

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Parts 653 and 655****Wage and Hour Division****29 CFR Part 501**

[DOL Docket No. ETA-2019-0007]

RIN 1205-AB89

**Temporary Agricultural Employment of H-2A Nonimmigrants in the United States**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Labor (Department or DOL) is amending its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H-2A nonimmigrant status (H-2A workers) and enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. These regulations are consistent with the Secretary of Labor's (Secretary) statutory responsibility to certify that there are not sufficient able, willing, and qualified workers available to fill the petitioning employer's job opportunity, and that the employment of H-2A workers in that job opportunity will not adversely affect the wages and working conditions of workers in the United States similarly employed. Among the issues addressed in this final rule are improving the minimum standards and conditions of employment that employers must offer to workers; expanding the Department's authority to use enforcement tools, such as program debarment for substantial violations of program requirements; modernizing the process by which the Department receives and processes employers' job orders and applications for temporary agricultural labor certifications, including the recruitment of United States workers (U.S. workers); and revising the standards and procedures for determining the prevailing wage rate. This final rule will strengthen protections for workers, modernize and simplify the H-2A application and temporary labor certification process, and ease regulatory burdens on employers.

**DATES:** This final rule is effective November 14, 2022.

**FOR FURTHER INFORMATION CONTACT:** For further information regarding 20 CFR

part 653, contact Kimberly Vitelli, Administrator, Office of Workforce Investment, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-3980 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via Teletypewriter (TTY)/Telecommunications Device for the Deaf (TDD) by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

For further information regarding 20 CFR part 655, contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

For further information regarding 29 CFR part 501, contact Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue NW, 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/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

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## I. Executive Summary

### A. Purpose of the Regulatory Action

This final rule amends the standards and procedures by which the Department grants certification of agricultural labor or services to be performed by H–2A workers on a seasonal or temporary basis, and enforcement of the contractual obligations applicable to employers of H–2A workers. The major provisions

contained in this final rule will strengthen protections for workers, modernize and simplify the H–2A application and temporary labor certification process, and ease regulatory burdens on employers.

It is the policy of the Department to maintain robust protections for workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of the Employment and Training Administration (ETA), Wage and Hour Division (WHD), and the Department’s Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of wages and working conditions in the United States. In addition, these agencies make criminal referrals to the Department’s Office of Inspector General to combat visa-related fraud schemes.

The Department is updating its H–2A regulations to ensure that employers can address temporary labor needs by employing foreign agricultural workers, without undue cost or administrative burden, while maintaining the program’s strong protections. The changes in this final rule will enhance WHD’s enforcement capabilities, thereby ensuring that responsible employers are not faced with unfair competition and allowing for robust enforcement against program fraud and abuse that undermine the rights and interests of workers.

### B. Legal Authority

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an “H–2A” nonimmigrant visa classification for a worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.” 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1) and 1188.<sup>1</sup> The admission of foreign workers under this classification involves a multi-step process before several Federal agencies. A prospective H–2A employer must first apply to the Secretary for a certification that:

- there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

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

8 U.S.C. 1188(a)(1). The INA prohibits the Secretary from issuing this certification—known as a “temporary agricultural labor certification”—unless both of the above-referenced conditions are met and none of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers’ compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training, who in turn has delegated that authority to ETA’s Office of Foreign Labor Certification (OFLC). *See* Secretary’s Order 06–2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010). In addition, the Secretary has delegated to the Department’s WHD the responsibility under 8 U.S.C. 1188(g)(2) to assure employer compliance with the terms and conditions of employment under the H–2A program. *See* Secretary’s Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

Once an employer obtains a temporary agricultural labor certification from DOL, it may then file a petition for a nonimmigrant worker with the Secretary of Homeland Security. *See* 8 U.S.C. 1184(c).<sup>2</sup> If the employer’s petition is approved, the foreign workers residing outside the United States whom it seeks to employ must, generally, apply for a nonimmigrant H–2A visa at a U.S. embassy or consulate abroad, and seek admission to the United States with U.S. Customs and Border Protection.<sup>3</sup> If the employer seeks to employ foreign workers already performing work in the United States in H–2A status and wishes to petition the workers through an extension of stay or change of status, the foreign workers are not required to apply for a visa but should they depart from the United States subsequent to being granted such H–2A status, must generally obtain an H–2A visa in order to return to the country.

<sup>2</sup> Under sec. 1517 of title XV of the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, reference to the Attorney General’s or other Department of Justice Official’s responsibilities under sec. 1184(c) have been expressly transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202, 271(b).

<sup>3</sup> *See generally* 8 U.S.C. 1225; 8 CFR part 235.

<sup>1</sup> For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

### C. Current Regulatory Framework

Since 1987, the Department has operated the H–2A temporary labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501. The majority of the Department’s current regulations governing the H–2A program were published in 2010.<sup>4</sup> In addition, the Department has issued special procedures for the employment of foreign workers in the herding and production of livestock on the range as well as animal shearing, commercial beekeeping, and custom combining occupations.<sup>5</sup> The Department incorporated the provisions for employment of workers in the herding and production of livestock on the range into the H–2A regulations, with modifications, in 2015.<sup>6</sup> The provisions

<sup>4</sup> Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010) (2010 H–2A Final Rule); but see Final Rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States*, 84 FR 49439 (Sept. 20, 2019) (2019 H–2A Recruitment Final Rule) (rescinding the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment; expanding and enhancing the Department’s electronic job registry; and leveraging the expertise and existing outreach activities of State Workforce Agencies (SWAs) to promote agricultural job opportunities); see also Final Rule, *Rules Concerning Discretionary Review by the Secretary*, 85 FR 30608 (May 20, 2020) (establishing a system of discretionary secretarial review over cases pending before or decided by the Board of Alien Labor Certification Appeals [BALCA] and to make technical changes to Departmental regulations governing the timing and finality of decisions of the Administrative Review Board [ARB] and the BALCA).

<sup>5</sup> See Training and Employment Guidance Letter (TEGL) No. 32–10, *Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations under the H–2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=3042](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3042); TEGL No. 15–06, Change 1, *Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock under the H–2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=3044](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3044); TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=3041](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041); TEGL No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=3043](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3043); TEGL No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=3040](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3040).

<sup>6</sup> Final Rule, *Temporary Agricultural Employment of H–2A Foreign Workers in the Herding or*

governing the employment of workers in the herding and production of livestock on the range are now codified at 20 CFR 655.200 through 655.235.<sup>7</sup>

### D. Summary of Major Provisions of This Final Rule

After careful consideration of the public comments received, this final rule adopts much of the regulatory text proposed in the notice of proposed rulemaking (NPRM or proposed rule) published in the **Federal Register** on July 26, 2019, with some significant changes.<sup>8</sup> In particular, and as discussed in detail elsewhere in this preamble, this final rule adopts the following major changes to the Department’s H–2A program regulations:

#### Strengthening Worker Protections and Program Integrity

- Revises the standards and procedures by which employers qualifying as H–2A Labor Contractors (H–2ALCs) obtain temporary labor certification by permitting the electronic submission of surety bonds, adjusting the required surety bond amounts based on changes to adverse effect wage rates (AEWR), adopting a common bond form that includes standardized bond language, and permitting debarment of H–2ALCs that fail to provide adequate surety bonds. These provisions are intended to reduce the likelihood of program abuse by ensuring H–2ALCs are better able to meet their payroll and other program obligations to workers, streamline the process for accepting surety bonds, and strengthen the Department’s authority to address noncompliant bonds.

- Clarifies the definitions of “employer” and “joint employment,” the use of these terms in the filing of *Applications for Temporary Employment Certification*, and the responsibilities of joint employers. Employers that file as joint employers

*Production of Livestock on the Range in the United States*, 80 FR 62958 (Oct. 16, 2015) (2015 H–2A Herder Final Rule).

<sup>7</sup> Consistent with a court-approved settlement agreement in *Hispanic Affairs Project, et al. v. Scalia et al.*, No. 15-cv-1562 (D.D.C.), the Department recently rescinded 20 CFR 655.215(b)(2).

<sup>8</sup> Notice of Proposed Rulemaking, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 84 FR 36168 (July 26, 2019). In late 2020, the Department published a final rule to revise the methodology by which it determines the hourly AEWR for non-range agricultural occupations. Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States*, 85 FR 70445 (Nov. 5, 2020) (2020 H–2A AEWR Final Rule). The 2020 H–2A AEWR Final Rule addressed only that aspect of the NPRM. This final rule addresses the remaining aspects of the NPRM published on July 26, 2019.

are treated as such as a matter of law for purposes of compliance and enforcement. In addition, employers that do not file applications but nonetheless jointly employ workers under the common law of agency are responsible as joint employers. These provisions are intended to enhance worker protections by providing greater clarity regarding the responsibilities of joint employers, consistent with the statute and the Department’s current policy and practice.

- Provides that rental and/or public accommodations secured to house workers must meet applicable local, State, or Federal standards addressing certain health or safety concerns (e.g., minimum square footage per occupant, sanitary food preparation and storage areas, laundry and washing facilities), and requires employers to submit written documentation that such housing meets applicable standards and contains enough bed(s) and room(s) to accommodate all workers requested. These provisions are intended to better protect the health and safety of workers without imposing an undue burden on employers.

- Enhances the Department’s debarment authority by holding agents and attorneys, and their successors in interest, accountable for their own misconduct independent of the employer’s violation(s), and clarifies that *Applications for Temporary Employment Certification* filed by debarred entities during the period of debarment will be denied without review. These provisions are intended to improve program integrity and promote greater compliance with program requirements.

#### Modernizing the H–2A Application Process and Prevailing Wage Surveys

- Establishes a single point of entry by requiring that employers, except in limited circumstances, electronically file *Applications for Temporary Employment Certification*, job orders, and all supporting documentation through a centralized electronic system maintained by the Department, and permits the use of electronic signatures meeting valid signature standards. These provisions are intended to reduce costs and burdens for most employers, improve the quality of applications, reduce the frequency of delays associated with deficient applications, and better facilitate interagency data-sharing.

- Codifies the use of electronic methods for the OFLC Certifying Officer (CO) to send notices and requests to employers, circulate approved job orders to appropriate SWAs for

interstate clearance and recruitment of U.S. workers, and issue temporary labor certification decisions directly to the Department of Homeland Security (DHS). These provisions are intended to modernize OFLC's processing of applications to minimize delays, reduce administrative costs for the employer and the Department, and expedite the delivery of temporary agricultural labor certifications to DHS, while maintaining program integrity.

- Replaces outdated prevailing wage survey guidelines from the Department's ETA Handbook 385 (Handbook 385) with modernized standards that are more effective in producing prevailing wages for distinct crop or agricultural activities, and expands the universe of State entities that may conduct prevailing wage surveys, including SWAs, other State agencies, State colleges, or State universities. These provisions are intended to refine the minimum standards for prevailing wage surveys, including providing SWAs with the flexibility to leverage other State survey resources to expand the number and scope of surveys conducted based on information that is as reliable and representative as possible. In addition, while the minimum standards may not ensure statistically valid estimates for larger categories of workers, they are designed to provide more options for SWAs to make decisions about prioritizing precision, accuracy, granularity, or other quality factors in the data they use to inform prevailing wages.

#### Expanding Employer Access and Flexibilities To Use the H-2A Program

- Establishes new standards that permit individual employers possessing the same need for agricultural services or labor to file a single *Application for Temporary Employment Certification* and job order to jointly employ workers in full-time employment, consistent with the statute and the Department's longstanding practice. This provision is intended to provide small employers who cannot offer full-time work for their H-2A employees with an opportunity to participate in the H-2A program and ensure each employer will be held jointly liable for compliance with all program requirements.

- Codifies a unique set of standards and procedures, with some revisions, for employers that employ workers engaged in animal shearing, commercial beekeeping, and custom combining according to a planned itinerary across multiple areas of intended employment (AIE) in one or more contiguous States. These provisions are intended to provide appropriate flexibilities for

employers engaged in these unique agricultural activities that are substantially similar to the processes formerly set out in administrative guidance letters, and greater certainty in the handling of these applications by the Department under 20 CFR part 655, subpart B.

#### E. Summary of Costs and Benefits

Executive Order (E.O.) 12866<sup>9</sup> and E.O. 13563<sup>10</sup> direct agencies to assess the costs and benefits of available alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking has been designated a "significant regulatory action" under section (sec.) 3(f)(1) of E.O. 12866. Accordingly, it has been reviewed by the Office of Management and Budget (OMB).

The Department estimates that this final rule will result in costs, cost savings, and qualitative benefits. The cost of this final rule is associated with rule familiarization and recordkeeping requirements for all H-2A employers, as well as increases in the amount of surety bonds required for H-2ALCs. This final rule is expected to have an annualized quantifiable cost of \$2.75 million and a total 10-year quantifiable cost of \$19.29 million at a discount rate of seven percent. The cost savings of this final rule are the electronic submission of applications and application signatures, including the use of electronic surety bonds, and the electronic sharing of job orders submitted to the OFLC National Processing Center (NPC) with the SWAs. This final rule is estimated to have annualized cost savings of \$0.16 million and total 10-year quantifiable cost savings of \$1.12 million at a discount rate of seven percent.

The Department estimates that this final rule will result in an annualized net quantifiable cost of \$2.59 million and a total 10-year net cost of \$18.17 million, both at a discount rate of seven percent and expressed in 2021 dollars. The Department expects that this final rule will provide qualitative benefits including: (1) clearer application of certain housing-related standards when

employers choose to meet their H-2A housing obligations by providing rental and/or public accommodations, which will bolster worker health and safety protections; (2) an improved process of submitting and reviewing H-2A applications, which will reduce workforce instability; and (3) the adoption of electronic surety bonds and a standardized bond form, which will help streamline the H-2A application process and reduce delays. The Department believes that the qualitative benefits outweigh the quantitative net costs in this rule.

#### F. Severability

To the extent that any portion of this final rule is declared invalid by a court, the Department intends for all other parts of this final rule that can operate in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a court decision invalidating a portion of this final rule results in a partial reversion to the current regulations or to the statutory language itself, the Department intends that the rest of this final rule continue to operate, to the extent possible, in tandem with the reverted provisions.

## II. Acronyms and Abbreviations

AEWR	Adverse effect wage rate(s)
AIE	Area(s) of intended employment
ALJ	Administrative Law Judge
AOWL	Agricultural Online Wage Library
ARB	Administrative Review Board
ARIMA	Autoregressive integrated moving average
BALCA	Board of Alien Labor Certification Appeals
BLS	Bureau of Labor Statistics
CBA	Collective bargaining agreement
CFR	Code of Federal Regulations
CO	Certifying Officer(s)
COVID-19	Novel coronavirus disease
CPI	Consumer Price Index
DBA	Doing Business As
DC	District of Columbia
DHS	Department of Homeland Security
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
ECI	Employment Cost Index
E.O.	Executive Order
E-SIGN	Electronic Signatures in Global and National Commerce Act
ETA	Employment and Training Administration
FEIN	Federal Employer Identification Number
FICA	Federal Insurance Contributions Act
FLAG	Foreign Labor Application Gateway
FLC	Farm Labor Contractor
FLS	Farm Labor Survey
FLSA	Fair Labor Standards Act
FR	Federal Register
FTC	Federal Trade Commission
FY	Fiscal Year(s)
GPEA	Government Paperwork Elimination Act
H-2ALC(s)	H-2A Labor Contractor(s)

<sup>9</sup>E.O. 12866, *Regulatory Planning and Review*, 58 FR 51735 (Oct. 4, 1993).

<sup>10</sup>E.O. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (Jan. 21, 2011).

HR Human Resources  
 iCERT iCERT Visa Portal System  
 ICR Information Collection Request  
 IFR Interim final rule  
 INA Immigration and Nationality Act  
 IRC Internal Revenue Code  
 IRCA Immigration Reform and Control Act of 1986  
 IRS Internal Revenue Service  
 MSA Metropolitan Statistical Area(s)  
 MSPA Migrant and Seasonal Agricultural Worker Protection Act  
 NAICS North American Industry Classification System  
 NOA Notice(s) of Acceptance  
 NOD Notice(s) of Deficiency  
 NPC National Processing Center  
 NPRM Notice of proposed rulemaking  
 NPWC National Prevailing Wage Center  
 NW Northwest  
 OALJ Office of Administrative Law Judges  
 OEWS Occupational Employment and Wage Statistics  
 OFLC Office of Foreign Labor Certification  
 OIRA Office of Information and Regulatory Affairs  
 OMB Office of Management and Budget  
 OSHA Occupational Safety and Health Administration  
 PRA Paperwork Reduction Act  
 Pub. L. Public Law  
 PWD Prevailing wage determination(s)  
 QCEW Quarterly Census of Employment and Wages  
 RFA Regulatory Flexibility Act  
 RIN Regulation Identifier Number  
 RV Recreational vehicle  
 SBA Small Business Administration  
 Sec. Section of a Public Law  
 Secretary Secretary of Labor  
 SOC Standard Occupational Classification  
 Stat. U.S. Statutes at Large  
 SWA(s) State Workforce Agency(-ies)  
 TDD Telecommunications Device for the Deaf  
 TEGL Training and Employment Guidance Letter  
 TTY Teletypewriter  
 UI Unemployment insurance  
 UMRA Unfunded Mandates Reform Act of 1995  
 U.S. United States  
 U.S.C. United States Code  
 USCIS U.S. Citizenship and Immigration Services  
 USDA U.S. Department of Agriculture  
 WHD Wage and Hour Division

### III. Background and Public Comments Received on the Notice of Proposed Rulemaking

On July 26, 2019, the Department published an NPRM requesting public comments on proposals intended to modernize and simplify the process by which OFLC reviews employers' job orders and applications for temporary agricultural labor certifications for use in petitioning DHS to employ H-2A workers. See 84 FR 36168. The Department also proposed to amend the regulations for enforcement of contractual obligations applicable to the employment of H-2A workers and

workers in corresponding employment administered by WHD, and to amend the Wagner-Peyser Act regulations administered by ETA to provide consistency with revisions to H-2A program regulations governing the temporary agricultural labor certification process. *Id.* The NPRM invited written comments from the public on all aspects of the proposed amendments to the regulations. A 60-day comment period allowed for the public to inspect the proposed rule and provide comments through September 24, 2019.

The Department also received requests for an extension of the comment period for the NPRM. While the Department appreciated the issues raised concerning the public's opportunity to examine the rule and comment, the Department decided not to extend the comment period. The Department continues to believe that a 60-day comment period was sufficient to allow the public to inspect the proposed rule and provide comments, and this conclusion is supported by both the volume of comments received and by the wide variety of stakeholders that submitted comments within the 60-day comment period.

The Department received a total of 83,532 public comments in docket number ETA-2019-007 in response to the NPRM. In addition, the Department received 128 comments in response to document WHD\_FRDOC\_0001-0070 prior to the comment submission deadline. These comments were incorporated into docket number ETA-2019-007, and each comment received a note on regulations.gov indicating that it was timely received. The commenters represented a wide range of stakeholders from the public, private, and not-for-profit sectors. The Department received comments from a geographically diverse cross-section of stakeholders within the agricultural sector, including farmworkers, workers' rights advocacy organizations, farm owners, trade associations for agricultural products and services, not-for-profit organizations representing agricultural issues, and other organizations with an interest in farming, ranching, and other agricultural activities. Public sector commenters included Federal elected officials, State officials, and agencies representing 14 State governments. Private sector commenters included business owners, recruiting companies, and law firms. Other commenters included immigration advocacy groups, public policy organizations, and trade associations interested in immigration-related issues. The vast majority of

comments specifically addressed proposals and issues contained in the NPRM. The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and this final rule was developed after review and consideration of all public comments timely received in response to the NPRM.<sup>11 12</sup>

### IV. Discussion of General Comments

Following careful consideration of the public comments received, the Department made a number of modifications to the NPRM's proposed regulatory text. Section V of this preamble sets out the Department's interpretation and rationale for the amendments adopted to 20 CFR part 655, subpart B, 20 CFR 653.501(c)(2)(i), and 29 CFR part 501, section by section. Before setting out the detailed section-by-section analysis below, however, the Department will first acknowledge and respond to general comments that did not fit readily into this organizational scheme.

Of the total public comments received, 82,893 comments were associated with form letters or letter writing campaigns. One not-for-profit organization submitted the names of 8,602 community members expressing general concerns about worker wages,

<sup>11</sup> As explained elsewhere in this rule, the Department separately published a final rule—the 2020 H-2A AEWR Final Rule—that addressed the proposal and public comments concerning the AEWR methodology and was limited to only that aspect of the NPRM. This final rule addresses the remaining aspects of the NPRM. Previously, on January 15, 2021, the Department announced and posted on OFLC's website an unpublished final rule on these remaining aspects of the NPRM, explaining that the rule was pending publication in the **Federal Register** with a 30-day delayed effective date. See Announcements, *U.S. Department of Labor Withdraws Forthcoming H-2A Temporary Agricultural Program Rule for Review* (Jan. 20, 2021), <https://www.dol.gov/agencies/eta/foreign-labor/news>. On January 20, 2021, however, the Department withdrew this document from the Office of the Federal Register, prior to the document being made available for public inspection, for the purpose of reviewing issues of law, fact, and policy raised by the rule. Therefore, the unpublished draft rule (hereinafter referenced as “the January 2021 draft final rule”) never took effect. 5 U.S.C. 552(a)(1), 553; cf. *Humane Society v. U.S. Dep't of Ag.*, No. 20-5291, —F.4th—, 2022 WL 2898893, at \*8 (D.C. Cir. 2022) (holding that “agencies may repeal a rule made available for public inspection in the Office of the Federal Register only after complying with the [Administrative Procedure Act's] procedural requirements”). The **Federal Register** and the Code of Federal Regulations remain the official sources for regulatory information published by the Department. *Id.* Any statements in the January 2021 draft final rule do not represent the Department's formal policy. Moreover, the January 2021 draft final rule and any statements contained therein do not, and may not be relied upon to, create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party.

worker safety, and enforcement of immigration laws. A not-for-profit foundation and labor union letter writing campaign resulted in the submission of more than 74,000 form letters and postcards from individual farmworkers expressing general concerns over issues such as the growth of the H-2A program, worker wages, costs to workers, working conditions, housing conditions, job opportunities for U.S. workers, and enforcement and oversight of program protections. Additional letter writing campaigns were organized by agricultural associations, trade associations, local groups of farmers, and private individuals. The Department recognizes and appreciates the public's interest in this regulatory action. Where these letters discussed substantive changes within the scope of the rule, the Department has considered and addressed these issues, in detail, in the section-by-section analysis of this preamble.

