeland Security unless the petitioner has applied for and received a temporary employment certification from the U.S. Secretary of Labor (Secretary). The temporary employment certification reflects a determination by the Secretary that:

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

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certifications under 8 U.S.C. 1184(c) has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), which in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an H-2B employer related to the temporary employment certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment, and assuring program integrity. The regulations pertaining to the issuance, denial, and revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, subpart A.

(c) *Role of the Wage and Hour Division (WHD).* DHS, effective January 18, 2009, under section 214(c)(14)(B) of the INA, 8 U.S.C. 1184(c)(14)(B), has delegated to the Secretary certain

investigatory and law enforcement functions to carry out the provisions under 8 U.S.C. 1184(c). The Secretary has delegated these functions to the WHD. In general, matters concerning the rights of H-2B workers and workers in corresponding employment under this part and the employer's obligations are enforced by the WHD, including whether employment was offered to U.S. workers as required under 20 CFR part 655, subpart A, or whether U.S. workers were laid off or displaced in violation of program requirements. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certifications, and to seek remedies for violations, including recovery of unpaid wages and reinstatement of improperly laid off or displaced U.S. workers.

(d) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, and these regulations apply to the employment of any H-2B worker and any worker in corresponding employment as the result of an *Application for Temporary Employment Certification* filed with the Department on or after the effective date of these regulations.

#### § 503.2 Territory of Guam.

This part does not apply to temporary employment in the Territory of Guam. The Department does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H-2B visas, or enforce compliance with the provisions of the H-2B visa program in the Territory of Guam. Under DHS regulations, 8 CFR 214.2(h)(6)(v), administration of the H-2B temporary employment certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

#### § 503.3 Coordination among Governmental agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding noncompliance with H-2B statutory or regulatory labor standards will be immediately forwarded to the appropriate WHD office for suitable action under these regulations.

(b) Information received in the course of processing registrations and applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or,

where applicable to employer enforcement under the H-2B program, may be forwarded to other agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is sought will be cited in a single debarment proceeding. OFLC and the WHD will coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

#### § 503.4 Definition of terms.

For purposes of this part:

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

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

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

*Administrator, Wage and Hour Division (WHD)* means the primary official of the WHD, or the Administrator's designee.

*Agent* means a legal entity or person who:

(1)(i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes;

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

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

*Agricultural labor or services* means those duties and occupations defined in 20 CFR 655.100.

*Applicant* means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (Form ETA 9142 and the appropriate appendices).

*Application for Temporary Employment Certification* means the Office of Management and Budget (OMB)-approved Form ETA 9142 and the appropriate appendices, a valid wage determination, as required by § 655.12, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary employment certification determination from DOL.

*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 that 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, or quality of the regional transportation network). 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. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

*Certifying Officer (CO)* means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H-2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under 20 CFR part 655, subpart A.

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

*Corresponding employment* means the employment of workers who are not H-2B workers by an employer that has an accepted H-2B *Application for Temporary Employment Certification* in any work included in the job order or in any work performed by the H-2B workers. To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

*Date of need* means the first date the employer requires services of the H-2B workers as listed on the application.

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

*Employee* means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms "employee" and "worker" are used interchangeably in this part.

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

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

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and

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

*Employment and Training Administration (ETA)* means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

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

*Full time* means 35 or more hours of work per week for the purpose of the H-2B program.

*H-2B Petition* means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2B nonimmigrant workers. The *H-2B Petition* includes the approved *Application for Temporary*

*Employment Certification* and the Final Determination letter.

*H-2B Registration* means the OMB-approved Form ETA 9155, submitted by an employer to register its intent to hire H-2B workers and to file an *Application for Temporary Employment Certification*.

*H-2B worker* means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

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

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

*Job opportunity* means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

*Job order* means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including all obligations and assurances under 20 CFR part 655 and this part that is posted between and among the State Workforce Agencies (SWAs) on their inter- and intra-State job clearance systems.

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

*Layoff* means any involuntary separation of one or more U.S. employees without cause.

*Metropolitan Statistical Area (MSA)* means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro

area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

*National Processing Center (NPC)* means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications.

*Non-agricultural labor and services* means any labor or services not considered to be agricultural labor or services as defined in subpart B of this part. It does not include the provision of services as members of the medical profession by graduates of medical schools.

*Occupational employment statistics (OES) survey* means the program under the jurisdiction of the BLS that provides annual wage estimates for occupations at the State and MSA levels.

*Offered wage* means the wage that equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage.

*Office of Foreign Labor Certification (OFLC)* means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

*Prevailing wage determination (PWD)* means the prevailing wage for the position, as described in 20 CFR 655.12, which is the subject of the *Application for Temporary Employment Certification*.

*Professional athlete* is defined in 8 U.S.C. 1182(a)(5)(A)(iii)(II), and means an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

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

*Secretary of Homeland Security* means the chief official of the U.S.

Department of Homeland Security or the Secretary of Homeland Security's designee.

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

*State Workforce Agency (SWA)* means a State government agency that receives funds under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

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

*Successor in interest* means

(1) Where an employer has violated 20 CFR part 655, Subpart A or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

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

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

(viii) Similarity of products and services; and

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

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

*United States (U.S.)* means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

*United States Citizenship and Immigration Services (USCIS)* means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by

employers seeking H-2B workers to perform temporary nonagricultural work in the U.S.

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

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

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

*Wage and Hour Division (WHD)* means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

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

#### § 503.5 Temporary need.

(a) An employer seeking certification under 20 CFR part 655, subpart A must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). The need of a job contractor is inherently permanent in nature and the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer is a job contractor.

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B). Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.

#### § 503.6 Waiver of rights prohibited.

A person may not seek to have an H-2B worker, a worker in corresponding employment, or any other person, including but not limited to a U.S. worker improperly rejected for employment or improperly laid off or displaced, waive or modify any rights conferred under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations. Any agreement by an employee purporting to waive or modify any rights given to said person under

these provisions will be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary will be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

#### **§ 503.7 Investigation authority of Secretary.**

(a) *Authority of the Administrator, WHD.* The Secretary of DHS has delegated to the Secretary, under 8 U.S.C. 1184(c)(14)(B), the authority to perform all investigative and enforcement functions under 8 U.S.C. 1101, 1103(a)(6), and 1184(c). The Administrator, WHD will perform all such functions.

(b) *Conduct of investigations.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations, either under a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, worksite, vehicles, structure, facility, place and records (and make transcriptions, photographs, scans, videos, photocopies, or use any other means to record the content of the records or preserve images of places or objects), question any person, or gather any information, in whatever form, as may be appropriate.

(c) *Confidential investigation.* The WHD will 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 obligations imposed by 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, 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 will refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

#### **§ 503.8 Accuracy of information, statements, data.**

Information, statements, and data submitted in compliance with 8 U.S.C. 1184(c) 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 a

material fact by any trick, scheme, or device, 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, will be fined not more than \$250,000 or imprisoned not more than 5 years, or both.

### **Subpart B—Enforcement**

#### **§ 503.15 Enforcement.**

The investigation, inspection, and law enforcement functions that carry out the provisions of 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or the regulations in this part pertain to the employment of any H–2B worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced.

#### **§ 503.16 Assurances and obligations of H–2B employers.**

An employer employing H–2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions:

(a) *Rate of pay.* (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* accepted by OFLC.

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

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and must be normal and usual for non-H–2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must pay a piece rate that is no less than the normal rate for workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the

workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly rate, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage rate for each hour worked.

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

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay. Deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker “kicks back” directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter, including any agents or

workers, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification*.

(d) *Job opportunity is full time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job order.

(f) *Three-fourths guarantee.* (1) 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 in each 4-week period beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any.

(2) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 4-week period during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date 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 job order and all extensions thereof are in effect.

(4) The 4-week periods to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 4-week period also includes any partial workweek, if the

first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 4 weeks and 6 days). The final 4-week period includes any time remaining after the last full 4-week period ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 10-week period, during which a normal workweek is specified as 5 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 120 hours (4 weeks  $\times$  40 hours/week = 160 hours  $\times$  75 percent = 120) in the first 4-week period, at least 120 hours in the second 4-week period, and at least 60 hours (2 weeks  $\times$  40 hours/week = 80 hours  $\times$  75 percent = 60) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(7) 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. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 4-week period during the period of the job order the employer affords the U.S. or H-2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in a 4-week period if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) 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 work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 4-week period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of

hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, 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 job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H-2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: records showing the nature 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 in paragraph (f) 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) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

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



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

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

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

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

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

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

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

(j) *Transportation and visa fees.* (1)(i)

Transportation to the place of employment. The employer must provide the worker transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer may arrange and pay for the transportation and subsistence directly, advance the reasonable cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker in the first workweek for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in 20 CFR 655.173.