Many of the comments received expressed general support for or opposition to the proposed rule, without discussing specific provisions of the NPRM. The Department received comments from individual business owners, farmers, and trade associations that expressed general support for taking action to change the H-2A program, including efforts to streamline the electronic document filing system, modernizing and improving the efficiency of the program, making the program more flexible and responsive to farmer needs, and creating an environment that fosters a more stable workforce without harming U.S. workers. Other commenters stressed the importance of protecting and improving the American farming industry through the proposed regulations. Another commenter mentioned the growth of the H-2A program in their State as evidence that the program plays a vital role in the agricultural sector. The Department values and appreciates these commenters' support for the proposed rule, as well as their unique and informed perspectives on the program's strengths and proposed points of improvement.

In addition to comments expressing general support for the rule, the Department received several comments supporting other comments that were submitted in response to the NPRM. Most of these comments were from individual farmers and ranchers expressing support for a comment submitted by an agricultural association or trade association. The Department acknowledges the time and effort undertaken by these commenters to

voice their opinions on this rulemaking and lend their support for the opinions of others. Where these comments supported substantive changes within the scope of the rule, the Department has considered and addressed these issues, in detail, in the section-by-section analysis of this preamble.

The Department also received several comments in general opposition to the changes proposed in the NPRM, including from private citizens, farmworkers, and workers' rights advocacy organizations. These comments included concerns that changes to the H-2A program could disproportionately harm small farms. In accordance with the Regulatory Flexibility Act (RFA), an analysis on the impact on small farms was performed, and the results were considered in formulating this final rule. Additional commenters expressed the view that stronger protections and accountability for worker safety and living conditions are needed, asserting that the changes proposed in the NPRM would serve to weaken labor standards and increase instances of abuse within the immigration system. Some commenters feared that the proposed changes would disproportionately harm marginalized communities, including immigrants, individuals with disabilities, and people of color. One commenter opposed the changes proposed in the NPRM out of a general concern that such changes, once implemented, would encourage employers to deny jobs to U.S. farmworkers in order to hire foreign workers for less pay. Still other commenters stated that the changes proposed in the NPRM would make working and living conditions worse for farmworkers both within the H-2A program as well as farmworkers who are already lawfully present in the United States and employed in that capacity. These commenters underscored the importance of increasing protections for both U.S. workers' and H-2A workers' living and working conditions. Some commenters worried that the proposed changes would increase costs to workers, decrease their wages, or both. In contrast, one commenter expressed concern about the proposal increasing costs for employers through higher wages and labor standards for workers. Other commenters expressed general concerns about how the changes would impact food safety and the appeals process. A few commenters criticized the proposed rule for not including provisions to address recruitment fees and sectors in agriculture that have year-round needs for labor.

The Department values and appreciates the participation and input

from these commenters and the perspectives they have to offer. The mission of DOL is to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and protection of workers' rights. Under this charge, the Department continues to be as diligent as possible in safeguarding worker rights, promoting the welfare of all workers, and investigating and preventing abuse within the U.S. agricultural economy, and it shares these commenters' concerns for the protection of all farmworkers in the United States. Where these comments supported substantive changes within the scope of the rule, the Department has considered and addressed these issues, in detail, in the section-by-section analysis of this preamble.

#### **V. Section-by-Section Summary of This Final Rule, 20 CFR Part 655, Subpart B; 20 CFR 653.501(c)(2)(i); and 29 CFR Part 501**

This section of the preamble provides the Department's responses to public comments received on the NPRM and rationale for the amendments adopted to 20 CFR part 655, subpart B, 20 CFR 653.501(c)(2)(i), and 29 CFR part 501, section by section, and generally follows the outline of the regulations. Within each section of the preamble, the Department has noted and responded to those public comments that are addressed to that particular section of this final rule. If a proposed change is not addressed in the discussion below, it is because the public comments did not substantively address that specific provision and no changes have been made to the proposed regulatory text. The Department received some comments on the NPRM that were outside the scope of the proposed regulations, and the Department offers no substantive response to such comments. The Department also has made some nonsubstantive changes to the regulatory text to correct grammatical and typographical errors, in order to improve readability and conform the document stylistically, that generally are not discussed below.

##### *A. Introductory Sections*

##### **1. Section 655.100, Purpose and Scope of Subpart B**

The NPRM proposed minor amendments to this section to clarify the purpose of the H-2A program regulations in paragraph (a) and the scope of those regulations in paragraph



(b). Proposed paragraph (a) reflected the purpose of the final rule as realizing the Department's statutory authority to establish a process through which it will make factual determinations regarding the issuance of a temporary agricultural labor certification and certify its determination to DHS. *See* 8 U.S.C. 1188(a). Proposed paragraph (b) described the scope of the Department's role in receiving, reviewing, and adjudicating *Applications for Temporary Employment Certification*, including establishing standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H-2A employers must comply, and the rights and obligations of H-2A workers and workers in corresponding employment. The Department received some comments on this provision, but has not made any substantive changes to the regulatory text in response to these comments. Therefore, as discussed below, this provision remains unchanged from the NPRM except for minor technical changes.

Although many commenters generally applauded the Department's efforts to amend the H-2A regulations through this rulemaking activity, others stated the proposed regulations were unsatisfactory in addressing a wide array of immigration and workforce issues impacting the United States. Some called for an "overhaul" of the immigration system as it relates to agricultural labor through this rule or through a "guest" worker program, and some suggested creation of a system where the agricultural workforce would have a pathway to citizenship. Others stated that the changes proposed in this rulemaking would weaken workers' wages, protections, and U.S. worker recruitment obligations, and would not incentivize farmers' use of E-Verify administered by DHS and the Social Security Administration. However, no commenters objected to the Department's proposed language under § 655.100 stating the purpose and scope of its H-2A program regulations based on the Department's statutory authority under the INA.

To the extent commenters urged action beyond the proposed changes that the Department presented for public comment in the NPRM, their comments are outside the scope of this rulemaking. To the extent these commenters commented on the Department's proposals in specific provisions of the NPRM (*e.g.*, wage requirements or recruitment obligations), the Department has addressed their specific comments in the preamble discussion of those

particular provisions. Generalized comments relating to this final rule are addressed in section IV, Discussion of General Comments. In the absence of objection to the Department's proposed revisions to this regulatory language describing the purpose and scope of its H-2A program regulations, the Department has adopted these provisions as proposed, with minor changes in § 655.100. In this final rule, the Department reversed the order of the words "purpose" and "scope" in the section heading in order to reflect the sequence of topics in paragraphs (a) and (b). The Department also revised "temporary agricultural labor or services" to now read "agricultural labor or services of a temporary or seasonal nature" and included the word "temporary" in front of "foreign workers" to better reflect the determinations made in the Department's temporary agricultural labor certification.

## 2. Section 655.101, Authority of the Agencies, Offices, and Divisions of the Department of Labor; and 29 CFR 501.1, Purpose and Scope

The NPRM proposed minor amendments to this section related to the delegated authorities of ETA and WHD and the division of responsibilities between the agencies in administering the H-2A program. In addition to other statutory responsibilities required by 8 U.S.C. 1188, proposed paragraph (a) addressed ETA's authority to carry out the Secretary's responsibility to issue temporary agricultural labor certifications through OFLC, while proposed paragraph (b) addressed WHD's authority to carry out the Secretary's authority to investigate and enforce the terms and conditions of H-2A temporary agricultural labor certifications under 8 U.S.C. 1188, 29 CFR part 501, and 20 CFR part 655, subpart B ("this subpart") (collectively, "the H-2A program"). Proposed paragraph (c) reminded program users of ETA and WHD's concurrent authority to impose a debarment remedy, when appropriate, under ETA regulations at 20 CFR 655.182 or under WHD regulations at 29 CFR 501.20. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

Some commenters raised concerns about potential delays or confusion related to the manner in which ETA and WHD coordinate enforcement and share authority, as well as the level of

expertise of enforcement agencies to which ETA and WHD may make referrals. One commenter expressed concern about the frequency of WHD investigations of H-2A employers, as compared to non-H-2A employers, and objected to what it perceived as an expansion of WHD's enforcement authority. Another commenter suggested that the complementary regulation at 29 CFR 501.1(b) be revised to explicitly reference OFLC's authority to carry out responsibilities under 20 CFR part 655, subpart B, in addition to its authority under the statute. As the regulations are promulgated pursuant to OFLC's statutory authority, the Department considers the proposed regulations to adequately describe the scope of OFLC's authority. Further, by adding paragraph (b) to 20 CFR 655.101, the Department clarifies the role of WHD with regard to 20 CFR part 655, subpart B, within that subpart rather than solely within the complementary regulation at 29 CFR 501.1(c) and brings consistency to 20 CFR 655.101 and 29 CFR 501.1; both now address ETA's and WHD's roles. To the extent commenters raised concerns about the manner in which ETA and WHD coordinate enforcement and shared authority, in practice, those specific comments are addressed in connection with the relevant regulatory provision (*e.g.*, 20 CFR 655.182(g)). As no commenter raised issues with the proposed revisions to the description of the authority of the Department's agencies, offices, and divisions under 20 CFR 655.101 and 29 CFR 501.1 that necessitate changes, the Department is adopting them in this final rule without change.

## 3. Section 655.102, Transition Procedures

### a. Rescinding the Provision Allowing for the Creation of Special Procedures

As stated in the NPRM, the Department's H-2A regulations have, since their creation, provided authority under 20 CFR 655.102 to "establish, continue, revise, or revoke special procedures for processing certain H-2A applications," and the Department has exercised a limited degree of flexibility in determining when specific variations from the normal labor certification processes were necessary to permit the temporary employment of foreign workers in specific industries or occupations. However, the Department proposed to rescind the special procedures provision in its H-2A regulations in light of the decision in *Mendoza v. Perez*, 754 F.3d 1002, 1022 (D.C. Cir. 2014), which found that the

Department's determination to establish special procedures for sheep, goat, and cattle herding under § 655.102 was subject to the Administrative Procedure Act, possessed all the hallmarks of a legislative rule, and could not be issued through sub-regulatory guidance. The Department underwent notice-and-comment rulemaking to convert the sub-regulatory guidance for sheep and goat herding and production of livestock on the range into formal regulations; those provisions appear in the Department's H-2A regulations at 20 CFR 655.200 through 655.235, 2015 H-2A Herder Final Rule, 80 FR 62958.<sup>13</sup> Accordingly, the Department proposed in the NPRM new regulatory provisions under §§ 655.300 through 655.304 to incorporate the remaining special procedures covering the specific occupations of animal shearing, commercial beekeeping, and custom combining into the H-2A regulatory framework, effectively rescinding the TEGs covering those occupations. The Department received some comments on the Department's proposal to rescind existing § 655.102, but as discussed below, none warranted changes to the Department's proposed rescission. Therefore, the rescission of this provision remains unchanged from the NPRM.

Some commenters generally supported the proposal to engage in rulemaking (*i.e.*, through the NPRM and this final rule) to incorporate the procedures and standards from the TEGs for itinerant animal shearing, commercial beekeeping, and custom combining into the H-2A regulations, with some remarking that it provided an opportunity to comment on specific aspects of occupational variances. The Department addresses these specific comments in the preamble sections below that discuss §§ 655.300 through 655.304. Several other commenters expressed support for this proposal and cited general agreement with the conclusion that such procedures are substantive and require formal notice-and-comment rulemaking.

One trade association stated that it "takes no position" on the proposed rule's rescission of the special procedures provision, but recommended the procedures and standards set forth in TEGs should undergo "appropriate due process" before attaining the status of regulations. Although other trade

associations and individual commenters were in favor of eliminating informal special procedures, they recommended the Department retain the ability to develop formal special procedures when circumstances arise in the future. These commenters noted that U.S. agriculture will continue to evolve, and the Department must have the appropriate tools to implement immediate changes to assist farmers while protecting workers.

The Department understands the concerns expressed by a few commenters that consideration of special variances for specific industries or occupations, other than those addressed in this final rule at §§ 655.200 through 655.235 and §§ 655.300 through 655.304, may be appropriate at some point in the future. However, in light of the court's decision in *Mendoza* and the similarity between the special procedures at issue in that case and the current H-2A special procedure TEGs, the Department has determined that it should engage in formal notice-and-comment rulemaking procedures (*i.e.*, through the NPRM and this final rule) to incorporate into the regulations its current H-2A special procedures. Rescission of the broad authority in § 655.102 to establish special procedures does not preclude the Department from engaging in future notice-and-comment rulemaking or issuing guidance; rather, it reassures the public that the Department will engage in notice-and-comment rulemaking to establish variances in the future. Accordingly, the Department is adopting its proposal to rescind from the H-2A regulations the explicit provision permitting the Department to establish special procedures for processing certain *Applications for Temporary Employment Certification* under § 655.102.

#### b. Transition Procedures for Implementing Changes Created by This Final Rule

As stated in the NPRM, the Department proposed to repurpose § 655.102 to clarify which set of regulations—the 2010 H-2A Final Rule<sup>14</sup> or this final rule—an employer

must satisfy for each *Application for Temporary Employment Certification* that it has already submitted or that it is preparing to submit when this final rule becomes effective. The Department proposed to rename § 655.102 as "Transition procedures," and add regulatory language to support an orderly and seamless transition between the rules.

Paragraph (a) proposed that an *Application for Temporary Employment Certification* submitted to the OFLC NPC before the effective date of the final rule would be processed under the regulations in effect when it was submitted (*i.e.*, the 2010 H-2A Final Rule). However, an employer's engagement with H-2A program requirements begins in advance of its submission of the *Application for Temporary Employment Certification* to the NPC, with its submission of a job order to the SWA for review and clearance. In order to provide similar regulatory continuity for H-2A program job orders, paragraphs (b) and (c) proposed a procedure for determining which set of regulations would apply to an *Application for Temporary Employment Certification* submitted to the NPC on or after the effective date of the final rule.

As a result, any *Application for Temporary Employment Certification* with a first date of need no later than 90 days after the effective date of this final rule would be processed under the 2010 H-2A Final Rule. All other *Applications for Temporary Employment Certification* submitted on or after the effective date of this final rule would be processed under this final rule. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The majority of commenters that addressed transition procedures, including trade associations, an employer, and a SWA, generally supported the proposal. However, they expressed concern that the transition period might occur during a busy season or across calendar years, depending on the timing of the final rule's publication.

<sup>14</sup> The Department's reference to "the 2010 H-2A Final Rule" herein includes the regulatory text adopted through that rulemaking, 75 FR 6884, and in other minor revisions that took effect prior to the effective date of this final rule. 2019 H-2A Recruitment Final Rule, 84 FR 49439 (rescinding the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment; expanding and enhancing the Department's electronic job registry; and leveraging the expertise and existing outreach activities of SWAs to promote agricultural job opportunities); *see also* Final Rule,

*Rules Concerning Discretionary Review by the Secretary*, 85 FR 30608 (establishing a system of discretionary secretarial review over cases pending before or decided by the BALCA and to make technical changes to Departmental regulations governing the timing and finality of decisions of the ARB and the BALCA); 2021 H-2A Herder Final Rule, 86 FR 71373 (amending the regulations regarding the adjudication of temporary need for employers seeking to employ nonimmigrant workers in job opportunities covering the herding or production of livestock on the range).

<sup>13</sup> The Department recently rescinded § 655.215(b)(2) in a separate rulemaking, Final Rule, *Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H-2A Program*, 86 FR 71373 (Dec. 16, 2021) (2021 H-2A Herder Final Rule).



These commenters urged the Department to include sufficient time in the transition period for employers to become familiar with new requirements and for the Department and SWA to develop and implement processes associated with the changes in the final rule, ideally outside of busy filing periods (e.g., September, October, and November). The Department considered these interests and concluded that the transition procedures adopted in this final rule ensure that all job orders and *Applications for Temporary Employment Certification* submitted to the SWA and/or NPC before the effective date of this final rule will continue to be governed by the 2010 H-2A Final Rule. Not only will this approach ensure that the rule change does not complicate or disrupt an employer's application process mid-stream, but it will provide an appropriate period after publication of this final rule during which the Department, SWAs, and employers can adjust to the new rule before an employer submits its first job order for processing under this final rule (i.e., with a first date of need more than 90 days after the effective date of this final rule).

Three commenters remarked on the length of the transition period proposed. Two trade associations objected to what they viewed as a delay of the actual effective date of the final rule. They remarked that the final rule would not be fully in effect on the 30th day after publication. In contrast, a SWA urged the Department to consider a longer transition period, such as 180 days after the final rule's publication date, stating that both SWAs and employers need more than 90 days to adjust to the substantive changes being proposed, e.g., survey methodologies and staggered entry.<sup>15</sup>

The Department appreciates both the SWA's suggestion for more time as well as other commenters' concerns about prompt implementation of the new rule. The transition period implemented in this final rule balances these concerns. It allows the Department to implement necessary changes to program operations, application forms, and technology systems, and to provide training and technical assistance to the NPC, SWAs, employers, and other

<sup>15</sup> The Department decided not to adopt several major changes proposed in the NPRM (e.g., staggered entry), as discussed in relevant preamble sections, which mitigates the SWA's concern to some degree. In addition, as explained in the preamble discussing § 655.120, the Department anticipates the modernized prevailing wage determination (PWD) survey requirements will reduce the burden on SWAs.

stakeholders in order to familiarize them with changes required by this rule. However, the transition period also balances the preparation required to properly implement the new rule with the importance of promptly implementing the modernized regulations. It requires employers to prepare job orders in compliance with the new regulations, and it requires the NPC and SWA to be prepared to receive those job orders, 46 days after publication of this final rule. Further, using employers' first date of need after this final rule's effective date, rather than a job order or *Application for Temporary Employment Certification* submission date, better ensures that workers who perform labor or services during the same season will be covered by the same set of regulations.

4. Section 655.103, Overview of This Subpart and Definition of Terms; 20 CFR 653.501(c)(2)(i) of the Wagner-Peyser Act Regulations; and 29 CFR 501.3, Definitions

a. AEWR

The NPRM proposed conforming changes to the definition of AEWR to be consistent with the NPRM's proposal to adjust the methodology used to establish AEWR in the H-2A program. Subsequently, the Department issued the 2020 H-2A AEWR Final Rule (85 FR 70445), which revised the AEWR methodology for non-range agricultural occupations and included a revised definition of AEWR. On December 23, 2020, in *United Farm Workers v. Dep't of Labor*, No. 20-cv-01690 (E.D. Cal. filed Nov. 30, 2020), the U.S. District Court for the Eastern District of California issued an order preliminarily enjoining the Department from further implementing the 2020 H-2A AEWR Final Rule.<sup>16</sup> On April 4, 2022, after the parties submitted summary judgment briefing, the court vacated the 2020 H-2A AEWR Final Rule and remanded the rule to the agency for further rulemaking consistent with the court's order.<sup>17</sup> In this final rule, the Department is implementing the court's vacatur of the 2020 H-2A AEWR Final Rule by removing from the CFR the regulatory text that the Department promulgated through that rulemaking at § 655.103(b)

<sup>16</sup> Order Granting Plaintiffs' Motion for a Preliminary Injunction, *United Farm Workers v. U.S. Dep't of Labor*, No. 20-cv-1690 (E.D. Cal. Dec. 23, 2020), ECF No. 37. The court's order was issued two days after the effective date of the 2020 H-2A AEWR Final Rule.

<sup>17</sup> Order Granting Plaintiffs' Motion for Summary Judgment, *United Farm Workers v. U.S. Dep't of Labor*, No. 20-cv-1690 (E.D. Cal. Apr. 4, 2022), ECF No. 102; Judgment, *United Farm Workers v. U.S. Dep't of Labor*, No. 20-cv-1690 (E.D. Cal. Apr. 4, 2022), ECF No. 103.

(the definition of AEWR), thereby restoring the regulatory text to appear as it did before the effective date of the 2020 H-2A AEWR Final Rule.

The Department has good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date for this portion of the rule because they are unnecessary and would be contrary to the public interest. See 5 U.S.C. 533(b)(B), (d). First, the changes made here carry out the ministerial task of effectuating the court's vacatur order and restores the regulatory text to the operative regulatory text in place prior to the publication of the now-vacated rule (the definition of AEWR in effect under the 2010 H-2A Final Rule). Since the court's vacatur order, no other party has sought to appeal the court's order or otherwise block it from taking effect. The Department has therefore concluded that the notice and delayed effective date requirements are unnecessary.

Second, the Department has concluded that taking comment on this change would be contrary to the public interest because it could lead to confusion, particularly among the regulated public, as to the applicable definition of the AEWR and the AEWR methodology. This is especially true in light of the Department's December 1, 2021, NPRM proposing revisions to the reinstated 2010 AEWR methodology. Continuing to include the vacated methodology in the CFR while simultaneously proposing to amend the 2010 AEWR methodology in the separate rulemaking could be unnecessarily confusing to the regulated community. This change eliminates any possible confusion over the current AEWR methodology and, more importantly, any confusion over what methodology the Department has proposed to change in its current AEWR rulemaking.<sup>18</sup>

The Department has concluded that each of these reasons—that notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest— independently provides good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date.

b. Area of Intended Employment and Place of Employment

The NPRM proposed minor amendments to the definition of AIE by

<sup>18</sup> As noted below, the comment period for the 2021 H-2A AEWR NPRM closed on January 31, 2022, and the Department will address comments received in response to that proposal in that separate rulemaking.

replacing the terms “place of the job opportunity” and “worksites” with a newly defined term “place(s) of employment.” The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, these definitions remain unchanged from the NPRM with one minor revision.

As explained in the NPRM, the CO will continue using the definition of AIE to assess whether each place of employment—defined as a worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment—is within normal commuting distance from the first place of employment listed on the job order as a work location or, if designated, the centralized “pick-up” point (e.g., worker housing) to every other place of employment identified in the application and job order. After considering comments, as discussed below, the Department adopts the proposed definitions of AIE and place of employment with one minor change, to use the term “place of employment” in the singular in the definition of AIE.

Some commenters suggested the Department make substantive revisions to the proposed definition of “place of employment,” given how it is applied in the proposed definition of AIE at 20 CFR 655.103(b), and the explicit limitation of an *Application for Temporary Employment Certification* to one AIE that the Department proposed to incorporate at § 655.130(e). Some commenters asserted that travel time from one point on a farm to another (e.g., from one field to another noncontiguous field, or from a field to a packing facility) and/or incidental travel off the farm to places outside of the AIE should not be considered in the Department’s AIE evaluation. Several commenters, including a trade association, agent, and employers, used job opportunities involving trucking duties (e.g., delivering an employer’s crops to storage or market) as examples of their concerns. These commenters objected to listing all of a trucker’s delivery and pick-up locations on the *Application for Temporary Employment Certification* as worksites, which the CO would analyze under the definition of AIE at § 655.103(b) and subject to the geographic limitation at § 655.130(e). Several trade associations, agents, and employers commented that the Department should adopt the H–1B definition of place of employment at § 655.715, asserting that the Board of Alien Labor Certification Appeals (BALCA) has done so in some appeal

decisions. One commenter stated that adopting the H–1B definition would ensure that certain locations where work is performed for short durations are excluded from consideration in analysis of the AIE. An employer supported this approach as flexible and efficient, while other commenters stated it would provide clarity and certainty to the AIE evaluation. An agent acknowledged that the H–1B definition might be “less-than-ideal for the H–2A program for other reasons” and proposed a slightly modified version of the H–1B definition.