(ii) Transportation from the place of employment. If the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent

employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) *Employer-provided transportation.* All employer-provided 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 requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) *Disclosure.* All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

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

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

(l) *Disclosure of job order.* The employer must provide to an H-2B worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent modifications. For an H-2B worker changing employment from an H-2B employer to a subsequent H-2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H-2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H-2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language

common to a significant portion of the workers if they are not fluent in English.

(n) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or this part or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H-2B employment certification or employment, including payment of the employer's attorney or agent fees, application and *H-2B Petition* fees, recruitment costs, or any fees falsely attributed to obtaining the approved *Application for Temporary Employment Certification*. 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. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or

employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2B workers to seek or receive payments or other compensation from prospective workers. This documentation must be made available upon request by the CO or another Federal party.

(q) *Prohibition against preferential treatment of foreign workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 503.17.

(s) *Recruitment requirements.* The employer must conduct all recruitment activities, including any additional employer-conducted recruitment activities as determined by the CO, and as specified in 20 CFR 655.40-46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified, eligible U.S. worker who applies to the employer for the job opportunity, until the later of the date the last H-2B worker departs for the job opportunity or 3 days before the date of need. If the last H-2B worker has not departed by 3 days before the date of need, the employer is required to immediately inform the SWA in writing and notify the SWA of the new departure date as soon as available.

(u) *No strike or lockout.* There is no strike or lockout at the worksite for which the employer is requesting H-2B

certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H-2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer must contact by mail or other effective means all of its former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. This includes, but is not limited to, those former U.S. workers who have been laid off within a period of 120 days before the date of need.

(x) *Area of intended employment and job opportunity.* The employer must not place any H-2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification*.

(y) *Abandonment/termination of employment.* Upon the separation from employment of worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification*, the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of such separation of an H-2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the

voluntary abandonment of employment by the H-2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 4-week period preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification*, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents.

(aa) *Cooperation with investigators.* The employer must cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's authority pursuant to 8 U.S.C. 1184(c).

#### **§ 503.17 Document retention requirements of H-2B employers.**

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H-2B workers are required to retain the documents and records proving compliance with 20 CFR part 655, subpart A and this part, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention.* The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of adjudication if the *Application for Temporary Employment Certification* is denied or 3 years from the day the Department receives the letter of withdrawal provided in accordance with 20 CFR 655.62.

(c) *Documents and records to be retained by all applicants.* All employers filing an *H-2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records

and must provide the documents and records in the event of an audit or investigation:

- (1) Documents and records not previously submitted during the registration process that substantiate temporary need;
- (2) Proof of recruitment efforts, as applicable, including:
  - (i) Job order placement as specified in 20 CFR 655.16;
  - (ii) Advertising as specified in 20 CFR 655.41 and 655.42;
  - (iii) Contact with former U.S. workers as specified in 20 CFR 655.43;
  - (iv) Contact with labor organizations, if applicable, as specified in 20 CFR 655.44;
  - (v) Contact with bargaining representative(s), copy of the posting of the job opportunity, and contact with community-based organizations, if applicable, as specified in 20 CFR 655.45(a), (b) and (c); and
  - (vi) Additional employer-conducted recruitment efforts as specified in 20 CFR 655.46;
- (3) Substantiation of the information submitted in the recruitment report prepared in accordance with 20 CFR 655.48, such as evidence of nonapplicability of contact with former workers as specified in 20 CFR 655.43;
- (4) The final recruitment report and any supporting resumes and contact information as specified in 20 CFR 655.48;
- (5) Records of each worker's earnings, hours offered and worked, and other information as specified in § 503.16(i);
- (6) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification*, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 503.16(r);
- (7) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment in the *Application for Temporary Employment Certification*, including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment Certification*, as specified in § 503.16(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 503.16(r);
- (8) The written contracts with agents or recruiters, including the written contract prohibiting an agent or recruiter from receiving payments, as specified in § 503.16(p);
- (9) Written notice provided to and informing OFLC that an H-2B worker or

worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification*, as specified in § 503.16(y);

(10) The *H-2B Registration*, job order, and the *Application for Temporary Employment Certification*; and

(11) The approved *H-2B Petition*, including all accompanying documents.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 20 CFR part 655, Subpart A and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

#### § 503.18 Validity of temporary employment certification.

(a) *Validity period.* A temporary employment certification is valid only for the period of time between the beginning and ending dates of employment, as approved on the *Application for Temporary Employment Certification*. The certification expires on the last day of authorized employment.

(b) *Scope of validity.* A temporary employment certification is valid only for the number of H-2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification*. The temporary employment certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

#### § 503.19 Violations.

(a) *Types of violations.* Pursuant to the statutory provisions governing enforcement of the H-2B program, 8 U.S.C. 1184(c)(14)(A), a violation exists under this part where the Administrator, WHD, through investigation, determines that there has been a:

(1) Willful misrepresentation of a material fact on the *H-2B Registration*, *Application for Temporary Employment Certification*, or *H-2B Petition*;

(2) Substantial failure to meet any of the terms and conditions of the *H-2B Registration*, *Application for Temporary Employment Certification*, or *H-2B Petition*. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the Department of State during the visa application process.

(b) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(c) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H-2B Registration*, *Application for Temporary Employment Certification*, or *H-2B Petition*, the factors that the Administrator, WHD may consider include, but are not limited to, the following:

- (1) Previous history of violation(s) under the H-2B program;
- (2) The number of H-2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);
- (3) The gravity of the violation(s);
- (4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and
- (5) Whether U.S. workers have been harmed by the violation.

(d) *Employer acceptance of obligations.* The provisions of this part become applicable upon the date that the employer's *Application for Temporary Employment Certification* is accepted. The employer's submission of and signature on the approved *H-2B Registration*, Appendix B of the *Application for Temporary Employment Certification*, and *H-2B Petition* constitute the employer's representation that the statements on the forms are accurate and that it knows and accepts the obligations of the program.

#### § 503.20 Sanctions and remedies—general.

Whenever the Administrator, WHD determines that there has been a violation(s), as described in § 503.19, such action will be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Institute administrative proceedings, including for: The recovery of unpaid wages (including recovery of prohibited recruitment fees paid or impermissible deductions from pay, and recovery of wages due for improperly placing workers in areas of employment

or in occupations other than those identified on the *Application for Temporary Employment Certification* and for which a prevailing wage was not obtained); the enforcement of provisions of the job order, 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced; or debarment for no less than 1 or no more than 5 years.

(b) The remedies referenced in paragraph (a) of this section will be sought either directly from the employer, or from its successor in interest, as appropriate.

#### **§ 503.21 Concurrent actions.**

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 503.1(b) and in 20 CFR part 655, subpart A. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 503.1(c). The taking of any one of the actions referred to above will not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.73 or under § 503.24.

#### **§ 503.22 Representation of the Secretary.**

The Solicitor of Labor, through authorized representatives, will represent the Administrator, WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and these regulations.

#### **§ 503.23 Civil money penalty assessment.**

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation that meets the standards described in § 503.19. Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*, constitutes a separate violation. Civil money penalty amounts for such violations are determined as set forth in paragraphs (b) through (e) of this section.

(b) Upon determining that an employer has violated any provisions of § 503.16 related to wages, impermissible deductions or prohibited fees and expenses, the Administrator, WHD may

assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s), not to exceed \$10,000 per violation.

(c) Upon determining that an employer has terminated by layoff or otherwise or has refused to employ any worker in violation of § 503.16(r), § 503.16(t), or § 503.16(v), within the periods described in those sections, the Administrator, WHD may assess civil money penalties that are equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed \$10,000 per violation. No civil money penalty will be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(d) The Administrator, WHD may assess civil money penalties in an amount not to exceed \$10,000 per violation for any other violation that meets the standards described in § 503.19.

(e) In determining the amount of the civil money penalty to be assessed under paragraphs (c) and (d) of this section, the Administrator, WHD will consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties will be reserved for willful failures to meet any of the conditions of the *Application for Temporary Employment Certification and H-2B Petition* that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or these regulations;

(2) The number of H-2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

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

(4) Efforts made in good faith to comply with 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, and these regulations;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety; and

(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.

#### **§ 503.24 Debarment.**

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under 20 CFR

part 655, subpart A to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, WHD finds that the employer committed a violation that meets the standards of § 503.19. Where these standards are met, debarable violations would include but not be limited to:

(1) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H-2B workers and/or workers in corresponding employment;

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

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

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

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under 20 CFR part 655, subpart A or this part;

(6) Impeding an investigation of an employer under this part;

(7) Employing an H-2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(8) A violation of the requirements of § 503.16(o) or (p);

(9) A violation of any of the provisions listed in § 503.16(r);

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

(11) Fraud involving the *H-2B Registration, Application for Temporary Employment Certification, or H-2B Petition*; or

(12) A material misrepresentation of fact during the registration or application process.