The Department declines to adopt the H–1B definition of “place of employment” for the H–2A program because doing so would be a major change that commenters and stakeholders generally could not have anticipated as an outcome of the rulemaking, thus warranting additional public notice and opportunity for comment. Additionally, the H–1B definition of “place of employment” is tailored to the specialty occupations eligible for the H–1B program, and this definition is not easily retrofitted or modified to apply to agricultural occupations eligible for the H–2A program.<sup>19</sup> Finally, such a change is not necessary to address commenters’ concerns.

The Department’s proposed definition of AIE considers the normal commuting distance to the place of employment where the workday begins, not the geographic scope of a worker’s route after the workday begins. Under the proposed definition of “place of employment,” a truck driver’s delivery locations, for example, are places of employment, as they are worksites or other physical locations at which the truck driver performs work under the job order. However, those delivery locations are not considered in the AIE analysis of normal commute to the place of employment because the workday for the job opportunity begins before a worker travels to those locations. The

<sup>19</sup> For example, the H–1B regulations provide the following examples of non-worksites (i.e., locations that do not constitute a place of employment) for an H–1B worker: “[a] computer engineer sent to customer locations to ‘troubleshoot’ complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a ‘home office’ sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.” See § 655.715. These examples have limited parallels within the agricultural economy.

geographic scope limitation on such places of employment (i.e., after the workday begins) are addressed under § 655.130(e), which, as revised, accommodates work at “places of employment outside of a single [AIE] only as is necessary to perform the duties specified in the *Application for Temporary Employment Certification*, and provided that the worker can reasonably return to the worker’s residence or the employer-provided housing within the same workday.”

While not assessed as part of an AIE review, an employer must identify on the *Application for Temporary Employment Certification* and job order all places of employment, including those after the workday begins, to allow both for the Department to review, and U.S. workers to be apprised of, the material terms and conditions of the job opportunity. If specific addresses are unknown, such as in the case of crop delivery to storage or market, the employer may describe the places to which deliveries will be made with as much specificity as possible (e.g., county or city names). To be clear, all worksites and physical locations where work will be performed under the job order, both those to which a worker must commute and those to which a worker must travel after their workday begins, must be disclosed in the *Application for Temporary Employment Certification* and job order; however, those worksites and physical locations to which a worker must travel after the workday begins to perform work under the job order will not be analyzed under the definition of AIE. These comments and the limitation of an *Application for Temporary Employment Certification* to one AIE, absent an exception, are discussed further in relation to the geographic scope provision at § 655.130(e).

A State employment agency expressed concern that the term “places of employment” may result in employer misrepresentation of the actual worksite, lead to confusion around where the “actual worksite” is located when reviewing a job order, and require the SWAs to identify more deficiencies in cases where the employer does not specify the worksite as a place of employment. A forestry employer expressed concern that the proposed definition would be unworkable because the employer performs work at places of employment across areas wider than normal commuting distances, considers employer-provided housing to be home, and does not expect workers to return home to their permanent residence each day.

To add clarity, the Department has revised the definition of AIE so that “place of employment” is singular. As discussed above, there may be a number of places of employment listed on an *Application for Temporary Employment Certification*, as an employer must identify each worksite or physical location where work under the job order will be performed. However, the CO uses only one place—the first place of employment identified or, if designated, the centralized “pick-up” point (e.g., worker housing)—to determine the normal commuting distance around that place and whether all of the worksites or physical locations to which a worker may commute to begin the workday are within that normal commute. Where an employer’s job opportunity involves a planned itinerary (e.g., animal shearing subject to § 655.300), and in the event an AIE analysis is required, the normal commute at each place along the planned itinerary would be analyzed.

Some commenters asserted that a normal-commuting-distance analysis should focus on the location of the housing or pick-up point employers provide for workers, rather than the places of employment listed on an employer’s *Application for Temporary Employment Certification*. A trade association, with support from other commenters, stated that, because employers are required to provide transportation to worksites from the housing the employer provides or a pick-up point, a normal commuting distance for U.S. workers should be measured from their home to the housing or pick-up point, not the worksite(s); and thus argued that worksites have little bearing on the AIE labor market test. Another trade association similarly remarked that the “housing or pick-up point, rather than the worksite” should be the determining factor, asserting that this would reflect the commuting patterns of agricultural workers more accurately. An employer urged adoption of a standard that would consider a worksite to be within the AIE if the employer has provided housing at the worksite; as normal commuting distance would be measured from each of the various locations where the employer provided housing to workers, employers could file fewer *Applications for Temporary Employment Certification*, each application covering multiple AIEs. Similarly, an agent stated that employers are required to provide housing within a normal commuting distance, which “would allow for multiple work/housing locations on a single application.”

The Department disagrees with commenters who assert that the location

of one or more places of employment is not relevant to evaluating normal commuting distance whenever an employer provides transportation from a designated pick-up point, such as the housing it provides to H–2A workers and those workers in corresponding employment who are not reasonably able to return to their own residence within the same day, as provided in § 655.122(d)(1). The Department likewise disagrees that providing additional housing at the place of employment negates the need for the AIE analysis. A worker who does not reside at the pick-up point must commute either to the pick-up point or to the place of employment directly. Further, if the workday does not begin at the pick-up point, the commute for a worker who travels to the pick-up point using their own transportation continues from the pick-up point to the place of employment using the employer’s transportation. To the extent a commute involves multiple segments, workers in corresponding employment may not be able to reasonably return to their own residences within the same day. Although an employer would be required to provide such workers with housing, the Department noted in the NPRM (and farmworkers and their advocates agreed in comments) that longer-than-normal commuting distance, transportation issues, and any requirement to live away from home and family are all factors that can discourage U.S. workers from accepting temporary agricultural job opportunities, impacting recruitment and the Department’s ability to assess the labor market prior to issuing a final determination. Should a worker in corresponding employment choose not to live in employer-provided housing to reduce the commute, the Department has health and safety concerns, such as driver fatigue that can be exacerbated by increased commute times. In a comment addressing transportation safety under § 655.122(h), a State employment agency noted that driver fatigue in agriculture is a “real and concerning issue,” stating that it is not uncommon to see workers at worksites that are hours away from housing sites. (To the extent these commenters are discussing workers’ movement between various places of employment after the workday begins, the Department has addressed this issue above and in § 655.130(e).)

Separately, a workers’ rights advocacy organization discussed the use of the definition of AIE for other purposes, for example, to frame the geographic area for prevailing practice and wage surveys, asserting that regulatory

language at §§ 655.122(d)(5) and 653.501(c)(2)(i) limits AIE in those contexts to a single State. Those comments with regard to prevailing wage surveys are addressed in the discussion of prevailing wage determinations (PWDs) at § 655.120(c).

In addition to soliciting comments on the proposed definitional changes, the Department invited input on whether it should further revise the definition of AIE either to continue making fact-based determinations on a case-by-case basis, with the consideration of other objective factors such as commuting or labor market area designation systems or other comprehensive commuting studies and data, or to implement a uniform standard, like a maximum commuting distance or time above which a commute would be considered unreasonable in all cases. The Department asked that comments address the advantages and disadvantages of different alternatives and how implementation would provide greater clarity and ensure the integrity of the labor market test.

Commenters variously expressed general concerns that the current definition of AIE is too broad, too narrow, or too ambiguous, but without offering an alternative framework. A trade association stated that AIE “varies by the nature of the employer’s need and does not fit neatly into one defined box,” while an employer expressed concern that the current definition created such a broad standard that it could result in subjective review of an application. An agent suggested the definition of AIE should be expanded to reflect that agricultural employers now have statewide and interstate production to “reduce crop failure risks, expand marketing windows, and improve capital utilization”; otherwise, the commenter suggested, the definition failed to accommodate modernization of agricultural operations. Many farmworkers emphasized that it is important to them to work close either in distance or time to where they live due to the lack of a driver’s license, post-work obligations like schoolwork, and the need to care for their children and be available if family emergencies occur. A workers’ rights advocacy organization expressed concern that the definition of AIE leads to a large AIE and results in fewer U.S. worker applicants for job opportunities because the regulation does not require employers to provide transportation to local workers.

Some commenters objected to the use of Metropolitan Statistical Areas (MSAs) in the H–2A program’s definition of AIE as an objective means of evaluating a

normal commute in particular areas, but did not offer an alternative. Some trade associations, with support from other commenters, asserted that MSAs and commuting distance have no correlation with the nature of agricultural work. For example, one commenter stated that commute times associated with MSAs “bear little resemblance to how agricultural workers get to their jobs.” A workers’ rights advocacy organization expressed concern that many farmworkers will have difficulty traveling to and between distant points within large MSAs and cited language from OMB stating that MSAs “are not designed as a general-purpose framework for nonstatistical activities.” See *2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas*; Notice, 75 FR 37246 (June 28, 2010). One of the trade associations, with other commenters echoing its statement, noted that the widely varying commute times associated with different MSAs will make it difficult for a Farm Labor Contractor (FLC) to contract with a farmer with certainty about whether the farm will be determined to be inside or outside an arbitrary commute time for that specific MSA.

The commenters who addressed whether the Department should impose a more uniform standard for all employers, such as a maximum commuting distance or time above which a commute would be considered unreasonable in all cases, generally did not support a rigid measure of time or distance applicable in all cases. Several trade associations and an agent stated that use of a specific metric to determine reasonable commuting distance would be difficult due to various factors. An agent commented that employers transport workers to “wherever the work is available,” and the Department should not limit transportation to commute times that may vary widely based on factors like traffic patterns. One stated that measuring commutes in miles would be inappropriate because it would not account for areas in which distance can be traveled quickly, and measuring in time would penalize those who travel difficult terrain or encounter heavy traffic during daily commutes. One trade association stated that there is too much variation in terrain, weather, population concentration, road quality, and traffic across the country to apply a rigid definition of normal commuting distance. Another trade association similarly remarked that it would be impossible to use a definitive rigid measure of reasonable commuting

distance due to variation in agriculture across the country, and urged the Department to provide more flexibility. While one agent suggested that a rigid commuting distance could be consistently applied, an employer urged the Department to adopt a flexible approach and not apply a rigid definition of normal commuting distance.

The commenters who suggested a maximum commute distance or commute time disagreed as to an appropriate limit. Trade associations, individual employers, and an agent suggested the Department should not consider a commute time to be unreasonable unless, for example, the worksite is at least 2 hours from the housing, the pick-up point, or both. One viewed it as a more easily understood approach that “would prevent any misunderstanding of whether a specific farm will fit an MSA’s commute time and better conform to the realities of agricultural employment.” An agent commented that a smaller, more restrictive AIE is not helpful to anyone, neither the small local workforce that is not large enough for farmers’ needs, nor the farmer who will have to artificially separate parts of its widespread operation to fit into discrete AIEs. This commenter argued that the Department has “no statistics that legal, local or domestic workers would take jobs if they were just confined to about a 60-mile radius of any one farm.” By comparison, a workers’ rights advocacy organization urged the Department to limit the definition of “normal commuting distance” to distances “considerably shorter than the 60+ mile figure” requested by employers and suggested that a more reasonable maximum distance might be 45 miles. Some commenters who opposed a maximum commuting distance stated that if the Department were to adopt a maximum distance standard, it should provide flexibility to account for typical travel delays.

Upon careful consideration of all comments received, the Department declines to further modify the definition of AIE. Although using MSAs as a proxy for commuting area may result in broader geographic areas than might seem typical for jobs in rural areas, employers are required to provide housing to any worker in corresponding employment unable to reasonably return home at the end of the workday, including those who reside within the broadly identified commuting area. Some commenters appeared to conflate the concept of “reasonable commuting distance” as used in this section with the requirement that the employer

provide housing to workers in corresponding employment who are not reasonably able to return to their residence within the same day. The Department notes that reasonable commuting distance as it relates to AIE is a general concept, whereas a determination as to whether a worker in corresponding employment is reasonably able to return to their residence at the end of the day is specific to the worker in question. Therefore, it is possible that a worker in corresponding employment could reside within a reasonable commuting distance of the place of employment, but could not reasonably return to their residence at the end of the day due to personal circumstances (e.g., lack of a private vehicle or public transportation). In such a situation, the employer would be required to offer housing to the worker in corresponding employment. Therefore, while commenters provided certain arguments that MSAs might be an imperfect fit in some situations, these comments neglect to consider the continued value in using MSAs to provide a level of predictability and adjudicatory consistency for employers nationwide, which the Department and many commenters both consider important. As commenters have not identified any clearly superior alternative, this final rule continues to rely on a case-by-case approach to assessing AIE given the varying circumstances across areas that affect travel and commuting times.

#### c. Average AEWR

The NPRM proposed to define a new term “average adverse effect wage rate” (average AEWR). The term is necessary to effectuate the Department’s proposal to make adjustments to the H-2ALC surety bond amounts based on changes to a nationwide average AEWR. The Department proposed to calculate the average AEWR as a simple average of the published AEWRs applicable to the Standard Occupational Classification (SOC) 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and publish an updated average AEWR annually to serve as the benchmark for future adjustments to the required bond amounts.

The Department received only two comments specifically relating to the proposal to define the average AEWR. Both commenters misunderstood the nature of this proposal, believing that the Department was proposing an alternative to the wage sources listed in § 655.120(a), and opposed the proposal for this reason. The Department reiterates that the average AEWR is only intended to be used as a benchmark for

making adjustments to the required bond amounts. Under this proposal, the average AEWR does not change or replace the wage rate required under § 655.120(a).<sup>20</sup>

Accordingly, the Department adopts the definition of average AEWR with minor modifications. As defined in this final rule, the average AEWR is the simple average of the AEWRs applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and published by the OFLC Administrator in accordance with § 655.120.<sup>21</sup> The revised definition clarifies that once set, the average AEWR remains in effect until the OFLC Administrator publishes an adjusted average AEWR and it becomes effective. Adjustments to the average AEWR will occur consistent with the schedule for adjusting the relevant AEWRs under § 655.120.

#### d. Corresponding Employment

The NPRM did not propose amendments to the definition of corresponding employment or request comments on any aspect of the definition. However, the Department received a few comments suggesting modifications to the definition, none of which necessitated substantive changes to the regulatory text from the NPRM. Therefore, this final rule retains the definition of corresponding employment from the current rule without change.

Several commenters stated that the definition should be modified to include a de minimis exception, allowing non-H–2A workers to perform a limited amount of work similar to the duties described in the job order or performed by the H–2A workers without being considered to be engaged in corresponding employment. Alternatively, several commenters

<sup>20</sup> See 84 FR 36168, 36179 (explaining that the Department proposes to maintain the current requirement in § 655.120(a) that an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, with only minor changes).

<sup>21</sup> The AEWR methodology proposed in the NPRM would have resulted in the publication of separate AEWRs specific to the SOC 45–2092 and other occupational classifications for field and livestock workers. Under the modifications made to the Department’s AEWR methodology in the 2020 H–2A AEWR Final Rule, the OFLC Administrator would instead publish an AEWR for each State for a combined field and livestock workers category, which would be applicable to the SOC 45–2092. However, as discussed above, the 2020 H–2A AEWR Final Rule was preliminarily enjoined in *United Farm Workers v. U.S. Dep’t of Labor*, No. 20–cv–01690 (E.D. Cal. Dec. 23, 2020). Regardless of the precise AEWR methodology used, the average AEWR will be based on the AEWRs that apply to the SOC 45–2092, whether they are SOC-specific or for a combined field and livestock workers category.

indicated that the definition should be more similar to the definition of corresponding employment under the H–2B program regulations, which defines corresponding employment to include work that is either substantially similar to the work included in the job order or substantially the same work performed by H–2B workers, and excludes certain full-time, incumbent employees. See 20 CFR 655.5; 29 CFR 503.4.

The Department has carefully considered these comments requesting that the definition of corresponding employment be revised and narrowed but declines to alter the definition of corresponding employment at this time. The Department did not propose any changes to the definition of corresponding employment or request comments on any aspect of the definition. Many parties who would be affected by any change in the definition of corresponding employment therefore had no reason to anticipate any change in the current definition or to provide input as to how the definition could be revised. The Department received only a limited number of comments on this topic, all from employers and their representatives, with no feedback from other affected parties to enable the Department to obtain multiple perspectives on this issue. Further, the regulation provides important protections for workers by requiring that non-H–2A workers performing the same work as H–2A workers receive the same wages and working conditions as H–2A workers. Accordingly, the Department declines to adopt any changes to the definition of corresponding employment.

#### e. Employer and Joint Employment

The NPRM proposed amendments to the definitions of “employer” and “joint employment” to clarify the use of these terms in the filing of *Applications for Temporary Employment Certification* and the responsibilities of joint employers, consistent with the INA and the Department’s longstanding administrative and enforcement practice. The Department received many comments on these proposed definitions, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, these definitions remain unchanged from the NPRM with one minor revision.

Section 218 of the INA recognizes that growers, agricultural associations, and H–2ALCs that file applications are

employers or joint employers.<sup>22</sup> In conformity with the statute as well as the Department’s current policy and practice, the NPRM proposed to clarify the definitions of employer and joint employment with respect to the H–2A program to include all of those entities the statute deems employers or joint employers. Specifically, the Department proposed to add language to the definition of joint employment to clarify that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H–2A workers sponsored under the application and, if applicable, of corresponding workers. The Department further proposed to clarify the definition of joint employment to include an employer-member of an agricultural association that is filing as a joint employer, but only during the period in which the employer-member employs H–2A workers sponsored under the association’s joint employer application. The Department proposed to add language to the definition of joint employment to clarify that growers that file the joint employer application proposed in § 655.131(b) are joint employers, at all times, with respect to the H–2A workers sponsored under the application and all workers in corresponding employment. In light of these proposed changes, the Department also proposed a slight change to the joint employment language in the current regulation to clarify that entities that do not file applications but jointly employ workers under the common law of agency are also joint employers that may be held liable for violations under the statute. In other words, entities that file applications as joint employers are joint employers as a matter of law, regardless of the common law of agency. The Department will assess the joint employer status of all other entities based on the nature of the employment relationship between the putative joint employer and the worker under the common law of agency, as provided in the existing definition of employee at § 655.103 and required by Supreme Court precedent. In addition to the proposed changes to the definition of joint employment, the Department proposed to add language to the definition of employer to clarify that a

<sup>22</sup> See 8 U.S.C. 1188(c)(2) (“The employer shall be notified in writing within seven days of the date of filing if the application does not meet the [relevant] standards”); 8 U.S.C. 1188(c)(3)(A)(i) (“The Secretary of Labor shall make . . . the certification described in subsection (a)(1) if . . . the employer has complied with the criteria for certification”); 8 U.S.C. 1188(d)(2) (“If an association is a joint or sole employer of temporary agricultural workers, . . . [H–2A] workers may be transferred among its [employer-]members”).

person who files an application other than as an agent is an employer and, similarly, that a person on whose behalf an application is filed is an employer. As the Department noted in the NPRM, these proposed revisions reflected the Department's longstanding administrative and enforcement practice that is already familiar to employers.

#### Joint Employment for Agricultural Associations Filing as a Joint Employer With Their Employer-Members

The Department received numerous comments related to its proposal to clarify that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H-2A workers sponsored under the application and, if applicable, of corresponding workers. Two associations supported the proposed definition of joint employment. Two other associations submitted lengthy comments opposing the proposal. The two associations opposing the proposal each asserted the INA does not permit the Department to impose joint employer liability on an agricultural association for the violations of an association member, unless the association committed, participated in, or had knowledge of the violation. The associations cited sec. 1188(d)(3)(A) of the INA, which limits the debarment of joint employer agricultural associations based on violations an employer-member commits to instances in which the agricultural association committed, participated in, had knowledge of, or had reason to know of the violation. The associations submitted that Congress's specific choice to permit debarment for an employer-member violation only when an agricultural association meets this standard evinces a general intent to hold agricultural associations otherwise accountable for employer-member violations only when they committed, participated in, or knew of the underlying violation.

The associations explained that Congress conferred a "special status" on agricultural associations "in order to level the playing field for small employers" and that imposing joint employer liability on agricultural associations that elect to file a joint employer application would "frustrate that status" because associations cannot afford exposure to such liability. Both assert that exposure to such liability would result in associations' inability to file joint employer applications. The associations also stated that the Department has historically applied the common law of agency to determine whether an entity employs a worker and

oppose the "proposed radical change to agency law."

Two other associations asserted that the Department has never held an association liable for employer-member violations unless the association was involved in or directly participated in the violation. One of these associations also agreed with the two associations described immediately above that the proposal to hold agricultural associations accountable for employer-member violations when the agricultural association elected to file a joint employer application is inconsistent with the statute. That association also commented that the proposal will reduce small farmers' access to the program and potentially threaten the existence and participation of associations in the program. And finally, various other employer commenters lodged general objections to holding associations liable for the violations that their employer-members commit.<sup>23</sup>

A workers' rights advocacy organization supported the Department's proposal to clarify that an agricultural association that elects to file a joint employer application is at all times a joint employer of the H-2A workers sponsored under the application as well as any corresponding workers. The commenter submitted that the clarification will incentivize associations to monitor employer-member compliance with program requirements.

After carefully considering the comments it received, the Department has decided to retain its proposed clarification of the definition of joint employment to include language specifying that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H-2A workers sponsored under the application and any corresponding workers. The plain language of sec. 1188(d) of the INA requires this interpretation. Section 1188(d)(2) only allows an agricultural association to file a single application on behalf of its employer-members to sponsor H-2A workers that it may "transfer" among its membership "[i]f [the agricultural] association is a joint or sole employer of temporary agricultural

workers."<sup>24</sup> Thus, an association attests to joint employer status when it submits a joint employer application for authorization to transfer H-2A workers among its membership. In addition to permitting the association to transfer H-2A workers, filing a single application rather than individual applications on behalf of each employer-member of an agricultural association results in significant financial savings and substantially reduces the efforts and costs associated with the required recruitment and advertising. The statute requires an agricultural association to assume joint employer (or sole employer) status to qualify for these benefits.<sup>25</sup> Even if the statutory language did not compel this result, the Department would nevertheless adopt this interpretation as agricultural associations are uniquely positioned to be knowledgeable of program requirements, and this requirement encourages associations that transfer workers among their employer-members to ensure that their employer-members understand program rules and regulations, assist their membership in achieving compliance, and provide accountability for agricultural associations filing as joint employers.

Should an agricultural association prefer not to accept the obligations of joint (or sole) employment, it may choose instead to file individual applications on behalf of its employer-members as an agent, thereby limiting its liability, consistent with sec. 1188(d)(1) (but also foregoing the privileges that apply if it files a Master Application). The statutory scheme accordingly permits an agricultural association to choose to assume the

<sup>24</sup> See also the title of sec. 1188(d)(2) ("Treatment of Associations Acting as Employers.") (emphasis added).