(b) *Debarment of an agent or attorney.* If the Administrator, WHD finds, under this section, that an agent or attorney participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) *Debarment procedure—(1) Notice of Debarment.* If the Administrator, WHD makes a determination to debar an employer, attorney, or agent, the Administrator, WHD will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the Notice of its right to request a debarment hearing and the timeframe under which such rights must be exercised under § 503.43. If the party does not request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 503.43(e).

(2) [Reserved]

(e) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction debar under 20 CFR 655.73 or under this part. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(f) *Debarment from other labor certification programs.* Upon debarment under this part or 20 CFR 655.73, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

#### **§ 503.25 Failure to cooperate with investigators.**

(a) No person will interfere or refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's investigative or enforcement authority under 8 U.S.C. 1184(c). 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. 114.

(b) Where an employer (or employer's agent or attorney) interferes or does not cooperate with an investigation concerning the employment of an H-2B worker or a worker in corresponding employment, or a U.S. worker who has been improperly rejected for

employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H-2B workers giving rise to the investigation. In addition, WHD may take such action as appropriate where the failure to cooperate meets the standards in § 503.19, including initiating proceedings for the debarment of the employer from future certification for up to 5 years, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action will not bar the taking of any additional action.

#### **§ 503.26 Civil money penalties—payment and collection.**

Where a civil money penalty is assessed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty must be received by the Administrator, WHD within 30 calendar days of the date of the final order. The person assessed the penalty will remit the amount ordered to the Administrator, WHD by certified check or by money order, made payable to the Wage and Hour Division, United States Department of Labor. The remittance will be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

#### **Subpart C—Administrative Proceedings**

#### **§ 503.40 Applicability of procedures and rules.**

The procedures and rules contained herein prescribe the administrative appeal process that will be applied with respect to a determination to assess civil money penalties, to debar, to enforce provisions of the job order or obligations under 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or these regulations, or to the collection of monetary relief due as a result of any violation.

#### **Procedures Related to Hearing**

#### **§ 503.41 Administrator, WHD's determination.**

(a) Whenever the Administrator, WHD decides to assess a civil money penalty, to debar, or to impose other appropriate administrative remedies, including for the recovery of monetary relief, the employer against which such action is taken will be notified in writing of such determination.

(b) The Administrator, WHD's determination will be served on the employer by personal service or by

certified mail at the employer's last known address. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

#### **§ 503.42 Contents of notice of determination.**

The notice of determination required by § 503.41 will:

(a) Set forth the determination of the Administrator, WHD, including:

(1) The amount of any monetary relief due; or

(2) Other appropriate administrative remedies; or

(3) The amount of any civil money penalty assessment; or

(4) Whether debarment is sought and the term; and

(5) The reason or reasons for such determination;

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

(c) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge (Chief ALJ) within 30 calendar days of the date of the determination, the determination of the Administrator, WHD will become final and not appealable;

(d) Set forth the time and method for requesting a hearing, and the related procedures for doing so, as set forth in § 503.43, and give the addresses of the Chief ALJ (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served); and

(e) Where appropriate, inform the employer that the Administrator, WHD will notify OFLC and DHS of the occurrence of a violation by the employer.

#### **§ 503.43 Request for hearing.**

(a) An employer desiring review of a determination issued under § 503.41, including judicial review, must make a request for such an administrative hearing in writing to the Chief ALJ at the address stated in the notice of determination. In such a proceeding, the Administrator will be the plaintiff, and the employer will be the respondent. If such a request for an administrative hearing is timely filed, the Administrator, WHD's determination will be inoperative unless and until the case is dismissed or the Administrative Law Judge (ALJ) issues an order affirming the decision.

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

(1) Be dated;

(2) Be typewritten or legibly written;  
 (3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by the agent or attorney of such employer; and

(6) Include the address at which such employer or agent or attorney desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief ALJ, at the address stated in the Administrator, WHD's notice of determination, no later than 30 calendar days after the date of the determination. An employer which fails to meet this 30-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the ALJ.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service within the time set forth in paragraph (c) of this section. For the requesting employer's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or its attorney or agent, must be filed within 25 days.