<sup>25</sup> See *Admin. v. WAFLA*, ALJ No. 2018-TAE-00013 (OALJ Aug. 25, 2021), *appeal pending*, ARB No. 2021-0069 (agricultural association is a joint employer of workers employed under master application as a matter of law); *Little v. Solis*, 297 FRD 474, 478 (D. Nev. Jan. 27, 2014) (as a joint employer applicant, agricultural association is a joint employer of H-2A workers for purposes of the H-2A program); *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1072 (E.D. Wash. June 7, 2013) (an agricultural association that submits a joint employer application is a party to the H-2A workers' work contracts as a matter of law); *Martinez-Bautista v. D & S Produce*, 447 F. Supp. 2d 954, 962 (E.D. Ark. Aug. 25, 2006) (entities that jointly applied to employ H-2A workers are joint employers of the workers); cf. *WHD v. Native Techs., Inc.*, ARB No. 98-034, 1999 WL 377285, \*6 (ARB May 28, 1999) (filer of a labor condition application under H-1B provisions of the INA is an "employer" by operation of law, independent of criteria under the common law test of employer); but see *Admin. v. Azzano Farms & WAFLA*, ALJ No. 2019-TAE-00002 (OALJ Oct. 2, 2019), *appeal pending*, ARB No. 2020-0013.

<sup>23</sup> Another agricultural association that submitted a comment (generally supported by several other commenters, including trade associations and individual employers) offered no criticism of the NPRM's clarification that agricultural associations that file a joint employer application are liable at all times for violations committed against H-2A workers sponsored under the applications as well as any applicable corresponding workers.



traditional responsibilities of a joint/sole employer, including any liability to the workers it jointly/solely employs—or file an application as an agent and generally avoid employer liability. However, when associations file as agents, H–2A workers cannot be transferred among their employer-members, pursuant to sec. 1188(d)(2).

The Department notes the contention that it has never sought to hold an agricultural association liable for employer-member violations unless the agricultural association was involved in the violations is inaccurate. Holding an association accountable for employer-member violations when the association attested to joint employer status is consistent with WHD’s current statutory interpretation and its enforcement policy. WHD is presently asserting before the ARB that an association is liable for its employer-member’s violations based solely on its having filed a joint employer application.<sup>26</sup> WHD has also previously sought to enforce program requirements against other associations based solely on their election of joint employer status.

Additionally, it is inaccurate to state that sec. 1188(d)(3)(A) provides that violations committed by an association member are not the responsibility of an association unless the Secretary determines that the association participated in, had knowledge of, or had reason to know of the violations. Rather, this section provides that an association *is not subject to debarment* when an employer-member commits a violation (unless the Secretary determines that the association or other employer-member participated in, had knowledge of, or had reason to know of the violations). Read together, sec. 1188(d)(2) and (3)(A) assign full legal responsibility to agricultural associations for employer-member violations, with the exception of a release from program debarment for an agricultural association when the Department cannot satisfy sec. 1188(d)(3)(A)’s more exacting standard.

The debarment standard provides a meaningful limitation on the Department’s authority to debar an agricultural association for its employer-member’s violations. Consistent with the provision, the Department’s implementing regulations do not permit the Department to debar an association merely because its employer-member committed a substantial violation that subjects the employer-member to debarment. *See* 29 CFR 501.20(f).

When an association is not subject to debarment, civil money penalty assessments against the agricultural association for employer-member violations may be lower than those assessed for association members. As the Department noted in the NPRM, it will continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy includes consideration of the factors at § 501.19(b) when the Department assesses civil money penalties. The Department applies these factors to joint employers on a case-by-case basis. Thus, for example, if the Department determines an agricultural association achieved no financial gain from an employer-member’s failure to pay the required wage to H–2A or corresponding workers, but that the employer-member achieved significant financial gain, the civil money penalty, if any, applicable to the association would likely be less than that applicable to the employer-member for this violation.

#### Joint Employment for Employers Filing Joint Employer Applications Under § 655.131(b)

The Department received various comments concerning its proposal to add language to the definition of joint employment clarifying that growers that file the joint employer application proposed in § 655.131(b) are joint employers, at all times, with respect to the H–2A workers sponsored under the application and any corresponding workers. Five organizations representing growers’ interests expressed appreciation that the Department was proposing to permit “small growers to jointly apply” for H–2A workers and to permit such growers to share H–2A workers. However, these commenters, as well as a sixth organization, all opposed the Department’s proposal to treat each grower as a joint employer at all times for purposes of liability. The five organizations representing growers’ interests requested that the Department only hold employer(s) that commit a program violation accountable. They asserted that co-applicants that do not commit the violations are “innocent” and should not be held liable “for another employer’s violation(s).” The sixth organization similarly submitted that “[o]nly the employer [that] is guilty for violating the terms of the program should be penalized.” Another organization representing growers’ interests likewise contended “there is no basis for extending liability to any entity that did not have knowledge of or participate in any violation . . . .”

A workers’ rights advocacy organization suggested that the job order that joint employers file in connection with a § 655.131(b) joint employer application should include language specifying that all named employers are agreeing to joint employment liability for the entire period of employment listed on the order. Otherwise, the commenter asserted, joint employers might contend liability extends solely to the dates on which H–2A workers complete work at the property owned or operated by the particular employer. The commenter specifically submitted this addition is necessary to prevent joint employer applicants from “disputing joint employment should something go wrong.”

The Department has reviewed closely the comments it received on this subject. It has decided to retain its proposed clarification of the definition of joint employment to include language specifying that the joint employers that file an application under § 655.131(b) are, *at all times*, joint employers of all H–2A workers sponsored under the application and, if applicable, of corresponding workers. The purpose of the Department’s proposal to add § 655.131(b) to its implementing regulations was to permit a small grower that has a need for H–2A workers but cannot, alone, guarantee full-time employment to use the H–2A program by joining with another (or other) small grower(s) in the same area to obtain H–2A workers to perform the same work. Full-time employment under the program is 35 hours per workweek. *See* § 655.135(f). The proposal accordingly permits co-applicants that cannot, alone, employ a worker for 35 hours per workweek to file an application together to employ H–2A workers and to move sponsored H–2A workers from one employer to another to satisfy the 35 hours per workweek requirement.

The statute specifically contemplates that all filers (other than agents) are employers and only expressly permits an entity (*i.e.*, an agricultural association) to move H–2A workers from one employer to another when the entity agrees to retain program responsibility and liability with respect to the workers it moves. *See* 8 U.S.C. 1188(d)(2). Therefore, as the Department stated in the NPRM and reaffirms here, the statute requires entities that jointly apply for H–2A workers whom they intend to move among themselves to retain program responsibility with respect to the H–2A workers and, if applicable, any corresponding workers. Because the statute provides that an entity permitted to move H–2A workers from one employer to another must

<sup>26</sup> *See Azzano Farms*, ARB No 2020–0013; *WAFLA*, ARB No. 2021–0069.

retain program responsibility with respect to the workers, and because the retention of such responsibility will aid the Department's enforcement of the program and enable corresponding workers and H-2A workers to obtain the wages they are owed consistent with joint employment principles, the Department is not adopting the commenters' request to release co-applicants from liability for the violations that another co-applicant commits. Thus, if the Department determines any employer named in the *Application for Temporary Employment Certification* under § 655.131(b) has committed a violation, either one or all of the employers named in the *Application for Temporary Employment Certification* can be found responsible for remedying the violation(s) and for attendant penalties. For example, if employer C and employer D file a joint employer application under proposed § 655.131(b) and employer C fails to pay the H-2A workers the required wage, employer D will be jointly liable for employer C's violations. This approach not only conforms to the statute, it is consistent with judicial authority.<sup>27</sup> Further, even if the statutory language did not require this interpretation, the Department would adopt it. The Department believes this policy will encourage employer compliance while helping to ensure that any back wages owed by joint employers will be paid. As an enforcement matter, it can be difficult to determine exactly where workers employed by joint employers are employed in a given workweek. The focus on the joint nature of the employment rather than the individual employer will assist in obtaining the wages owed to workers in the event they are underpaid and provide an incentive for all joint employers to maintain and monitor compliance.

However, the Department retains discretion to impose lower civil money penalties against the joint employers that did not commit the underlying violation. If it determines any such penalties are appropriate, such penalties may be less than those it imposes against the joint employer that committed the violation. As the Department noted above, it will continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy includes consideration of the

factors at 29 CFR 501.19(b) when the Department assesses civil money penalties. The Department applies these factors to joint employers on a case-by-case basis. Thus, for example, if the Department determines a joint employer had no previous history of violations, but that the other joint employer had a previous history of violations, the civil money penalty, if any, applicable to the joint employer with no previous history of violations would likely be less than that applicable to the joint employer that committed the violation.

Furthermore, as with agricultural associations that filed a joint employer application with their employer-members, the Department will not debar a joint employer that filed a joint employer application under 20 CFR 655.131(b) merely because another joint employer committed a substantial violation that subjects that other joint employer to debarment. Thus, for instance, if employer D in the example above did not participate in employer C's violation, the Department will not seek to debar employer D, even if employer C's underlying violation is substantial and subjects employer C to a debarment remedy. The Department has edited 20 CFR 655.182(h) and 29 CFR 501.20(f) to confirm this approach.

#### Joint Employment Period for Employer-Members Employing H-2A Workers Under an Agricultural Association Filing as a Joint Employer With the Employer-Members

The Department proposed to clarify the definition of joint employment to include an employer-member of an agricultural association that is filing as a joint employer during the time the employer-member employs H-2A workers sponsored under the association's joint employer application. Therefore, an employer that employs H-2A workers sponsored under an agricultural association joint employer application is jointly employing the H-2A workers with the agricultural association and, accordingly, is liable for any violations committed during the period it employs such workers. The proposed rule additionally clarified that an employer that is a member of an agricultural association that filed a joint employer application is *only* in joint employment with the agricultural association when it is employing the pertinent H-2A workers. Thus, if employer-member A commits program violations at a time when it is the only employer-member jointly employing the pertinent H-2A workers with the agricultural association, other employer-members within the association are not liable for such violations (provided the other employer-members did not

participate in the violations, which were substantial, and thereby subject themselves to debarment). See 8 U.S.C. 1188(d)(3)(A); 29 CFR 501.20(f). The Department received no comments that caused it to reconsider this proposal. The Department has accordingly implemented the provision unchanged from the NPRM in this final rule.

The Department notes that the arrangement described above under § 655.103(b) is different from employers filing joint employer applications under § 655.131(b) that are, at all times, liable for any violation that another joint employer commits. As discussed previously, each § 655.131(b) joint employer is permitted to move H-2A workers to its co-applicants, whereas it is the agricultural association, not the employer-member, that may transfer workers when the agricultural association files as a joint or sole employer. The statute expressly permits an association to move H-2A workers from one entity to another *only* when the association agrees to retain program responsibility with respect to the moved H-2A workers by filing as a joint or sole employer. The Department has accordingly concluded that to permit § 655.131(b) joint employers to move workers, it must require the joint employers, like an agricultural association permitted to transfer H-2A workers, to retain program responsibility with respect to the H-2A workers. In short, the legally relevant analog to § 655.131(b) joint employers for purposes of determining whether to require such employers to retain program responsibility at all times is an agricultural association that files a joint or sole employer application (not an employer-member of such an association). As a matter of policy, providing joint employers joint responsibility also serves to better ensure compliance with statutory and regulatory requirements in the same way that shared responsibility between associations and their membership incentivizes compliance.

#### The Joint Employment Language More Expressly Codifies That the Common Law of Agency Determines Joint Employer Status for Non-Filers

In the NPRM, the Department proposed a slight change to the joint employment language in the current regulation to make clear that an entity that meets the definition of employer under the common law of agency but did not file an H-2A application is a joint employer. As the Department explained in the NPRM, controlling judicial and administrative decisions provide that to the extent a Federal

<sup>27</sup> *Martinez-Bautista v. D & S Produce*, 447 F. Supp. 2d 954, 960-62 (E.D. Ark. 2006) (ruling entities that jointly applied to employ H-2A workers are joint employers of the workers and rejecting application of agricultural association liability principles when the joint employers had not filed through an association).

statute does not define the term employer, the common law of agency governs whether an entity is an employer.<sup>28</sup> Accordingly, the proposal continued to use the common law of agency, as provided by current § 655.103 in the definition of employee, to define the term joint employment for associations and growers that have not filed applications (as well as to define the term employer when an entity has not filed an application). Thus, for example, under the Department's current and continuing enforcement policy—with which employers are already familiar—a grower is a joint employer with an H-2ALC with which it contracts to provide H-2A workers if the grower is jointly employing the H-2A workers under the common law of agency. The Department received no comments that caused it to reconsider this proposal. It has accordingly implemented the proposal unchanged from the NPRM in this final rule.<sup>29</sup>

#### The Department Is Adopting Clarifications to the Definition of Employer Proposed in the NPRM

In the NPRM, the Department proposed to add language to the definition of employer to clarify both that a person who files an application other than as an agent is an employer and that a person on whose behalf an application is filed is an employer. An employer association opposed the proposed clarification. Its comment appeared to say that the definition of employer should be no broader than an entity that employs H-2A workers under the common law of agency. Two other associations asserted the proposed clarifications to the definition of employer are inconsistent with the INA. These two associations specifically asserted the statute does not permit the Department to hold agricultural associations accountable as an

“employer” when they have filed a joint employer application on behalf of their employer-members. The Department addressed above why the statute not only permits but also requires it to treat an agricultural association that files a Master Application as a joint employer of the pertinent workers. Because a joint employer is simply an employer of workers that another entity also employs, the statute requires the Department to treat an agricultural association that files an application as a joint employer as an “employer.” The Department's clarification of the definition of employer to include those that file an application (other than as an agent) is not only consistent with the INA; the INA compels it. Further, even if the INA did not compel this conclusion, the Department would nonetheless adopt these clarifications as a matter of good policy. The Department believes this policy will encourage employer compliance by providing an incentive for associations to disseminate information, make additional inquiries regarding their employer-members' responsibilities to workers under certified H-2A applications, and help to assure that any back wages owed by joint employers will be paid in full.

The Department also received a comment that the current definition of employer does not adequately contemplate complex business organizations. It is beyond the scope of this rulemaking for the Department to determine all the ways that a business seeking to use the H-2A program might organize itself. The Department hopes the following general guidance will be useful to entities that use complex business structures. The Department will treat the entity that files an application as an employer unless the filer identifies itself as an agent. If the filer identifies itself as an agent, the Department will treat as an employer the entity the agent identifies as its principal. The Department will also treat any other entity that actually employs the pertinent H-2A workers under the common law of agency as an employer. For example, if one entity within a complex business organization files an application as an employer and another entity within the same complex business organization employs the workers under the common law of agency, the Department will treat each entity as an employer (whether or not the filer jointly employs the workers under the common law). Other tests that may pertain to the employment relationship under Federal common law such as the integrated employer or the successor in interest tests may also be

applicable depending on the facts of the individual case. This paragraph is intended to provide general guidance, however, and as mentioned above, it is beyond the scope of this rulemaking to determine all the ways that a business seeking to participate in the program might organize itself.

A commenter also brought to the Department's attention a minor grammatical error in the regulatory text's definition of employer at paragraph (iii). The Department agrees with the commenter and has made a minor technical change to the language to address the grammatical error.

#### Employer-Member Responsibility for Violations Committed Under a Joint Employer Application Filed by an Agricultural Association

Consistent with existing practice, the Department observed in the NPRM that when an agricultural association files a joint employer application, an employer-member of that association is an employer of the H-2A workers during the time the employer-member employs the workers. The Department further noted that when only one employer-member is employing the H-2A workers at the time of a program violation, only that employer-member and its agricultural association are fiscally responsible for program violations. The Department received no comments opposing this approach and is accordingly implementing it unchanged from the NPRM.

#### Department's Approach To Imposing Liability Among Culpable Joint Employers

In the NPRM, the Department proposed to continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy, as noted previously, includes consideration of the factors at 29 CFR 501.19(b) when the Department assesses civil money penalties. The Department applies these factors to joint employers on a case-by-case basis. For example, if the Department determines an agricultural association achieved no financial gain from an employer-member's failure to pay the required wage to H-2A or corresponding workers, but that the employer-member achieved significant financial gain, the civil money penalty, if any, applicable to the association would likely be less than that applicable to the employer-member for this violation.

The Department received multiple comments supporting this approach. For example, a grower association specifically voiced its support for the

<sup>28</sup> See *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322–24 (1992); *Garcia-Celestino v. Ruiz Harvesting*, 843 F.3d 1276, 1288 (11th Cir. 2016); *Admin. v. Seasonal Ag. Services, Inc.*, ARB Case No. 15–023, 2016 WL 5887688, at \*6 (ARB Sept. 30, 2016). The focus of the common law standard is the “hiring entity's” right to control the manner and means by which the product is accomplished.” *Ruiz Harvesting*, 843 F.3d at 1292–93 (quoting *Darden*, 503 U.S. at 323). Application of the standard typically entails consideration of a variety of factors. See *id.* at 1293 (citing *Darden*, 503 U.S. at 323–24).

<sup>29</sup> The Department additionally notes, as it did in the NPRM, that the current H-2A program definitions of employer and joint employment, as well as those the Department is implementing herein, are different from the definitions of “employer,” “employee,” and “employ” in the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA) and the definition of “employ” in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* (MSPA).

case-by-case approach. The Department also received a comment from another grower association opposing this approach, however, arguing that only the culpable party or parties should be assessed a civil money penalty. As noted above, the Department will apply the relevant factors on a case-by-case basis to joint employers and thus appropriately consider culpability. The Department accordingly intends to continue to assess civil money penalties against joint employers in this manner.

#### Proposal To Move Certain Requirements in the Definition of Employer

The current definition of employer in the H-2A program requires an employer to have a place of business in the United States and a means of contact for employment as well as a Federal Employer Identification Number (FEIN). The Department proposed to move these requirements to §§ 655.121(a)(1) and 655.130(a). The proposal required a prospective employer to include its FEIN, its place of business in the United States, and a means of contact for employment in both its job order submission to the NPC and its *Application for Temporary Employment Certification*. The Department is implementing its proposal to move these requirements unchanged from the NPRM in this final rule.

#### f. First Date of Need and Period of Employment

The NPRM proposed to add definitions of the terms “first date of need” and “period of employment.” The Department received many comments on the definition of “first date of need” and has revised the proposed definition after consideration of these comments, as discussed below. The Department received no comments on the proposed definition of “period of employment” and has adopted the definition without change from the NPRM.

The Department explained in the NPRM that an employer indicates the period of employment on its job order and *Application for Temporary Employment Certification* by identifying the first and last dates on which it requires the temporary agricultural labor or services for which it seeks a temporary agricultural labor certification. The first date the employer identifies on the job order and *Application for Temporary Employment Certification* is used as the date on which work will start for purposes of recruitment and for calculating program requirements (e.g., the positive recruitment period under § 655.158). However, as actual start dates may vary

due to such factors as travel delays or crop conditions at the time the employer expected work to begin, the Department proposed to define the term “first date of need” as the first date on which the employer “anticipates” requiring the temporary agricultural labor or services sought. The Department explained that the inclusion of the word “anticipates” in the definition would provide a limited degree of flexibility—up to 14 calendar days after the first date of need listed on the temporary agricultural labor certification—for the actual start date of work for some or all of the temporary workers hired to occur.

Commenters who supported the proposed definition and the inclusion of the word “anticipates,” included employers, agents, trade associations, two State government commenters, and a State elected official. These commenters asserted that some flexibility to adjust actual start dates would simplify the program and facilitate both compliance and administration, while ensuring workers still receive the benefits promised.

Commenters who opposed the definition, including a workers’ rights advocacy organization and farmworkers, focused their opposition on the potential for actual start date variability underlying the word “anticipates.” These commenters asserted that delayed start dates are harmful to workers, who value predictability and certainty in employment start dates, particularly where they turn down other work or have to travel far to make themselves available to work at the time and place needed. In addition, these commenters stated that farmworkers have expenses beyond housing and meals and cannot afford to lose expected pay for up to 2 weeks, should the actual start date be later than the first date of need offered. Similarly, one State government commenter recommended the Department further clarify employer obligations to provide subsistence and/or meals to workers when work does not start on the anticipated start date to ensure that employers understand and satisfy those obligations.

The workers’ rights advocacy organization urged the Department to strengthen protections in the employment service regulations at § 653.501(c)(5) if the Department retains the proposal, by requiring the employer to pay workers the hourly rate for the hours listed on the job order on each day work is delayed (not only the workdays in the first workweek), unless the employer notifies both the SWA and worker (not only the SWA) at least 10 days before the anticipated start date,

and setting the three-fourths guarantee calculation to the anticipated start date, rather than the actual start date. Amending the regulations at § 653.501(c)(5) as suggested would be a major change to that regulation that commenters and stakeholders could not have anticipated as an outcome of the proposed definitions, thus warranting additional public notice and opportunity for comment. As such, the Department declines to adopt the suggestion at this time.

A number of commenters expressed concern about the proposal. One employer thought workers might misuse the definition to arrive “late” and, as a result, employers would not have workers in place when needed. However, the Department did not intend for this definition to provide a flexible window for workers’ arrival at the place of employment without the employer’s consent. During recruitment, workers agree to make themselves available at the time and place needed. Should a worker not report for work for 5 consecutive working days without the employer’s consent, the employer may exercise the abandonment provision at § 655.122(n). In addition, a workers’ rights advocacy organization expressed concern about the definition’s application in master applications (i.e., applications agricultural associations may file in joint employment with their employer-members). The commenter thought that the actual start date flexibility, when combined with the Department’s proposal to allow employer-members’ actual start dates to vary by up to 14 days, could result in workers employed under a master application having actual start dates that vary by up to 28 days. This commenter asserted that this combination would increase the complexity of master applications and uncertainty for workers, which could discourage U.S. workers from applying. However, the proposed definition was intended to anchor the 14-day actual start date flexibility applicable to all employer-members on the master application to the earliest anticipated start date of any employer-member included in the application. As a result, all employer-members included in the master application would have been limited to the same 14-day “anticipated” start date flexibility window as any other H-2A application, calculated from the earliest employer-member start date included in the application.

One commenter supported the definition and the 14-day flexibility discussed but stated 30 days of flexibility would be preferable. The commenter’s suggestion would amplify

concerns other commenters have expressed about workers waiting for work to begin, which is a concern shared by the Department. In addition, the suggestion is inconsistent with the Department's observation of existing practice, as discussed above, in which a start date may vary slightly due to factors beyond an employer's control. Because the Department intended in the NPRM to clarify, not change, existing requirements and practice regarding anticipated and actual start dates, the Department declines to adopt the suggestion by the commenter.