(e) The determination will take effect on the start date identified in the written notice of 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.

(f) Copies of the request for a hearing will be sent by the employer or attorney or agent to the WHD official who issued the notice of determination on behalf of the Administrator, WHD, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

### Rules of Practice

#### § 503.44 General.

(a) Except as specifically provided in these regulations and to the extent they do not conflict with the provisions of this part, 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 will apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The

Federal Rules of Evidence and Subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence will guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

#### § 503.45 Service of pleadings.

(a) Under this part, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the ALJ may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any ALJ proceeding must be served on the attorneys for the Administrator, WHD. One copy must be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-2716, Washington, DC 20210, and one copy must be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following service and includes the last day of the period unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

#### § 503.46 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1184(c)(14) and these regulations will be commenced upon receipt of a timely request for hearing filed in accordance with § 503.43.

#### § 503.47 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1184(c)(14) and these regulations will be captioned in the name of the person requesting such hearing, and will be styled as follows:

In the Matter of \_\_\_\_, Respondent.

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

#### § 503.48 Conduct of proceeding.

(a) Upon receipt of a timely request for a hearing filed under and in

accordance with § 503.43, the Chief ALJ will promptly appoint an ALJ to hear the case.

(b) The ALJ will notify all parties of the date, time and place of the hearing. Parties will be given at least 30 calendar days notice of such hearing.

(c) The ALJ may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement must be served upon each other party. Post-hearing briefs will not be permitted except at the request of the ALJ. When permitted, any such brief must be limited to the issue or issues specified by the ALJ, will be due within the time prescribed by the ALJ, and must be served on each other party.

### Procedures Before Administrative Law Judge

#### § 503.49 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but before 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 will 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 will also provide:

(1) That the order will 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 will 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 attorney or agent 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 therefore, the ALJ, within 30 days thereafter, will, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

#### Post-Hearing Procedures

##### § 503.50 Decision and order of Administrative Law Judge.

(a) The ALJ will 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 will include a statement of the findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision will 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 will be stated in the decision.

(c) In the event that the Administrator, WHD assesses back wages for wage violation(s) of § 503.16 based upon a PWD obtained by the Administrator from OFLC during the investigation and the ALJ determines that the Administrator's request was not warranted, the ALJ will remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the ALJ, the ALJ will accept as final and accurate the wage determination obtained from OFLC or, in the event the employer filed a timely appeal under 20 CFR 655.13 the final wage determination resulting from that process. Under no circumstances will the ALJ determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The decision will be served on all parties.

(e) The decision concerning civil money penalties, debarment, monetary relief, and/or other administrative remedies, when served by the ALJ will

constitute the final agency order unless the Administrative Review Board (ARB), as provided for in § 503.51, determines to review the decision.

#### Review of Administrative Law Judge's Decision

##### § 503.51 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 will, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition will be served on all parties and on the ALJ.

(b) No particular form is prescribed for any petition for the ARB's review permitted by this part. However, any such petition will:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue or issues stated in the ALJ decision and order giving rise to such petition;
- (4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Include as an attachment the ALJ's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

(c) If the ARB does not issue a notice accepting a petition for review of the decision 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 will be deemed the final agency action.

(d) 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 will be served upon the ALJ and upon all parties to the proceeding.

##### § 503.52 Responsibility of the Office of Administrative Law Judges (OALJ).

Upon receipt of the ARB's Notice under § 503.51, the OALJ will promptly

forward a copy of the complete hearing record to the ARB.

##### § 503.53 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify the parties of:

- (a) The issue or issues raised;
- (b) The form in which submissions will be made (i.e., briefs, oral argument, etc.); and
- (c) The time within which such presentation will be submitted.

##### § 503.54 Submission of documents to the Administrative Review Board.

All documents submitted to the ARB will be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-5220, Washington, DC 20210. An original and two copies of all documents must be filed. Documents are not deemed filed with the ARB until actually received by the ARB. All documents, including documents filed by mail, must be received by the ARB either on or before the due date. Copies of all documents filed with the ARB must be served upon all other parties involved in the proceeding.

##### § 503.55 Final decision of the Administrative Review Board.

The ARB's final decision will be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

#### Record

##### § 503.56 Retention of official record.

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

Signed in Washington, this 11th day of March 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

**Nancy Leppink,**

*Deputy Administrator, Wage and Hour Division.*

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