After consideration of the comments and suggestions, the Department reiterates that the proposed definition, including the word "anticipates," was only intended to make plain the Department's existing understanding that a projected start date of need is difficult to set with certainty, given the required time periods for filing, and the actual start date of agricultural work must be afforded some flexibility to accommodate environmental and other agricultural conditions at the time work was projected to begin. For example, the Wagner-Peyser agriculture clearance system uses the term "anticipated" in relation to start dates and provides a process close to the start date the employer identified in the job order for the employer, the SWA, and referred farmworkers to communicate regarding the actual start date of work. See § 653.501(c)(1)(iv)(D), (c)(3)(i) and (iv), (c)(5), and (d)(4). These regulations require an employer to notify the SWA of start date changes at least 10 business days before the originally anticipated start date and require the SWA to notify farmworkers that they should contact the SWA between 9 and 5 business days before the anticipated start date to verify the actual start date of work.

§ 653.501(c)(5) and (d)(4). The Department also appreciates the opportunity to clarify employer obligations and worker protections regarding possible changes from the first date of need disclosed in the H-2A job order to the actual start date of work. As discussed above, the Wagner-Peyser agriculture clearance system regulations facilitate communication between employers and farmworkers before workers who must travel to the place of employment depart for the place of employment. If an employer fails to timely notify the SWA of a start date change (*i.e.*, at least 10 business days before the anticipated first date identified in the job order), beginning on the first date of need, it must offer work hours and pay hourly wages to each farmworker who followed the procedure to contact the SWA for

updated start date information. See § 653.501(c)(3)(i) and (c)(5). In addition, under the Department's H-2A regulations at § 655.145(b), if an employer requests a start date delay after workers have departed for the place of employment, the employer must assure the CO that it will provide housing and subsistence to all workers who are already traveling to the place of employment, without cost to the workers, until work commences. If an employer fails to comply with its obligations, the SWA may notify the Department's WHD for possible enforcement, as provided in § 653.501(c)(5), or the Department may pursue revocation of the temporary agricultural labor certification, following the procedures at § 655.181, or debarment of the employer, following the procedures at 20 CFR 655.182 or 29 CFR 501.20.

Although the January 2021 draft final rule would have adopted the proposed definition of "first date of need," after further consideration of the comments, the Department has determined that adopting the definition as proposed—including the term "anticipates," which the Department explained as a 14-day start date flexibility in the actual start date of work—in this final rule could increase, rather than decrease, complexity and confusion with regard to an employer's obligations in the event a start date delay is necessary. Including the word "anticipates" in the definition added ambiguity to the requirement, which could increase the potential for miscommunication or misunderstandings about when workers should be expected to begin work, or from when they should expect to be compensated. For example, as discussed above, commenters interpreted the proposal to mean that workers could choose to arrive within a flexible window of time, or that this would allow a variability of up to 28 days in master applications. In addition to the potential confusion this change might cause, the Department agrees that adding this language without also considering additional worker protections could be detrimental to workers, and this was not the Department's intention. As such, the Department has revised the definition of "first date of need" in this final rule to remove the term "anticipates" and the related 14-day flexibility for the actual start date of work.

While the Department appreciates the suggestions commenters made with regard to enhancing existing worker protections related to start date delays, those suggestions are beyond the scope of this rulemaking as noted above. The

proposal within the scope of this rulemaking was inclusion of start date flexibility of up to 14 days in the definition of "first date of need" and conforming language. For clarity, the Department reiterates that revising the proposed definition has no impact on the employer's obligations in the event of a start date delay, for example, under the Wagner-Peyser agriculture clearance system regulations.

#### g. Job Order

The NPRM proposed minor amendments to the definition of "job order" to conform to the proposed change under § 655.121, requiring electronic filing of the job order by the employer and transmittal of the approved job order by the CO to the SWA, and updating the job order form name and number. The Department received one comment on the proposed changes to this definition, which did not necessitate substantive changes to the regulatory text. Therefore, as discussed below, this definition remains unchanged from the NPRM.

A workers' rights advocacy organization expressed support for the proposal, explaining that electronic filing would streamline processing times and reduce burden, but commented that the SWA, in addition to the NPC, should receive immediate notice of the filing of the job order and proposed that the words "and SWA" be added to the end of the proposed definition. The Department appreciates the comment but respectfully declines. As explained in addressing comments on § 655.121, the changes to the job order filing process, under this final rule, avoid duplication of processes and will create significant savings and efficiencies for employers, SWAs, and the Department. Furthermore, transmission of the job order to the SWA will be virtually instantaneous upon submission in OFLC's Foreign Labor Application Gateway (FLAG) system.

#### h. Prevailing Wage

Proposed Definition in 20 CFR 655.103(b)

The NPRM defined prevailing wage as the wage rate established by the OFLC Administrator for a crop activity or agricultural activity and geographic area based on a survey conducted by a State that meets the requirements in § 655.120(c). The Department received no comments on this change. This final rule therefore adopts the language of the NPRM with a minor revision to account for a prevailing wage for a distinct work task or tasks performed within a crop or

agricultural activity, as applicable. This modification conforms the definition of prevailing wage with current practice and language in ETA Handbook 385, as well as changes made to other portions of § 655.120(c) in this final rule, discussed below.

#### Proposal in 20 CFR 653.501(c)(2)(i)

The current H-2A regulation defines “prevailing wage” as the “[w]age established pursuant to § 653.501(d)(4),” the Wagner-Peyser Act regulation that covers clearance of both H-2A and non-H-2A interstate and intrastate agricultural job orders. Due to regulatory revisions to part 653, § 653.501(d)(4) no longer addresses prevailing wages but rather discusses the referral of workers.<sup>30</sup> The current version of § 653.501(c)(2)(i), in turn, requires SWAs to ensure the employer has offered no less than the higher of prevailing wages or the applicable Federal or State minimum wage for H-2A and non-H-2A agricultural job orders, but it does not address how prevailing wages are established.

In the NPRM, the Department proposed to use the same methodology to establish the prevailing wage for both H-2A and non-H-2A agricultural job orders. As a result, it proposed to amend § 653.501(c)(2)(i) to define “prevailing wage” for the agricultural recruitment system in the same manner as the Department proposed to define “prevailing wage” for the H-2A program in § 655.103(b). Section 655.103(b), as proposed, defined “prevailing wage” as “[a] wage rate established by the OFLC Administrator for a crop activity or agricultural activity and geographic area based on a survey conducted by a [S]tate that meets the requirements in § 655.120(c).” As discussed below, this final rule adopts the proposed amendment to § 653.501(c)(2)(i) with minor clarifying changes.

A workers’ rights advocacy organization opposed the Department’s proposed change to § 653.501(c)(2)(i) on the basis that it only referred to prevailing wage surveys, thus establishing such surveys as the “sole mechanism” to determine whether the prevailing wage rate is the highest rate of pay. This commenter expressed concern that the proposal would reduce the SWA’s role in determining

prevailing wages. The commenter explained the current regulation at § 653.501(c)(2)(i) allows an “active role” by SWAs to “independently determine” that prevailing wages in some areas of a State are higher than the AEWR, the minimum wage, or the prevailing wage in other areas. By codifying a survey methodology, the commenter believed, the Department would restrict the SWAs’ ability to use other methods to determine whether the job order is offering an “adequate” wage. According to the commenter, the current regulation protects U.S. workers, especially piece rate workers, who receive a higher wage rate than their peers in other parts of the State, as a result of collective bargaining or market conditions.

After careful consideration of the commenter’s concerns, the Department has decided to retain the NPRM proposal with minor clarifying changes. Specifically, this final rule adopts the NPRM’s proposal to amend § 653.501(c)(2)(i) so that it incorporates the Department’s revised prevailing wage survey methodology in § 655.120(c) and revised definition of “prevailing wage” in § 655.103(b). In addition, this final rule revises § 653.501(c)(2)(i) to more clearly distinguish the minimum requirements for wages and working conditions. The existing regulation addresses the minimum requirements for working conditions within the minimum requirements for wages, which may cause confusion as to the standards that apply to each requirement. Accordingly, this final rule separates these requirements into two different sentences to clarify that agricultural positions subject to 20 CFR part 653, subpart F, must, at a minimum, offer (1) the applicable prevailing wage or the applicable Federal or State minimum wage, whichever is higher, and (2) working conditions that are not less than the prevailing working conditions among similarly employed workers in the AIE. The standards governing the prevailing wage methodology are set forth in revised §§ 655.103(b) and 655.120(c), and addressed in the preamble to § 655.120(c). The standards governing the wage rate an H-2A employer must offer, advertise in its recruitment, and pay are set forth in revised §§ 655.120(a) and 655.122(l).

The Department disagrees with the commenter that the above-referenced revisions to § 653.501(c)(2)(i) will diminish the SWA’s role in determining prevailing wages under the H-2A program. Under this final rule, SWAs will continue to follow the Department’s criteria for prevailing wage surveys, either to conduct a survey itself or to

select a survey conducted by another State agency to submit to the Department. Prior to this rule, the SWAs used ETA Handbook 385, which was last updated in 1981, and other sub-regulatory guidance to conduct such surveys and submit prevailing wage findings, when available, to the Department for review. In this sense, the Department has directed SWAs to use prevailing wage surveys to determine prevailing wage rates for agricultural job orders since at least 1981. The NPRM simply proposed to amend §§ 655.103(b) and 653.501(c)(2)(i) to reflect the new proposed survey methodology at § 655.120(c).

Under the revised methodology, SWAs continue to play an active role in determining prevailing wages. They retain the discretion to develop, administer, and report the results of prevailing wage surveys to the Department, including the discretion to determine where to conduct surveys for particular crop or agricultural activities and, if applicable, distinct work task(s) within those activities, subject to the methodological requirements of this final rule. For example, SWAs may conduct prevailing wage surveys of State, sub-State, and regional geographic areas based on the factors listed in § 655.120(c)(1)(vi). In instances where a non-SWA State entity conducts the prevailing wage survey, the SWA will review the survey and submit, if appropriate and as before, the applicable information to the Department.

Moreover, prevailing wage surveys are but one method used to determine whether the wage offer in a job order for temporary agricultural work is “adequate.” Employers applying for H-2A temporary labor certification must generally offer in their job order and pay the highest of five wage sources (*i.e.*, the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage). *See* § 655.120(a) (excluding certain employment). All other (non-H-2A) employers seeking to place interstate or intrastate job orders for temporary agricultural work must still pay the highest of the applicable prevailing wage or the applicable Federal or State minimum wage, as specified under this section.

The commenter’s assertion that the current regulation protects U.S. workers who enjoy a higher wage rate as a result of collective bargaining conflates the prevailing wage and the required wage for purposes of the H-2A program. As explained above, prevailing wage surveys are but one of the distinct wage sources the Department compares to

<sup>30</sup> The Department revised 20 CFR part 653 in 2016 in response to the enactment of the Workforce Innovation and Opportunity Act in 2014, which amended the Wagner-Peyser Act. *See* Final Rule, *Workforce Innovation and Opportunity Act*, 81 FR 56072 (Aug. 19, 2016). The contents in § 653.501(d)(4) are now located, with changes not relevant here, in § 653.501(c)(2)(i).



determine which wage source is the highest and therefore the wage that an H-2A employer must offer and pay. If an employer files an H-2A application for job opportunities subject to the agreed-upon collective bargaining wage, the collective bargaining wage would be evaluated as one of the applicable wage sources under § 655.120(a). If the collective bargaining wage is the highest of available wage sources applicable to the H-2A application, the employer must offer and pay that wage to its H-2A workers and non-H-2A workers in corresponding employment. Similar principles hold for a non-H-2A interstate or intrastate agricultural job order, in which the prevailing wage may differ from the required wage a particular employer may be legally obligated to offer and pay. Section 653.501(c)(2)(i) provides a floor, rather than a ceiling, for the wage that must be offered in an interstate or intrastate job order for a temporary agricultural position. Employers may always offer wages that exceed the minimum required under this section, and in some instances, such as where an applicable collective bargaining agreement (CBA) requires a higher wage offer, they may be obligated to do so. However, the Department reminds H-2A employers that any job offer to U.S. workers must offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. § 655.122(a).

#### i. Successor in Interest

The Department proposed conforming changes to the definition of “successor in interest” consistent with proposed changes to 20 CFR 655.182 and 29 CFR 501.20, which clarify that the Department may take action against an employer, agent, attorney, or combination thereof, for debarable violations described under those sections. As discussed below, this provision remains unchanged from the NPRM. A workers’ rights advocacy organization supported the conforming changes to the definition without further comment. An agent further proposed that the Department should modify the definition of successor in interest to formally adopt guidance issued under the 2010 H-2A Final Rule where the Department determined that the regulation could be reasonably interpreted to allow a temporary agricultural labor certification to be assumed by a successor employer. The commenter also thought the definition should be more generalized, rather than framed from an enforcement perspective. Although the Department

appreciates this comment, further modification to the definition is unnecessary. The Department added agents and attorneys to the definition to clarify that successor in interest to agents and attorneys may be subject to enforcement actions, consistent with 20 CFR 655.182 and 29 CFR 501.20. In doing so, the Department made no change to the definition with regard to employers. The Department maintains its position, established in the supporting guidance, that a successor in interest entity may use a temporary agricultural labor certification issued, provided that it assumes all obligations, liabilities, and undertakings arising under the temporary agricultural labor certification. Therefore, this final rule adopts the proposed definition from the NPRM without change.

#### j. Additional Definitions Adopted in This Final Rule

The NPRM proposed minor amendments to the definition of Temporary Agricultural Labor Certification and proposed adding definitions of the following terms to provide greater clarity throughout the regulations: Act, Administrator, applicant, *Application for Temporary Employment Certification*, BALCA, Chief Administrative Law Judge (ALJ), DHS, ETA, H-2A Petition, MSA, OFLC Administrator, piece rate, place of employment, Secretary of Labor, Secretary of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), WHD, and WHD Administrator. The Department received no comments on the proposed definitions of these terms. Therefore, this final rule adopts the definitions of these terms from the NPRM, with two minor changes. In this final rule, the Department simplifies the definition of “USCIS” to mean U.S. Citizenship and Immigration Services, an operational component of DHS, while defining “DHS” as the Department of Homeland Security as established by sec. 111 of title 6, U.S. Code. The respective authorities and functions of DHS and USCIS, as an operational component of DHS, are set forth in their authorizing statutes, implementing regulations, and delegation of authorities.

#### k. 20 CFR 655.103(c) and 29 CFR 501.3(b), Definition of Agricultural Labor or Services

The NPRM proposed amendments to expand the regulatory definition of agricultural labor or services pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a) to include reforestation and pine straw activities. The Department received many comments on this section and, for the

reasons explained below, has decided to rescind the proposal to incorporate reforestation and pine straw activities into the definition of agricultural labor or services at § 655.103(c). However, in proposing the occupational definitions for itinerant employment in animal shearing, commercial beekeeping, and custom combining at § 655.301, subject to the proposed procedural variances contained in §§ 655.300 through 655.304, the Department has made a technical, conforming revision to this section to clarify that the job duties under § 655.301 qualify for certification under the H-2A program.

The Department proposed to define reforestation activities as predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas, including, but not limited to, planting tree seedlings in specified patterns using manual tools, and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. The proposed definition of reforestation activities would have included some forest fire prevention or suppression duties, when incidental to other reforestation activities, and would have excluded vegetation management activities in and around utility, highway, railroad, and other rights-of-way because these activities involve the destruction of vegetation, not cultivation. The NPRM proposed to define pine straw activities as operations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations.

In the NPRM, the Department reasoned that reforestation and pine straw activities share fundamental similarities with traditional agricultural industries, both in terms of activities performed and working conditions. These similarities had previously prompted the Department to consider similar proposals to include reforestation and pine straw activities within the H-2A program in the 2008 and 2009–2010 rulemakings, but ultimately the Department rejected these proposals due to lack of stakeholder support. 2010 H-2A Final Rule, 75 FR 6884; 2008 H-2A NPRM, 73 FR 8538, 8555 (Feb. 13, 2008). The NPRM posited that many of the comments that led the Department to opt against expanding the definition of agriculture in the 2009–2010 rulemaking were no longer applicable due to recent regulatory changes in the H-2B program—specifically the publication of the 2015 H-2B Interim Final Rule (IFR) (80 FR

24042, Apr. 29, 2015), which implemented cost-related requirements in the H-2B program similar to those currently found in H-2A.

#### Comments Related to the Inclusion of Reforestation and Pine Straw Gathering Activities in the H-2A Program

Comments attributable to the reforestation industry or its representatives either opposed the change or did so absent significant changes to the proposal. Some industry commenters simply stated that the H-2A program, particularly with the changes proposed in the NPRM, was a less attractive, more costly, and more burdensome alternative to the H-2B program. Other commenters rejected the assertion that reforestation shared similar characteristics to traditional agricultural industries and stated that these differences resulted in the H-2A program, or certain key H-2A provisions, being essentially unworkable for the reforestation industry.

Many industry commenters stated that the unpredictable nature of reforestation work precluded compliance with the H-2A program. Some commenters posited that the H-2A program was designed for workers returning to the same fields each year, whereas reforestation occurs on a rotating cycle of up to 30 years and is heavily weather-dependent. Industry commenters stated that the flexibility required for reforestation work presents difficulties in obtaining pre-inspected housing that complies with H-2A housing standards, and that it would be impossible at the time of the application to determine whether each potential motel along an itinerary would meet these standards. Another industry commenter stated that it would be impossible to make hotel reservations in advance as schedules are constantly changing. Some commenters also indicated that remote worksites require additional housing flexibility, such as tents or mobile housing.

Industry commenters further stated that the unpredictable and transient nature of reforestation work would not allow employers to submit itineraries to the Department when applying for temporary labor certification, and that the requirement of a separate application per itinerary was unworkable and would dramatically increase filing costs. One commenter stated that some reforestation employers have more than 30 crews working on 30 separate itineraries, and another commenter with 35 crews on separate itineraries stated that its filing costs would increase from \$8,500 for one

application to \$297,500 for 35 applications.

Similarly, many industry commenters stated that the reforestation industry would be unable to comply with the H-2A requirement to provide meals or kitchen facilities to workers. Commenters stated that motel accommodations for reforestation workers frequently lack kitchen facilities, and that the unpredictable nature of reforestation work means that arranging catering is logistically difficult. Some commenters stated that the workers cook for themselves at the worksites. One commenter may have misunderstood the H-2A meals requirement and stated that it could not provide meals and kitchen facilities (whereas only one or the other is required).

Further, industry commenters opposed the proposed exclusion of utility right-of-way maintenance activities from the definition of reforestation activities. These commenters asserted that utility right-of-way maintenance cannot be divorced from other reforestation activities because the same companies necessarily engage in both, and the activities are nearly identical. Commenters stated that a large number of forestry employers—including three of the top five H-2B employers overall—also perform utility right-of-way spraying, and these activities are included in the same contracts and have the same job duties as reforestation work. Another commenter stated that the exclusion of utility right-of-way work would bifurcate a successful business model historically used by the industry, and another stated that the two industries rely on the same workforce and separating them between visa classifications would harm both industries.

The Department received significantly fewer comments from the pine straw industry. Three comments from the pine straw industry supported the proposal to include pine straw in the definition of agricultural labor or services for the reasons offered in the NPRM, one of which represented a letter-writing campaign with 100 identical comments. These comments emphasized that the pine straw industry is agricultural in nature and should be regulated as such under agricultural rules. Additionally, one commenter pointed out that many pine straw companies already use the H-2A program.

Worker advocates opposed the proposal, primarily because the inclusion of the pine straw and reforestation industries in the H-2A program would remove nonimmigrant

reforestation and pine straw workers' access to MSPA protections. These commenters identified access to the MSPA right to private action as an essential worker protection for H-2B workers engaged in reforestation and pine straw activities. Employee advocates also expressed concern that reforestation and pine straw employers would stop paying overtime to reforestation and pine straw workers due to a misunderstanding (as explained below) (either from the commenter itself or on the part of the employer) that H-2A employees are exempt from the FLSA overtime requirements simply by virtue of holding an H-2A visa. Some commenters also stated that the inclusion of reforestation within the uncapped H-2A program removes the numerical limitation on one of the largest users of the capped H-2B program and presents a substantial benefit to all H-2B employers by essentially providing H-2B cap relief.

Commenters raised other concerns and objections to the inclusion of reforestation and pine straw activities in the H-2A program. Two commenters stated that the Department's rationale for the proposal was not justified and does not overcome objections raised in prior rulemakings to similar proposals. One commenter stated that costs for reforestation employers would increase because they would not be permitted to house four employees in the same hotel room under the H-2A standards. This same commenter also stated that reforestation employers would be unable to comply with the three-fourths guarantee due to the uncertainty inherent in reforestation work, that the Department is unable to enforce the H-2B inbound transportation standards in some States, and that the Department risked violating the permanent injunction entered under *Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987).<sup>31</sup> Two commenters representing State governments posited that inclusion of these industries in the H-2A program would increase work for SWAs and asked if additional funding would be provided. Another commenter advised that the Department and the Department of State (DOS) must be fully funded, particularly given any potential expansions to the H-2A program.

Comments from non-industry specific sources, including agents, State

<sup>31</sup> In *Bresgal v. Brock*, the Ninth Circuit Court of Appeals enjoined the Department to cease refusing to enforce MSPA as to recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker for all predominantly manual forestry work, including but not limited to tree planting, brush clearing, pre-commercial tree thinning, and forest firefighting.

governments, State farm bureaus and trade associations, tended to favor the proposal, albeit mostly in a generic and unsubstantiated way. Some comments expressed their support for any expansion of the H-2A program. One commenter representing the landscaping industry expressed support for the proposal because it would relieve pressure on the H-2B visa cap, and an insurance association supported the proposal because this expansion of H-2A would require more employers to obtain surety bonds. One State farm bureau, however, supported the proposal because the forest industry adds \$6.4 billion annually in value to Arkansas' economy, and expanding the scope of the H-2A program would allow this industry to address labor shortages.

Upon careful consideration of the comments submitted, the Department declines to adopt the proposal to include reforestation and pine straw activities within the H-2A program. As noted above, the Department had hypothesized in the NPRM that objections to similar proposals in previous rulemakings would no longer be considered relevant; however, this hypothesis was disproved by the multitude of comments in opposition. As was found in the 2009–2010 rulemaking, comments from or on behalf of those that would be most affected by the reforestation proposal (*i.e.*, from the reforestation industry and employee advocates) overwhelmingly opposed the proposal, citing, in part, additional burdens due to the differences between the programs. While the pine straw industry submitted some comments supporting its inclusion in the H-2A program, the Department finds persuasive the concerns raised by employee advocates and accordingly declines to adopt the proposal with respect to pine straw as well. Additionally, as many commenters identified, pine straw employers are currently permitted use of the H-2A program (pursuant to the FLSA definition of agriculture and if the other requirements of the program are met) if the pine straw activities are performed by a farmer or on a farm as an incident to or in conjunction with such farming activities. For example, employees engaged in the gathering of pine straw on a Christmas tree farm are engaged in H-2A agriculture if the Christmas trees are produced using extensive agricultural and horticultural techniques.<sup>32</sup> Declining to adopt the

proposal has no impact on employers seeking workers to perform pine straw gathering under these circumstances, and such employers may continue to use the H-2A program. On the other hand, pine straw gathering that is not performed by a farmer or on a farm (*e.g.*, that occurs in wild or uncultivated forests, in forest tree nurseries, or on timber tracts, or that is performed in conjunction with commercial landscaping activities) does not constitute agricultural labor or services; employers seeking temporary foreign workers to perform pine straw activities under these circumstances may continue to use the H-2B program.

Though not within the scope of this rulemaking, the Department also wants to take this opportunity to address comments raising concerns about the current state of working conditions for H-2B reforestation workers. When commenters indicate that they cannot reasonably provide meals or kitchen facilities to reforestation workers because the worksites are too remote and conditions too uncertain, the Department cannot ignore the implication that some reforestation workers may not currently have access to sufficient food and/or facilities to prepare food. Itinerant workers constitute a vulnerable population; these workers are frequently wholly dependent on their employer for housing and transportation, work in remote areas far removed from services, and may not be fully aware of their geographic location. The Department reminds employers of itinerant workers not using the H-2A program that they should, at the very least, facilitate access to food and/or kitchen facilities by ensuring that workers have sufficient time and available transportation options to access grocery stores/cooking facilities, and/or prepared meals.

In response to concerns expressed by commenters that some reforestation employers using the H-2B program may not provide full-time job opportunities and may not pay for inbound transportation, the Department reminds the public that such legal requirements are already in place. An H-2B job opportunity must be for full-time work, defined as 35 hours of work per week, and the FLSA applies independently of the H-2B program's requirements. Specifically, the Fifth Circuit's decision in *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010), affects an employer's responsibility for inbound

transportation costs under the FLSA in that Circuit, but does not affect an employer's inbound transportation obligations pursuant to the H-2B program regulations, nor does it affect the Department's ability to enforce those obligations. *See* 20 CFR 655.20(d); 20 CFR 655.5; 29 CFR 503.16(d); 29 CFR 503.4; 20 CFR 655.20(j)(1)(i); and 29 CFR 503.16(j)(1)(i).

#### Other Comments Requesting the Inclusion or Exclusion of Certain Agricultural Activities or Industries in the H-2A Program

The Department received many comments in this section that did not address the specific proposal relating to reforestation and pine straw, but rather suggested modifications to the scope of the H-2A program to include or exclude other activities or industries. As discussed below, the Department is not adopting these suggested modifications to the definition of agricultural labor or services.

These commenters sought to expand the H-2A program to include all employment in packing houses or processing facilities that pack, process, or handle agricultural or horticultural commodities, even if, for example, more than half of the commodities are produced by other growers. Commenters stated that this division between packing houses based solely on the producer of the commodity is outdated and inequitable, because some packing houses have access to the H-2A program whereas others conducting identical activities do not. Commenters stated that all packing houses experience the same shortage of labor, regardless of the producer of the products, and the nature of the H-2B program is inadequate to address the packing house's needs, both in terms of the number of workers available under the program and certification processing timelines. Multiple commenters suggested an expansive definition of agricultural labor or services encompassing packing houses and processing facilities.

Many commenters stated that the H-2A program should encompass all transporting of an agricultural commodity to a facility for preparation to market, regardless of who produced the commodity or where the transportation occurs. Several commenters stated that harvesting is not complete until the product arrives at the packing facility or place of first processing, and the transportation to the place of first processing is an essential component of harvesting. Others stated that a contractor transporting agricultural or horticultural products is

<sup>32</sup> These techniques include activities such as planting seedlings in a nursery; ongoing treatment with fertilizer, herbicides, and pesticides as necessary; replanting in line-out beds or in

cultivated soil; yearly pruning or shearing; and harvesting for ornamental use. *See* 29 CFR 780.216(b).

essentially working for, or acting in the place of, the grower that produced those products, and thus is engaged in agricultural work. Many commenters referenced a critical shortage of truck drivers willing, qualified, and available to transport crops (particularly within the shorter season inherent in agriculture), and noted that many growers do not have the means to perform these transportation services themselves. The expansive definition submitted by multiple commenters similarly addressed this issue by suggesting inclusion of the following: the transportation of any agricultural or horticultural product in its unmanufactured state by any person from the farm to a storage facility, to market, or to any place of handling, planting, drying, packing, packaging, processing, freezing, or grading such as a packing house, a processing establishment, a gin, a seed conditioning facility, a mill, or a grain elevator; and the handling, planting, drying, packing, packaging, processing, freezing, or grading by any person of any agricultural or horticultural commodity in its unmanufactured state.

Some commenters sought the explicit inclusion of specific industries in the definition of agriculture or more generally in the H-2A program. Some commenters requested that the H-2A program encompass work in seafood cultivation, harvesting, and processing due to the industry's connection to food production and its difficulty in meeting its labor needs using a domestic workforce and the capped H-2B program. One commenter requested that the definition explicitly incorporate activities related to the care and feeding of horses and suggested it should incorporate grooms, stable-hands, exercise riders, and general caretakers, regardless of where the work is performed. A different commenter sought the inclusion of all agribusinesses, including agricultural retailers, in the program. Some commenters stated that all aspects of the ginning of cotton, including the related transportation from the field to the gin, are agricultural. A trade association representing the landscaping industry suggested the reclassification of several other industries currently within the H-2B program to reduce pressure on the H-2B visa cap.

Some commenters stated that specific industries, or employers in general, should have the flexibility to use either the H-2A or H-2B program depending on their specific needs. Some commenters opined that employers have the expertise to know which program best meets their needs, whereas others

stated that their industry was sufficiently diverse to require participation in both the H-2A and H-2B programs.

One commenter sought to exclude activities from the program that are currently performed by H-2A workers. Specifically, this commenter suggested that work in constructing livestock buildings on farms, when the worker is not employed by the farmer, should not be permitted in the H-2A program because the work is, generally, non-agricultural.

To the extent that commenters suggested amendments to the definitions of agricultural labor under sec. 3121(g) of the Internal Revenue Code (IRC) and agriculture under sec. 3(f) of the FLSA, these suggestions are outside the scope of this rulemaking as well as beyond the Department's statutory authority under the H-2A program. Congress defined these terms in their respective statutes and expressly incorporated these definitions into sec. 101(a)(15)(H)(ii)(a) of the INA. Any ability to amend these definitions, or their incorporation in the INA, also lies with Congress. Similarly, the Department is unable to reinterpret these statutory definitions solely within the context of the INA; the Department is constrained by pre-existing interpretations of these definitions within their respective statutes, including their implementing regulations, sub-regulatory guidance, and resulting case law. As a result, the Department cannot edit or limit these definitions in this rulemaking, such as by removing the 50-percent threshold from the IRC definition of agricultural labor; reinterpreting the phrase "in the employ of the operator of a farm"; or excluding all construction occupations from the H-2A program because, in specific circumstances, construction work may constitute agricultural labor or services within one of the statutory definitions. In addition, the Department notes that it defers to the Department of the Treasury's Internal Revenue Service (IRS) for interpretation of the IRC.

The Department has carefully considered all comments requesting that the Secretary use his statutory authority to define additional activities and/or industries as agricultural labor or services, and respectfully declines to make further revisions to this definition beyond the technical or conforming revisions discussed above. These comments did not respond to proposals made in the NPRM, nor did the Department propose or invite comment on possible additions to the definition of agricultural labor or services beyond the proposal to add reforestation and

pine straw activities. All affected parties could not reasonably expect that the Department was contemplating and seeking comment on potential additions other than reforestation and pine straw activities, and thus, the public has not been fully afforded the opportunity to consider and respond to the potential inclusion of these activities and/or industries in the H-2A program.

Many comments received in response to the NPRM, as well as in previous rulemakings, illustrate that some employers perceive significant advantages in participating in the H-2B program as opposed to the H-2A program, and vice versa, depending on the labor demands of the specific industries who commented. Additionally, nearly all comments regarding additional expansions to the H-2A program originated from employers and their representatives, with minimal input from other affected parties, further suggesting that all parties could not reasonably have thought to comment on the proposals to expand the definition beyond the additions proposed in the NPRM. Consequently, the Department is disinclined to further expand the definition of agricultural labor or services in this rulemaking.

The Department also declines to adopt the suggestion that employers be afforded the discretion to choose participation in either the H-2A or H-2B program. As previously explained in the preamble to the 2010 H-2A Final Rule, Congress clearly intended to create two separate programs: H-2A for agricultural work and H-2B for other, non-agricultural work. *Compare* 8 U.S.C. 1101(a)(15)(H)(ii)(a) with 8 U.S.C. 1101(a)(15)(H)(ii)(b). 2010 H-2A Final Rule, 75 FR 6884, 6888. Allowing employers the discretion to use either program based on their individual preferences erases any meaningful distinction between the two programs and is inconsistent with congressional intent. However, as some commenters identified, certain industries necessarily will use both the H-2A and H-2B programs depending on the specific activities being performed. For example, the grooming and exercise riding of horses at a racetrack in connection with commercial racing is non-agricultural, whereas the care and feeding of those horses on a farm is agricultural work.<sup>33</sup>

<sup>33</sup> Employees engaged in the breeding, raising, and training of horses on farms for racing purposes are agricultural employees as defined by the FLSA. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm in connection with commercial racing are not employed in agriculture.

### Other Comments Requesting Expansion of the H-2A Program for Year-Round Employment in Agriculture

Many commenters requested that the scope of the H-2A program be expanded to include all job opportunities in certain industries, regardless of whether the opportunity is seasonal or temporary, including dairy, mushroom, poultry, livestock, aquaculture, and indoor nursery/greenhouse farming. Commenters emphasized that these industries encounter the same labor shortages as other agricultural industries, and that the limitation of the H-2A program to seasonal and temporary agricultural work is fundamentally inequitable and ignores the realities faced by year-round agriculture. Of the industries submitting comments, commenters representing the dairy industry noted particular concerns with difficulties in obtaining and retaining a sufficient workforce, and proposed solutions such as allowing for year-round visas and cycling different short-term H-2A workers through employment in a given year so that a series of workers on temporary visas could satisfy the employer's permanent need. Other commenters stated that there was no statutory basis for allowing herders to be employed for 364 days in a year while not allowing the same for other industries.

The Department received nearly identical comments in response to the 2008 and 2009–2010 rulemakings. In response to current comments, the Department reiterates that it must consider each employer's specific job opportunity on a case-by-case basis and its program experience has consistently shown that the majority of activities in these industries are year-round and therefore cannot be classified as either temporary or seasonal as required under the H-2A regulations and the INA, and not because they are non-agricultural. While the Department recognizes the workforce challenges encountered by various agricultural industries, it is limited by the INA to certifying H-2A applications for jobs of a temporary or seasonal nature. As stated in the preamble to the 2010 H-2A Final Rule, the determination as to whether a particular activity is eligible for H-2A certification rests on a finding that the duration of the activity or the need for that activity is temporary or seasonal. Permanent job opportunities cannot be classified as temporary or seasonal. 2010 H-2A Final Rule, 75 FR 6884, 6890–6891. Instead, employers that

cannot find U.S. workers to fill permanent rather than temporary or seasonal jobs may wish to petition for workers under employment-based immigrant visa programs. *See, e.g.*, 8 U.S.C. 1153(b)(3); *see also* 8 U.S.C. 1101(a)(15)(H)(ii)(a) (INA permits only “agricultural labor or services . . . of a temporary or seasonal nature” to be performed under the H-2A visa category). Finally, with regard to comments above related to the period of need for herders, the Department recently rescinded, in the separate 2021 H-2A Herder Final Rule, the 364-day provision that governed the adjudication of temporary need for employers of sheep and goat herders (§ 655.215(b)(2)) to ensure the Department's adjudication of temporary or seasonal need is conducted in the same manner for all H-2A applications.

### Other Comments Related to the Requirements for Overtime Pay Under the FLSA

Some commenters expressed concerns about or requested clarification of the requirement for overtime pay under the FLSA to H-2A workers. One commenter said that some employers incorrectly assume that H-2A workers are always exempt from the FLSA overtime requirement, and another commenter made this same incorrect assumption in its comment. Other commenters stated that the classification of certain industries and activities as agricultural under one Act and non-agricultural under another was confusing, and that the reclassification of pine straw activities as agricultural under the INA would simplify compliance. Another commenter suggested a regulatory clarification that construction labor performed on a farm for an independent contractor, as opposed to for the farm operator, is not agricultural employment for the purposes of the FLSA, and that employees providing such services are entitled to overtime pay.

In light of these comments, the Department reiterates that the FLSA applies independently of the H-2A program. H-2A workers are not exempt from overtime pay under the FLSA simply by virtue of holding an H-2A visa, nor are workers engaged in corresponding employment with H-2A workers exempt from FLSA overtime pay simply because they are so engaged. The FLSA exempts employees employed in agriculture, as defined in sec. 3(f) of that same Act, from overtime pay (and, in more limited circumstances, from the Federal minimum wage) in any workweek that the worker is employed solely in agriculture. *See* FLSA sec. 13(a)(6) and

(b)(12), 29 U.S.C. 213(b)(6) and (12). However, the INA defines agriculture more broadly than the FLSA and, consequently, some H-2A workers are employed in activities that do not constitute FLSA agriculture and thus are entitled to FLSA overtime pay. For example, H-2A workers employed by a farmer are exempt from FLSA overtime in any workweek in which they are engaged in packing fruit grown exclusively by that same farmer. However, if during a given workweek these same H-2A workers, in addition to packing fruit grown by their employer also pack fruit grown by another farmer, they are entitled to FLSA overtime pay in that workweek.<sup>34</sup> Because the H-2A program's definition of agricultural labor or services is broader than the FLSA definition of agriculture (*i.e.*, it encompasses activities that constitute agricultural labor under the IRC, as well as logging and pressing of apples for cider on a farm), workers may be engaged in agricultural labor for H-2A program purposes but exempt or nonexempt from FLSA overtime in any particular workweek depending on their activities during that period. The Department encourages employers to consult the FLSA regulations at 29 CFR part 780 to determine if employees are entitled to FLSA overtime, and to consult applicable State and local laws, which may impose overtime or other wage requirements.

Reforestation and pine straw activities, as defined in the NPRM, similarly do not constitute FLSA agriculture unless performed by a farmer or on a farm as incident to or in conjunction with such farming activities, and employees engaged in these activities are frequently entitled to FLSA overtime pay.

One commenter opined that construction labor performed by an independent contractor on a farm never

<sup>34</sup> As defined by the FLSA, packing, processing, and transporting agricultural or horticultural commodities do not constitute agricultural employment *unless* these activities are performed by a farmer or on a farm as incident to or in conjunction with such farming activities (*i.e.*, the farming activities of the farm or farmer). The packing, processing, or transporting of fruit produced by a different grower is performed as incident to or in conjunction with the farming activities of the farmer that produced the fruit, not the employer, and thus is outside the scope of the exemption from FLSA overtime pay. *See generally* 29 CFR part 780, subparts A, B, and C; §§ 780.137 and 780.138. FLSA exemptions are determined on a workweek basis, and an employee performing exempt work (*i.e.*, packing, processing, and transporting the employer's own fruit) and nonexempt work (*i.e.*, packing, processing, and transporting the fruit produced by a different grower) in the same workweek is entitled to overtime pay in that particular workweek. *See* §§ 780.10 and 780.11.

For these purposes, a training track at a racetrack is not a farm. *See* 29 CFR 780.122.

constitutes FLSA agriculture. The Department notes that construction labor may constitute FLSA agriculture when performed by a farmer or on a farm as incident to or in conjunction with such farming activities.

#### Minor Revisions Incorporating Occupational Definitions for Animal Shearing, Commercial Beekeeping, and Custom Combining in the H-2A Program

In proposing the occupational definitions for itinerant employment in animal shearing, commercial beekeeping, and custom combining at 20 CFR 655.301, the Department acknowledged in the NPRM that some of the listed activities may not otherwise constitute agricultural work under the current definition of agricultural labor or services in § 655.103(c), but are a necessary part of performing this work on an itinerary. *See* 84 FR 36168, 36222. Accordingly, and solely for the purposes of the proposed variances in §§ 655.300 through 655.304, the Department explained that it would include these activities in the occupational definitions. *Id.* The Department did not receive any comments on this aspect of its proposal. However, because only duties that fall within the definition of agricultural labor or services under § 655.103(c) may be certified under the H-2A program, and to clarify that the activities set forth under the definitions for animal shearing, commercial beekeeping, and custom combining in § 655.301 qualify for certification under the H-2A program, the Department is making a technical, conforming revision to § 655.103(c). Under new § 655.103(c)(5), the Department expressly states that, for the purposes of § 655.103(c), agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in §§ 655.300 through 655.304. Additionally, this final rule incorporates the minor technical changes to correct the internal citations from paragraphs (c)(1)(iv) and (v) to now read paragraphs (c)(1)(i)(D) and (E), respectively, in § 655.103(c)(1)(i)(E) and (F).

#### 1. 20 CFR 655.103(d) and 29 CFR 501.3(c), Definition of a Temporary or Seasonal Nature

The NPRM sought public comments to inform a decision whether to retain the current, two-arbiter model in which both the Department and DHS evaluate temporary or seasonal need during their sequential review processes, or to move the adjudication of an employer's temporary or seasonal need either exclusively to DHS or exclusively to

DOL. The Department solicited input from the public on this idea as a way to eliminate duplication of agency reviews. The Department received many comments on this idea and, for the reasons explained below, has decided to retain at present the current two-arbiter model of DHS and DOL sequentially adjudicating an employer's temporary or seasonal need.

The INA grants DHS broad authority to determine whether to admit temporary workers as H-2A nonimmigrants based on an employer's petition, in consultation with appropriate Federal agencies, and further defines an H-2A nonimmigrant as an individual coming temporarily to the United States to perform agricultural labor or services "of a temporary or seasonal nature." 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188. Pursuant to the INA and implementing regulations promulgated by the Department and DHS, the Department evaluates an employer's need for agricultural labor or services to determine whether it is seasonal or temporary during the review of an *Application for Temporary Employment Certification*. 20 CFR 655.161(a); 8 CFR 214.2(h)(5)(i)(A) and (h)(5)(iv). In order to promote greater consistency and reduce stakeholder confusion concerning the definition of temporary or seasonal need, the Department adopted the DHS definition in the 2010 H-2A Final Rule. *See* 75 FR 6884, 6890. *Compare* 20 CFR 655.103(d) with 8 CFR 214.2(h)(5)(iv)(A).

Through its longstanding review of the nature of an employer's need as part of its review of an *Application for Temporary Employment Certification*, such as examining the period of employment identified on the H-2A application and the nature of the employer's need for agricultural labor or services, inclusive of the job duties, qualifications and requirements, and geographic locations where work will be performed, the Department has developed expertise and a process for determining temporary or seasonal need to which H-2A employers have become accustomed. In addition, DHS regulations state that an H-2A petition must establish, among other things, that the "employment proposed in the certification is of a temporary or seasonal nature" and that the Department's finding that employment is of a temporary or seasonal nature during review of the *Application for Temporary Employment Certification* is "normally sufficient" for the purpose of an H-2A Petition. 8 CFR 214.2(h)(5)(iv). Under current practice, if the Department issues a temporary

agricultural labor certification and the employer files an H-2A Petition, DHS may reevaluate and adjudicate the employer's temporary or seasonal need using the same definition or may defer to the Department's finding.

Many commenters supported eliminating the two-arbiter model, with most identifying the Department as the preferred sole arbiter. These commenters argued that retaining both arbiters creates uncertainty, inconsistency, and redundancy with harm to farmers, including crop loss as a result of the time lost should DHS reach a different, adverse decision later in the process than the Department. Most of the commenters who favored a single-arbiter model supported the Department as the sole arbiter. Some commenters urged the Department to consider a new arbiter of temporary or seasonal need, namely the U.S. Department of Agriculture (USDA). Included among these commenters who suggested USDA were several trade associations, a couple of agents, and a State government agency who named the Department as their second choice after USDA. Two other commenters, a trade association, and a State government agency suggested that the Department perform the role over DHS but with increased consultation with USDA. However, in the NPRM, the Department only sought public comment on the potential for only DHS, or only DOL, to serve as a sole arbiter. The Department did not propose or seek comment for an agency other than the Department or DHS to perform this role.

Those commenters who favored the Department as the adjudicating authority for temporary or seasonal need, as opposed to DHS, noted the Department's expertise and greater comparative familiarity with the H-2A program. Commenters also valued the Department's position in the petition process relative to DHS, as employers are able to make adjustments earlier should questions regarding temporary or seasonal need arise and before incurring additional expenses associated with filing an H-2A Petition with DHS.

Several commenters, including an agent, an employer, and a trade association, did not express a position regarding whether the Department or DHS should be the sole arbiter but instead noted the importance of the Department and DHS having congruent definitions of whether employment is of a temporary or seasonal nature. Similarly, another agent did not clearly express an opinion about whether there should be a sole arbiter of temporary or seasonal need but stated that DHS should continue to hold decision-



making authority with respect to the temporary and seasonal requirements.

The Department appreciates the variety of public comment on this proposal. After careful consideration of the comments received, the Department has determined, that it will not at this time be making such a substantial change to the program.<sup>35</sup> Therefore, this final rule retains the current two-arbiter model of DHS and DOL both sequentially evaluating an employer's temporary or seasonal need.

The Department received additional comments regarding the definition of a temporary or seasonal nature at 20 CFR 655.103(d) and 29 CFR 501.3(c). Many of these commenters urged the Department to include year-round work, particularly in the dairy industry. As the Department only sought public comment on determining whether the Department or DHS should act as the sole arbiter of temporary or seasonal need, such comments are outside the scope of this rulemaking.

#### B. Pre-Filing Procedures

##### 1. Section 655.120, Offered Wage Rate

The statute provides that an H-2A worker is admissible only if the Secretary determines that “there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.” See 8 U.S.C. 1188(a)(1). In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring an employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. The Department proposed in the NPRM to maintain this wage-setting structure with only minor revisions and modify the methodologies by which the

Department establishes the AEWR and prevailing wages.

Prior to this final rule, the Department engaged in rulemaking to revise the methodology for establishing the AEWR that addressed the Department's proposals at paragraphs (b)(1), (2), and (5) of the NPRM, as well as the definition of AEWR in § 655.103(b). See 85 FR 70445. Most recently, the Department issued an NPRM on December 1, 2021, which proposed to revise the methodology for establishing the AEWR. 86 FR 68174. The comment period for the 2021 H-2A AEWR NPRM closed on January 31, 2022, and the Department will address those comments in a separate rulemaking. This final rule addresses all other aspects of the Department's proposals at § 655.120—specifically, paragraphs (a), (b)(3) and (4), (c), and (d). In addition, the Department reinstates the 2010 H-2A Final Rule's method and schedule for updating the AEWR at paragraph (b)(2), which is necessary due to vacatur of the 2020 H-2A AEWR Final Rule, as discussed in the preamble to the definition of AEWR at § 655.103(b).

The Department received many general comments related to H-2A labor costs and wage requirements, some claiming that wage requirements are too high and others stating that wage requirements are too low. To the extent those comments raised specific concerns or suggestions, they are discussed below.

##### a. The Department Retains the Requirement That the Offered Wage Rate Must Be the Highest of the Available Wage Sources

The Department protects against adverse effect on the wages of workers in the United States similarly employed by requiring, at § 655.120(a), that an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, unless the occupation is subject to an alternative wage rate structure. The Department proposed three minor changes to paragraph (a). As discussed below, this final rule adopts the proposed language from the NPRM with minor conforming changes.

First, the Department proposed to replace the current regulatory provision that provides an exception for separate wage rates set by “special procedures” (*i.e.*, sub-regulatory variances from the regulation) and instead include a specific reference to the regulatory provisions covering job opportunities in the herding and production of livestock

on the range under §§ 655.200 through 655.235. Applications to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the range, as defined in § 655.201, are subject to the wage rate structure at § 655.211 and are the only exception to the wage methodology set forth in this final rule at § 655.120. Further, as discussed above, the Department has removed the authority in § 655.102 to establish, continue, revise, or revoke “special procedures” for H-2A occupations. The Department received comments requesting that it address herder wages, including a State law involving overtime pay for herders; however, these comments are outside the scope of this rulemaking. The Department explicitly stated in the NPRM that it was not reconsidering the herder wage rate methodology. 84 FR 36168, 36220–36221.

Second, the Department proposed to replace the “prevailing hourly wage or piece rate” with “prevailing wage rate” in recognition of the fact that the Department has issued prevailing wage rates that are not in the form of an “hourly” or “piece” rate wages, including, for example, “monthly” prevailing wage rates.<sup>36</sup> An employer suggested the Department, instead, replace “prevailing hourly rate or piece rate” with “prevailing guaranteed hourly rate” and use the hourly guarantee alone to protect against adverse effect on the domestic workforce. The commenter explained that such an approach would protect wages without limiting employers' flexibility to reward productive workers through a piece rate or another incentive-based system. The Department declines to adopt the suggested language. To the extent the commenter seeks an hourly guarantee protection for workers in the event an employer uses incentive pay or piece rate, the regulation already provides hourly rate protection at § 655.122(l)(1) and (2); and, to the extent the commenter seeks to eliminate piece rate PWDs, such a suggestion is beyond the scope of this rulemaking. Further, the Department does not limit an employer's flexibility to offer wages exceeding the minimum required wage.

Third, the Department proposed to clarify that the requirement to offer and pay at least the prevailing wage rate applies only “if the OFLC Administrator

<sup>35</sup> The January 2021 draft final rule indicated the Departments' intent for DOL to serve as the sole arbiter of temporary or seasonal need through a prospective delegation of authority from DHS as well as a separate regulatory action to amend DHS's related regulations. However, the January 2021 draft final rule was not published and never took effect. Accordingly, any statements contained therein do not represent the Department's formal policy; and, similarly, they do not, and may not be relied upon to, create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party. As explained elsewhere in this rule, the **Federal Register** and the Code of Federal Regulations remain the official sources for regulatory information published by the Department.

<sup>36</sup> The Department also makes corresponding changes throughout the regulation, replacing “the prevailing hourly wage or piece rate” with “prevailing wage” or “prevailing wage rate,” except where a given provision specifically applies only to prevailing piece rates.

has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of paragraph (c)” of § 655.120.<sup>37</sup> In the event there is no prevailing wage finding applicable to an employer’s job opportunity, the employer’s wage obligation is the highest of the other four applicable wage sources listed in paragraph (a). An employer that supported this proposal asked the Department to clarify that the OFLC Administrator must review the survey for compliance with prevailing wage methodology requirements, asserting that underlying documentation may have been lacking in the past. The Department appreciates this concern and notes that survey documentation demonstrating compliance with methodological requirements must be attached to the updated prevailing wage survey collection (*i.e.*, Form ETA–232) at the time of submission to the OFLC Administrator. *See* § 655.120(c)(1)(i).

The Department received many comments from workers’ rights advocacy organizations that asserted the Department is required to determine a prevailing wage in all cases. These commenters expressed concern that the Department proposed to eliminate this “requirement,” and, by doing so, would permit employers to offer below-market wage rates in areas where a survey, if conducted, would produce a higher rate than the other wage sources. The Department reiterates that this final rule does not eliminate an existing requirement; rather, the revised language clarifies existing policy and practice. State-conducted prevailing wage surveys are another source of information that can provide protections for workers who are engaged in specific crop or agricultural activities offering piece rate pay or higher hourly rates of pay than the applicable AEW in a geographic area. However, where the crop or agricultural activities in a geographic area are paid at hourly rates lower than the AEW, a State-conducted prevailing wage survey would not protect wages from adverse effect; the AEW does. The AEW will continue to serve as a wage floor that prevents localized wage stagnation or depression in areas and occupations in which employers desire to employ H–2A workers. Neither the statute nor the Department’s H–2A program regulations require the Department to determine a prevailing wage rate in all cases, and the Department’s regulations and guidance have contemplated that there are situations in which the wage sources

listed in § 655.120(a) may be unavailable or inapplicable, as reflected in past practice.<sup>38</sup> As explained in the NPRM, the Department primarily meets its obligation to protect against adverse effect on the wages of workers in the United States similarly employed by requiring employers to offer, advertise, and pay at least the AEW. 84 FR 36168, 36179. As such, requiring SWAs to conduct prevailing wage surveys for every crop and agricultural activity in every area within their jurisdiction is unnecessary to prevent adverse effect. However, the Department agrees that prevailing wage rates, under the PWD methodology adopted in this final rule at § 655.120(c), can provide additional safeguards. The Department will continue to issue PWDs based on information that is as reliable and representative as possible concerning the average wages of U.S. workers in a crop or agricultural activity and distinct work task(s) within that activity, if applicable, for a particular geographic region. As explained below, this final rule modernizes the PWD methodology and empowers States to produce a greater number of reliable prevailing wage rates, which the OFLC Administrator may approve under the requirements of § 655.120(c).

The Department also received comments that suggested the Department should stop requiring H–2A employers to offer and pay the highest of the sources listed in paragraph (a) and use a different wage-setting standard instead. Two employers recommended the Department set the H–2A wage rate at the current Federal minimum wage of \$7.25 per hour, while a trade association suggested the Department use the minimum wage adjusted annually using the Consumer Price Index (CPI). A trade association recommended the PWD, if available, should be used to set the H–2A wage requirement, even if that wage rate is lower than the AEW, as it is the most

<sup>38</sup> *See, e.g., AFL–CIO, et al. v. Dole, et al.*, 923 F.2d 182, 185 (D.C. Cir. 1991) (noting Congress did not “define adverse effect and left it in the Department’s discretion how to ensure that the importation of farmworkers met the statutory requirements” and that the Department’s chosen methodology to prevent adverse effect is “a policy decision taken within the bounds of a rather broad congressional delegation”); § 655.122(l)(1) (“any agreed-upon collective bargaining rate”); 1987 H–2A IFR, 52 FR 20496, 20502 (June 1, 1987) (noting H–2A workers “must be paid at the highest of the applicable wage rates”); 2008 H–2A Final Rule, 73 FR 77110, 77115 (Dec. 18, 2008) (“the highest of the AEW, prevailing wage, or minimum wage, as applicable”); 2010 H–2A Final Rule, 75 FR 6884, 6947 (“some [S]tates do not perform prevailing wage surveys”); ETA Handbook 385 at I–115 (“Should a survey not result in a prevailing wage rate finding, another survey should be made at the earliest appropriate time.”).

accurate measure of the prevailing wage for that specific crop activity in that specific area. A public policy organization recommended the Department allow employers to pay H–2A workers less than the AEW and prevailing wage rate, provided that U.S. workers receive five percent more than the highest of those two rates. These comments are outside the scope of the Department’s proposed modifications to paragraph (a).

After consideration of the comments, the Department adopts the proposed language with two minor revisions. First, the Department has revised § 655.120(a) to clarify that an employer must offer and pay, at a minimum, the highest of the enumerated wage sources, but may choose to offer and pay a higher rate. Second, the Department has revised § 655.120(a)(2) to align with language regarding prevailing wages at § 655.120(c). As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language in this paragraph recognizes that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations.

#### b. AEW Determinations

This final rule covers the Department’s proposals at paragraphs (b)(3) and (4) of § 655.120, which the Department reserved when addressing paragraphs (b)(1), (2), and (5) in a separate rulemaking (*i.e.*, the 2020 H–2A AEW Final Rule). As explained above in the preamble to the definition of AEW at § 655.103(b), the 2020 H–2A AEW Final Rule was vacated, leaving the 2010 H–2A Final Rule in its place. For the same reasons as noted in the preamble to the AEW definition, the Department is implementing the court’s vacatur of the 2020 H–2A AEW Final Rule in this final rule by removing from the CFR the regulatory text that the Department promulgated through that rulemaking at § 655.120(b)(1), (2), and (5), thereby restoring the regulatory text to appear as it did before the effective date of the 2020 H–2A AEW Final Rule, subject to the changes noted in this section. The Department has good cause to bypass otherwise applicable requirements of notice and comment and a delayed effective date because these are unnecessary for the implementation of the court’s vacatur order and would be impracticable and contrary to public interest in light of the agency’s need to implement the final judgment. *See* 5 U.S.C. 533(b)(B), (d). Delaying the ministerial task of restoring the regulatory text also would be contrary to the public interest because it could lead to confusion, particularly

<sup>37</sup> The Department also makes a corresponding change to § 655.122(l).

among the regulated public, as to the applicable AEWR methodology. With regard to changes in this section, the Department issued the 2021 H-2A AEWR NPRM, which proposed new paragraphs (b)(1) and (5). Accordingly, the Department retains the 2010 H-2A Final Rule's paragraph (c) that provides for annual AEWR updates to be published in the **Federal Register**, redesignated as paragraph (b)(2) in this final rule, and will address paragraphs (b)(1) and (5) in a separate rulemaking.

i. Must Pay Any Higher AEWR on the Published Effective Date of the New Wage Rate

The text adopted in the 2010 H-2A Final Rule specified the employer's obligation to pay the wage rate "in effect at the time work is performed."<sup>39</sup> In the event the OFLC Administrator publishes an updated AEWR that is higher than the previous AEWR, a prevailing wage for the crop activity or agricultural activity or task(s) and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must start paying the higher wage on the effective date of the new rate. In the **Federal Register** notice publishing the updated AEWRs, the OFLC Administrator identifies the effective date of the new AEWRs. Proposed § 655.120(b)(3) was intended to more clearly articulate the timing of the wage adjustment by codifying the current practice of providing employers a short period of time (*i.e.*, up to 14 days) to update their payroll systems, such that an employer would not be required to adjust a worker's pay in the middle of a pay period, but would be required to promptly implement the adjustment.<sup>40</sup> See 84 FR 36168, 36188. Although the January 2021 draft final rule would have accepted the proposal to codify an adjustment period of up to 14 calendar days after the Department's publication of updated AEWRs in the **Federal Register**, after further consideration of the comments and as explained below, the Department has decided not to adopt this proposal, but it otherwise adopts the proposed language from the NPRM with minor conforming changes.

<sup>39</sup> Under 44 U.S.C. 1507, publication in the **Federal Register** provides legal notice of the new wage rates. Section 655.122(l) of the 2010 H-2A Final Rule required employers to pay the wage rate "in effect at the time work is performed."

<sup>40</sup> See, *e.g.*, Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2020 Adverse Effect Wage Rates for Non-Range Occupations*, 84 FR 69774 (Dec. 19, 2019) (announcing AEWRs for 2020 on December 19, 2019, to be effective January 2, 2020).

The Department received comments from associations, farm bureaus, employers, agents, individual commenters, an agricultural financial services business, and a national business advocacy organization opposing the requirement that employers must increase the wage rate during the employment period if the Department publishes a higher rate. Many of these commenters expressed concern this provision would make it more difficult for employers to conduct advance operational and budget planning because, at the time of filing, they would lack knowledge of the required wage rate(s) throughout the entire period of employment. An association asserted the wage rate required in the work contract should prevail throughout the employment period because "the determination of no adverse impact to domestic workers has been satisfied for the contract period" once the work contract is approved. These commenters, however, generally supported the Department's proposal to include a period of time for employers to adjust to the new wage rate after publication, rather than imposing an obligation to immediately implement, with an employer asserting immediate implementation would have been "unrealistic at best" due to the employer's need to update pay structures and a business advocacy organization asserting 14 days is insufficient. Another commenter urged the Department to set a "date certain" on which the updated wage rates would be effective.

The wage adjustment provision will affect only those employers whose OFLC-approved offered wage rate falls below the permissible minimum wage floor once the Department issues the new wage rates. The duty to pay an updated AEWR if it is higher than the other wage sources is not a new requirement, as employers participating in the H-2A program historically have been required to offer and pay the highest of the AEWR, the prevailing wage, or the Federal or State minimum wage at the time the work is performed.<sup>41</sup> As explained in the 2010 H-2A Final Rule, "[t]he Department recognizes that these wage adjustments may alter employer budgets for the

<sup>41</sup> See, *e.g.*, 1987 H-2A IFR, 52 FR 20496, 20521; *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: H-2A Program Handbook*, 53 FR 22076, 22095 (June 13, 1988) ("[c]ertified H-2A employers must agree, as a condition for receiving certification, to pay a higher AEWR than the one in effect at the time an application is submitted in the event publication of the [higher] AEWR coincides with the period of employment").

season" and, therefore, "employers are encouraged to include into their contingency planning certain flexibility to account for any possible wage adjustments." 2010 H-2A Final Rule, 75 FR 6884, 6901. This is especially true given that employers have been required to make these adjustments for many years and neither program experience nor comments on the NPRM demonstrated that a longer adjustment period would be necessary to avoid significant operational burdens on employers or the layoffs and crop deterioration cited by some commenters. For similar reasons, the Department believes concerns about significant mid-contract increases in the AEWR are overstated.

A SWA urged the Department to require immediate implementation of increased wage rates, asserting that a delay of up to 14 days would deprive workers of up to 2 weeks of pay at the AEWR and, therefore, would produce the type of adverse effect the Department is required to prevent. This commenter believed that if the Department permitted a 14-day adjustment period, it should require the employer to "pay any increases retroactively, perhaps in the pay period after the new wage rate becomes effective," which the commenter stated was consistent with the Department's FLSA regulations at 29 CFR 778.303. The Department is sensitive both to the worker protection concerns the SWA raised and to adopting an approach that could add complexity, which is inconsistent with the Department's goals in this rulemaking to enhance worker protections while simplifying the program to facilitate compliance and administration.

Therefore, in this final rule, the Department has not adopted the proposal that would have codified an adjustment period of up to 14 calendar days after the Department's announcement of the new AEWRs in the **Federal Register**; instead, the Department will continue current practice of stating the effective date of the new AEWRs in the **Federal Register** announcement of the new AEWRs, which may be immediate and will not be more than 14 calendar days after publication of that notice, consistent with historical and current practice. In addition, the Department has made a minor revision to align with language regarding prevailing wages at § 655.120(c). As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language at § 655.120(b)(3) recognizes that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural

activity in certain situations.

Additionally, the Department has made a minor revision to clarify that if an updated AEWR is higher than the other wage sources, the employer must pay at least the updated AEWR, but may choose to offer and pay a higher rate.

ii. Must Not Lower Wage Rate After Publication of a Lower AEWR

In § 655.120(b)(4), the Department proposed to prohibit employers from lowering the wage rate during the certified employment period in the event the OFLC Administrator publishes an updated AEWR that is lower than the rate guaranteed on the job order. In order to avoid potential confusion regarding the requirement to continue to pay the previously offered wage if a lower rate is published during the employment period, the Department also proposed to remove language in §§ 655.120(b) and 655.122(l) regarding the wage rate “in effect at the time work is performed.” This approach ensures the wage rate does not fall below the rate that was offered to workers and agreed to in the work contract and prevents employers from including a clause in the job order to allow such a reduction within contract terms. As discussed below, this final rule adopts the proposed language from the NPRM unchanged.

Employer, association, agent, and business advocacy group commenters opposed the Department’s proposal to prohibit employers from reducing the wage rate during the employment period, in the event the AEWR decreases. Several commenters, including associations, believed the proposal would unfairly undermine mutually agreed-upon contract terms. Some of these commenters asserted that the Department’s proposal infringed upon the employers’ and workers’ contract rights by permitting the Department to “void” or “abrogate” the wage rate offered and agreed to in the employment contract and prohibiting the employer from including wage reduction clauses in the contract. An agent asserted the prohibition against wage reductions mid-contract would disadvantage employers with start dates before an AEWR adjustment because they would be required to pay a higher rate throughout the period of employment, while an employer with a start date after the new AEWR rates are published could pay the lower rate. Two employers and a trade association stated that the employer should be permitted to pay a lower AEWR if one is published because the AEWR is the “exact wage” necessary to protect U.S. workers, and the commenters asserted “there is no

valid basis to require payment of a higher wage when that wage is no longer determined to be the AEWR.”

With respect to commenters’ concern that these provisions infringe on employers’ and workers’ freedom to contract, H-2A employers are free to include any terms and conditions in employment contracts that comply with all laws and regulations governing the H-2A program and employment generally. However, the Department holds the view that agricultural workers “generally comprise an especially vulnerable population whose low educational attainment, . . . low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market,” and, as a result, these workers’ “ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited” (2009 H-2A NPRM, 74 FR 45906, 45911 (Sept. 4, 2009)), and this “limited bargaining power . . . exacerbates the problem of stagnating [wages]” (2010 H-2A Final Rule, 75 FR 6884, 6894). Prohibiting contract terms that would lower wages paid below the offered and agreed-to rates aligns with these concerns and is consistent with the Department’s broad discretion to determine the most effective method of ensuring the employment of H-2A workers does not have an adverse effect on the wages of workers in the United States similarly employed.

The Department believes that prohibiting downward adjustments of wage rates during the period of certified employment is necessary to provide stability and predictability for workers who have limited ability to negotiate their wages and working conditions. Accordingly, this will help protect against potential adverse effects on the workers’ wages and working conditions, without increasing the employer’s wage costs above those in effect at the time of certification.

After consideration of the comments, the Department is adopting the proposal to prohibit the employer from reducing the offered wage, even in cases where the Department publishes a lower AEWR. Because the employer advertised and offered the higher rate on its job order, the employer cannot reduce the wage rate below the rate already guaranteed in the work contract. The Department has made a minor revision to clarify that if an updated AEWR is lower than the rate guaranteed on the job order, the employer must pay at least the rate guaranteed on the job order, but may choose to offer and pay a higher rate.

c. Section 655.120(c) Prevailing Wage Determinations

i. Background

The Department proposed to modernize the methodology used to conduct prevailing wage surveys that applies to both H-2A and other agricultural job orders placed in the Wagner-Peyser Act agricultural recruitment system. The Department previously relied on ETA Handbook 385, which was last updated in 1981, and other sub-regulatory guidance to set the standards that govern the prevailing wage surveys SWAs conduct to establish prevailing wage rates. The NPRM proposed to modernize these standards in order to establish reliable prevailing wage rates for employers and workers, and allow SWAs and other State agencies to conduct surveys using standards that are more realistic in a modern budget environment. Under the proposed methodology, the OFLC Administrator would issue a prevailing wage for a given crop activity or agricultural activity only if all of the requirements in proposed § 655.120(c)(1) are met.

In particular, the NPRM proposed the following methodological standards: (1) the SWA must submit a standardized form providing the methodology of the survey; (2) the survey must be independently conducted by the SWA or another State entity; (3) the survey must cover a distinct work task or tasks performed in a single crop activity or agricultural activity; (4) the surveyor must make a reasonable, good faith effort to contact all employers who employ workers in the crop or agricultural activity within the geographic area surveyed or conduct a randomized sampling of such employers; (5) the survey must be limited to the wages of U.S. workers, report an average wage, and be based on a single unit of pay used to compensate at least 50 percent of the U.S. workers included in the survey; (6) the survey must cover an appropriate geographic area based on several factors; and (7) the survey must report the wages of at least 30 U.S. workers and five employers and the wages paid by a single employer must represent no more than 25 percent of the sampled wages included in the survey.

SWAs that seek to prioritize precision of their estimates for the purpose of statistical validity for numerically large categories of workers may wish to consider employing statistical sampling methods that exceed the minimum standards contained in this final rule, such as those used by the National Agricultural Statistical Service in the

Agricultural Labor Survey.<sup>42</sup> However, as explained below, the Department is not requiring enhanced sampling methods.

In addition to these standards, the NPRM proposed to establish (1) a 1-year validity period for prevailing wage rates; (2) a 14-day window in which employers must implement newly required higher prevailing wage rates; and (3) the requirement that employers continue to pay at least the rate guaranteed on the job order if a prevailing wage rate is adjusted during a work contract. The Department received comments both in support of and in opposition to these proposals, which are discussed in greater detail below. These comments raised a variety of concerns, some general and some pertaining to specific provisions identified in the NPRM. The Department will first respond to the general comments before turning to the proposals in § 655.120(c) and the specific comments related to these proposals. As discussed below, the Department is adopting paragraphs (c)(1)(ii) and (vi) unchanged from the NPRM and is adopting paragraphs (c)(1) introductory text and (c)(1)(i), (iii) through (v), and (vii) through (ix) with some changes.

#### ii. General Comments on Prevailing Wage Determinations

The Department received general comments regarding the need for PWDs. Several commenters including employers and trade associations encouraged the Department to remove PWDs from the H-2A regulations entirely. Commenters explained agricultural wages involved too many factors, which prevent the government from establishing an accurate wage rate that is generally applicable and protects the domestic workforce from adverse effect. As an example of this “inaccuracy,” a few commenters observed that employers who respond to the survey in some regions or States pay higher rates to compete with employers who use the H-2A program in those areas. According to the commenters, the inclusion of these higher rates distorts survey results.

To the extent these comments recommend eliminating prevailing wages as a wage source under

§ 655.120(a), they are outside the scope of this rulemaking. With respect to comments on setting accurate wages when different factors affect agricultural workers’ pay, the Department acknowledges it cannot delay or forgo its delegated duties because the available data may be less than perfect.<sup>43</sup> The Department disagrees with the commenters’ suggestion that the inclusion of responses from employers paying higher rates to compete with H-2A employers necessarily distorts survey results. The commenters did not provide evidence that the inclusion of such rates “distorts” survey findings or offer examples of survey inaccuracies, beyond mentioning surveys challenged in two cases that have since been dismissed in favor of the Department and SWA.<sup>44</sup> Moreover, the prevailing wage rate is intended to reflect the average wage of U.S. workers in a geographic area for a crop or agricultural activity and, if applicable, distinct work task(s) within that activity. If employers are paying a certain average rate and the Department validates such a finding, then that is the prevailing wage employers must pay to applicable workers when it is the highest of available wage sources in § 655.120(a).

#### iii. General Comments on the Prevailing Wage Survey Methodology

Several SWAs, employers, agents, and trade associations supported modernizing the prevailing wage methodology and revising the regulations to provide concrete guidance and criteria. A SWA as well as some employers and trade associations believed the proposed standards were not rigorous enough to produce accurate PWDs. In contrast, workers’ rights advocacy organizations claimed the standards were too rigorous and would result in too few PWDs. Similarly, two U.S. Senators asserted the proposed methodology “is overly complex” and raises concerns, including “whether SWAs will be adequately equipped to undertake the wage surveys.” The Senators did not provide additional

explanation on why they believed the proposal was too complex. Some associations expressed concern there was no “third party . . . peer review” to show the standards would result in accurate prevailing wages. One association stated, without additional explanation, that changes to the survey methodology should only be attempted in a stand-alone rule, if at all. The Department appreciates and values the commenters’ general input on the prevailing wage survey methodology proposed in the NPRM. Because of the general nature of these comments, the Department is unable to address them in further detail. Beyond these general comments, the Department received comments on the specific proposals in § 655.120(c), which are addressed in the sections that follow.

#### iv. Section 655.120(c)(1) Introductory Text and (c)(1)(i)

The Department proposed in § 655.120(c)(1) that the OFLC Administrator will issue a prevailing wage for a crop activity or agricultural activity if all of the requirements in § 655.120(c)(1)(i) through (ix) are met. The Department did not receive comments on this specific proposal, and therefore adopts the language in the NPRM with a minor revision to account for a prevailing wage for “a distinct work task or tasks performed” within a crop or agricultural activity, if applicable. As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language recognizes there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations, and conforms to similar changes made to portions of § 655.120(c) in this final rule.

In § 655.120(c)(1)(i), the Department proposed to maintain the current requirement that the SWA submit a Form ETA-232 to explain the methodology used to conduct the prevailing wage survey. An employer and trade association supported the proposal, while several workers’ rights advocacy organizations expressed concern that the Department would only require consideration of a prevailing wage rate if it is approved by the Department, and OFLC in particular, because this could lead to the potential rejection of a prevailing wage survey finding submitted by a SWA.

Commenters, including two other trade associations, added that the Department should sanction SWAs that submit noncompliant or invalid surveys.

After considering the comments received in response to § 655.120(c)(1)(i), the Department has

<sup>42</sup> This detailed information on the statistical methodology of the Farm Labor Survey (FLS) is publicly available by searching *reginfo.gov* for Information Collection Requests (ICRs) with the key words “agricultural labor survey,” opening the most recent “Agricultural Labor” ICR package, then selecting “View Supporting Statement and Other Documents” and opening the Supporting Statement B (SSB) document.

<sup>43</sup> See *Zirkle Fruit Co. v. U.S. Dep’t of Labor, et al.*, 442 F. Supp. 3d 1366, 1383 (E.D. Wash. 2020) (“Agency action is not arbitrary or capricious simply because it is imperfect. Nor are agencies required to delay or forego their delegated duties simply because they lack a perfect dataset from which to undertake them.”).

<sup>44</sup> *Zirkle Fruit Co.*, 442 F. Supp. 3d at 1383; Order Dismissing Case, *Evans Fruit Co., et al. v. U.S. Dep’t of Labor, et al.*, No. 19-cv-3202 (E.D. Wash. Nov. 7, 2019); see also Order Denying Plaintiffs’ Motion for Preliminary Injunction, *Evans Fruit Co., Inc. v. U.S. Dep’t of Labor, et al.*, No. 19-cv-3202 (E.D. Wash. Oct. 11, 2019) (agency’s actions are not arbitrary simply because they rely on “imperfect data or used an imperfect approach”).

decided to retain the NPRM language with the same minor revision related to distinct work task(s) discussed above.<sup>45</sup> The Department has reviewed and approved SWA prevailing wage findings for decades and paragraph (c)(1)(i) reflects a continuation of this longstanding review and approval process, not a new requirement. *See, e.g.,* 1987 H-2A IFR, 52 FR 20496, 20521; ETA Handbook 385 at I-135. The Department disagrees that a sanction is needed, especially when the Department has and will continue to review prevailing wage findings submitted by SWAs to ensure they satisfy the Department's methodological requirements.

#### v. Section 655.120(c)(1)(ii)

The Department proposed to allow State entities other than the SWA, including a State agency, State college, or State university, to independently conduct prevailing wage surveys. This proposal sought to encourage more surveys conducted by reliable sources, independent of employer or worker influence. As the NPRM explained, SWAs have limited capacity to conduct surveys given other legal requirements, including the statutory requirement to conduct housing inspections. Other State entities, however, may have resources and expertise to conduct prevailing wage surveys for purposes of the H-2A program. Under the proposal, a State entity other than the SWA could choose to conduct a prevailing wage survey using State resources without any foreign labor certification program funding. Alternatively, the SWA could elect to wholly or partially fund a survey conducted by another State entity using funds provided by the Department for foreign labor certification programs.

The Department proposed to continue to require the SWA to submit the Form ETA-232 for any prevailing wage survey, even if the survey was conducted by another State entity. This process is designed to ensure the Department will not adjudicate conflicting surveys in the event the SWA identifies more than one State prevailing wage survey that might be used for purposes of the H-2A program. The NPRM solicited comments on alternate methods to address concerns with possible conflicting surveys, and whether there are additional neutral sources of prevailing wage information that the Department should use in the H-2A program to further its effort to

modernize State-conducted prevailing wage surveys. The Department received several comments on this proposal. Following full consideration of these comments, the Department has decided to retain the proposal in this final rule without change. The Department's responses to these comments are provided below.

#### Use of Alternative Data Sources

A workers' rights advocacy organization recommended the Department permit SWAs to determine prevailing wages based on information like employers' job service listings for similar positions and information in a State unemployment insurance (UI) database. The commenter explained that a "wage survey is merely one of the ways" to determine a prevailing wage and "SWAs have a variety of real time data available to them that is provided by employers." The commenter added that job service staff funded by Migrant and Seasonal Farmworker funds are "uniquely qualified" to assess if an hourly or piece rate wage is consistent with the prevailing practice in their region. The commenter also urged the Department to use the local wage from the Occupational Employment and Wage Statistics (OEWS) survey,<sup>46</sup> formerly the Occupational Employment Statistics survey prior to March 31, 2021, to establish prevailing wages for crop activities paid on an hourly basis when the SWA does not produce a prevailing wage finding or if the Department determines the finding submitted does not satisfy methodological requirements.

The Department appreciates the suggestions from the commenter. The Department agrees that SWAs and other State entities may draw on UI data, job service listings, and other sources of State-generated information to formulate prevailing wage surveys. For example, SWAs may use information in their State's UI database as one source to help identify the general universe of employers to contact, so long as there is a 20 CFR part 603 compliant agreement for the transfer of the data. SWAs may

also refer to job orders and similar information to help identify the pay structures for certain crop or agricultural activities to determine if there are distinct work task(s) within those activities before conducting a survey. As explained in the NPRM, prevailing wage surveys are specific to crop and agricultural activities and distinct tasks performed within these activities in particular geographic areas, as determined by SWAs. 84 FR 36168, 36185-36187. The Department has relied on SWAs to determine prevailing wages in the H-2A program for decades because they are uniquely positioned to determine the crops and activities to be surveyed, the ideal times to conduct surveys for various seasonal activities, the universe of employers to be surveyed, and the areas in which employers operate, based on their knowledge of prevailing local practices and conditions, differing pay structures for specific activities and crops, and the movement of migratory farm labor within the State. Based on this knowledge of local conditions, SWAs and other State entities can draw on alternative sources of information as they craft prevailing wage surveys in accordance with the methodological requirements in this rule.

To the extent the commenter is suggesting that sources such as employers' job service listings or information in a State UI database be used to solely determine prevailing wages, the Department is not able to adopt this suggestion in this rulemaking. Although these may be neutral sources of wage information, these sources are not surveys or data collections designed to facilitate identification of wages paid to workers engaged in a particular activity in a particular geographic area. As noted in the NPRM, the Department proposed to "modernize the methodology used by the SWAs to conduct prevailing wage surveys" and "allow the SWAs and other State agencies to conduct surveys using standards that are more realistic." 84 FR 36168, 36178, 36179.<sup>47</sup> The use of these alternative data sources in lieu of a State-conducted survey of wages in

<sup>46</sup> OEWS collects wage data from all 50 States as well as the District of Columbia (DC), Puerto Rico, Guam, and the Virgin Islands. *See* Bureau of Labor Statistics (BLS), *Occupational Employment and Wage Statistics Overview*, [https://www.bls.gov/oes/oes\\_emp.htm](https://www.bls.gov/oes/oes_emp.htm) (last modified Mar. 31, 2021) ("The OEWS survey is a federal-state cooperative program between [BLS] and [SWAs]. BLS provides the procedures and technical support, draws the sample, and produces the survey materials, while the SWAs collect the data. SWAs from all [50 States], plus [DC], Puerto Rico, Guam, and the Virgin Islands participate in the survey. Occupational employment and wage rate estimates at the national level are produced by BLS using data from the [50 States] and [DC].").

<sup>47</sup> *See also e.g.,* 84 FR 36168, 36179 ("Accordingly, the Department proposes to make the changes discussed below to modernize the prevailing wage methodology and empower States to produce a greater number of reliable prevailing wage surveys results."); 84 FR 36168, 36263 (prevailing wage defined as a wage rate established, *inter alia*, "based on a survey conducted by a state that meets the requirements in § 655.120(c)"); 84 FR 36168, 36176 (proposing a corresponding change to the Wagner-Peyser Act regulation at 20 CFR 653.501(c)(2)(i) to define "prevailing wage" in the same manner for the agricultural recruitment system as the Department proposes to define "prevailing wage" for the H-2A program).

<sup>45</sup> The Department has updated Form ETA-232 to align with the prevailing wage methodology in this final rule.



a crop or agricultural activity and geographic area to determine prevailing wages would require further consideration, in part, regarding the appropriate criteria such data sources must meet to produce prevailing wages in the H-2A program. Such a change to the proposal—adding both a method of determining prevailing wages other than State-conducted surveys of employers as well as the criteria for the SWA to use in evaluating and using non-survey data sources to determine prevailing wages—cannot be adopted without further consideration, including notice-and-comment rulemaking.

Similarly, the Department did not propose to rely on an alternative non-State survey, such as the OEWS survey, in the event a SWA or other State entity conducts a survey but the survey does not yield a PWD. Rather, the Department proposed using the OEWS survey to establish the AEWR in certain circumstances. 84 FR 36168, 36183–36184. Moreover, the NPRM explained that the Department meets its obligation to protect against adverse effect on the wages of workers in the United States similarly employed primarily by requiring employers to offer, advertise, and pay the AEWR, which is a form of prevailing wage and under the current wage methodology is the required wage rate in approximately 95 percent of H-2A applications. *Id.* at 36179. The NPRM therefore clarified that the Department is not obligated to establish a prevailing wage separate from the AEWR for every occupation and agricultural activity in every State. *Id.* Instead, the Department proposed to modernize the methodology used by the SWAs to conduct prevailing wage surveys to serve as an additional wage protection for workers in specific crops and activities. *Id.* Adopting the suggestion to use the OEWS survey when there is no PWD from a State-conducted survey would be a change that commenters and stakeholders generally could not have anticipated as an outcome of the rulemaking, thus warranting additional public notice and opportunity for comment.

Finally, to the extent the commenter is referring to SWA staff funded by Wagner-Peyser Act funds when it refers to “job service staff funded by Migrant and Seasonal Farmworker funds,” the Department agrees that SWAs are “uniquely” positioned to assess differing pay structures based on their knowledge of prevailing local practices and conditions, as discussed above.

#### Private and Other Third-Party Surveys

An individual commenter mistakenly believed the Department proposed to

eliminate employer-provided prevailing wage surveys, but there are no such surveys under the H-2A program and, as such, the NPRM did not propose their elimination. Several trade associations, agents, and a public policy organization asked the Department to permit the use of wage surveys conducted by other third parties, including employer-provided surveys. One of these commenters explained statistically valid employer-provided surveys would save Federal resources and allow for “more accurate” surveys tailored to particular areas and occupations. The commenter stated it was irrational for the Department to permit such surveys in the H-2B program, but not the H-2A program.

The Department declines to adopt the request to allow private or employer-provided surveys. As a preliminary matter, the Department notes that the comment mischaracterizes the Department’s position on the use of employer-provided surveys in the H-2B program. The 2015 H-2B Final Rule permits employer-provided surveys only in limited circumstances: (1) those conducted by a State or State agency, State college, or State university; (2) those submitted for a geographic area where the OEWS does not collect data, or in a geographic area where the OEWS provides an arithmetic mean only at a national level for workers employed in the SOC occupation; or (3) where the job opportunity is not included in an occupational classification of the SOC system, or is included within a SOC occupation designated as “all other.”<sup>48</sup> Further, only in the latter two scenarios (*i.e.*, (2) and (3)) would the Department permit an employer to submit a private wage survey for consideration. Subsequently, Congress required the Department to expand the types of surveys permitted in the H-2B program through Appropriations Act legislation first enacted in 2015 and every year since.<sup>49</sup>

<sup>48</sup> See 2015 H-2B Final Rule, 80 FR 24146, 24165–24171 (Apr. 29, 2015) (discussing at length the reasons the Department does not permit general use of employer-provided private wage surveys); § 655.10(f); see also *Comite de Apoyo a los Trabajadores Agrícolas (CATA) v. Perez*, 774 F.3d 173, 191 (3d Cir. 2014) (directing “that private surveys no longer be used in determining the mean rate of wage for occupations except where an otherwise applicable [OEWS] survey does not provide any data for an occupation in a specific geographical location, or where the [OEWS] survey does not accurately represent the relevant job classification”).

<sup>49</sup> See, e.g., Consolidated Appropriations Act, 2021, Public Law 116–260, div. H, tit. 1, sec. 110 (2020); Consolidated Appropriations Act, 2020, Public Law 116–94, div. A, tit. I, sec. 110 (2019); Consolidated Appropriations Act, 2016, Public Law 114–113, div. H, tit. I, sec. 112 (2015); see also

Moreover, due to regulatory differences between the H-2A and H-2B programs, the Department believes it is reasonable to exclude employer-provided surveys in the H-2A program but allow them in limited circumstances in the H-2B program. First, there is no AEWR under the H-2B program. Instead, the employer must offer a wage that is at least equal to the prevailing wage or the Federal, State, or local minimum wage, whichever is highest. Second, the PWD processes in the H-2A and H-2B programs are distinct. In the H-2B program, the prevailing wage is determined on a case-by-case basis, in advance of the employer’s application filing with the OFLC NPC.<sup>50</sup> In contrast, prevailing wages under the H-2A program are historically determined using one method—SWA surveys submitted to the OFLC Administrator—and are applicable to all H-2A applications for the crop or agricultural activity in the area surveyed.<sup>51</sup> There is no mechanism in the H-2A program for OFLC to evaluate wage surveys for specific job opportunities or from sources other than the SWA. Instead, the SWA must submit prevailing wage survey results to OFLC on the Form ETA–232. This final rule continues this requirement, even if the survey submitted with the SWA’s Form ETA–232 was conducted by another State entity. Finally, given that employers are required to pay the highest of the wage sources listed in § 655.120(a), it seems unlikely that an employer would submit an alternate wage survey because the wage finding from that survey would impact the employer’s wage offer requirement only if it is the highest among the sources in § 655.120(a).

#### Surveys Conducted by Non-SWA State Entities

An employer asserted that only State agriculture agencies should conduct surveys because SWAs and others lack industry expertise. A trade association opposed allowing SWAs to use surveys conducted by other State entities because this could create uncertainty

*Effects of the 2016 Department of Labor Appropriations Act* (Dec. 29, 2015) at p. 4, [https://www.foreignlaborcert.doleta.gov/pdf/H-2B\\_Prevailing\\_Wage\\_FAQs\\_DOL\\_Appropriations\\_Act.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf).

<sup>50</sup> H-2B employers must obtain a PWD from the National Prevailing Wage Center (NPWC) before filing an H-2B application with the NPC. The NPWC engages in a case-by-case analysis of the employer’s job opportunity and several wage sources.

<sup>51</sup> During application review, the NPC compares the prevailing wage for the crop or agricultural activity and area, if available, to the other applicable wage sources (*i.e.*, AEWR; CBA; and Federal and State minimum wages) to determine the highest wage.

and may produce wages that “fluctuate wildly.” A public policy organization stated the NPRM does not offer a methodology to resolve conflicting surveys or address whether State universities may accept money from grower associations to conduct prevailing wage surveys. In contrast, a commenter from academia and another association supported the proposal in the NPRM, with the association noting that surveys conducted by non-SWA State entities would “alleviate concerns” over the reliability of OEWS data for agricultural occupations and provide a “reasonable alternative” to the FLS.

The Department declines to adopt the suggestion to limit surveys to State agriculture agencies or SWAs. The Department seeks to increase, rather than limit, the number of State entities that can conduct surveys in order to encourage more prevailing wage findings. The commenters’ suggestion would conflict with this goal. Moreover, the Department is retaining the SWA as the entry point for other State entity surveys in order to leverage the SWA’s expertise in the selection of surveys to submit for OFLC approval. In response to the comment that the NPRM did not offer a “methodology” to resolve conflicting surveys, this final rule clarifies that the SWA will evaluate conflicting State surveys and submit to the Department only one survey for a crop or agricultural activity and distinct work task(s) in that activity, if applicable, for a particular area.

With regard to the comment on whether State universities could accept money from grower associations to conduct a survey, the Department understands this comment to be concerned with the impartiality of State-conducted surveys. As noted in the 2015 H–2B Final Rule, the Department has a long history of partnering with States to collect wage data and determine prevailing wage rates. *See* 80 FR 24146, 24170. The Department accepts surveys conducted by State entities, such as State agriculture agencies and universities, because these sources are considered reliable and independent of employer influence. *Id.* The requirement that the State must independently conduct the survey means that the State must design and implement the survey without regard to the interest of any employer in the outcome of the wage reported from the survey. *Id.* In addition, the Department does not believe wages will vary significantly depending on the State entity that conducts the survey. This is because entities will be held to the same methodological standards, and OFLC

will review prevailing wage findings prior to the issuance of any prevailing wage rate to ensure the survey meets methodological requirements.

vi. Section 655.120(c)(1)(iii)

The Department proposed that a prevailing wage survey must cover a distinct work task or tasks performed in a single crop activity or agricultural activity. The Department explained the concept of distinct work tasks is continued from ETA Handbook 385, which provides:

Some crop activities involve a number of separate and distinct operations. Thus, in harvesting tomatoes, some workers *pick* the tomatoes and place them in containers while others *load* the containers into trucks or other conveyances. Separate wage rates are usually paid for individual operations or combinations of operations. For the purposes of this report, each operation or job related to a specific crop activity for which a separate wage rate is paid should be identified and listed separately.

ETA Handbook 385 at I–113 (emphasis in original). The NPRM stated “[t]he distinct task requirement means that even within a single crop, distinct work tasks that are compensated differently (e.g., picking and packing) would be required to be surveyed in a manner that produces separate wage results.” 84 FR 36168, 36186.

The Department received several comments on this proposal. Some trade associations asked the Department to clarify what constitutes a distinct work task within a crop or agricultural activity so employers can provide more accurate and reliable wage data. A workers’ rights advocacy organization stated that it would be difficult for SWAs to determine which activities are paid differently until after the survey is complete. One trade association opposed the determination of wage rates by tasks because it believed doing so could negatively affect smaller operations and expose employers to liability.

After careful consideration of the comments, the Department has decided to retain the proposal in this final rule with clarification in this section of the preamble and a minor change to the regulatory text. In particular, the Department clarifies that if the SWA or surveyor knows before the administration of a survey that separate wage rates are paid to a distinct work task or tasks within a crop or agricultural activity, then the survey must be designed to capture that unique task(s) and wage rate(s). This knowledge could come from different sources, including prior experience or

stakeholder engagement during the survey development phase.

The Department also clarifies that a SWA or surveyor may determine that a task or tasks within a crop or agricultural activity is paid differently during or after the survey administration period. For example, a survey form could ask employers to list the crop activity—including distinct work task(s) within each activity—associated with each unique wage rate. The survey could also provide a space for employers to furnish additional information on factors that may affect wage rates. Depending on the responses from employers (if any), the SWA or surveyor may determine there are distinct work task(s) within an activity and that it therefore must calculate a separate wage rate for this task or tasks. The Department’s above clarifications allow SWAs to retain discretion over which crop and agricultural activities to survey and the methods for collecting data from employers—as is the case under current standard practice—while fulfilling the requirements of this provision. Finally, consistent with current practice and language in the Handbook, the Department has revised the regulatory text for this provision to clarify that the survey must cover work performed in a single crop or agricultural activity and, if applicable, a distinct work task(s) performed in that activity. This change recognizes that not every crop activity or agricultural activity will have a distinct work task or tasks and thus not every survey will cover such task or tasks.<sup>52</sup>

In response to the trade associations’ request for clarification, the concept of distinct work tasks is not new, but rather a continuation from ETA Handbook 385. As noted in the Handbook, the hallmark of a distinct work task performed in a crop or agricultural activity is a separate wage rate that is paid for that operation or job. Given the factors that may affect wage rates, the Department is unable to provide an exhaustive list of tasks for all crop or agricultural activities in all geographic areas. Instead, what constitutes a distinct work task must be determined in each case, depending on the information before the SWA or other State surveyor.

The Department acknowledges the workers’ rights advocacy organization’s comment that SWAs may not know if activities are paid differently until after the completion of a survey. As clarified above, a SWA or surveyor may

<sup>52</sup> *See* ETA Handbook 385 at I–113 (“Some crop activities involve a number of separate and distinct operations.”) (emphasis added).

determine a distinct work task or tasks performed within a crop or agricultural activity is paid differently during or after the survey administration period. The Department believes this clarification addresses the workers' rights advocacy organization's comment and notes SWA commenters did not express concern that determining the distinct work tasks to be covered by a survey has been challenging under the Handbook or will be challenging under the similar provision proposed in the NPRM. Finally, the trade association did not explain how the proposal would adversely affect smaller operations, though it claimed that smaller operations rely on fewer workers to perform a more diverse array of tasks. As explained above, the concept of a distinct work task is a continuation from ETA Handbook 385. The Department is not aware of instances where employers have been exposed to liability related to this concept in the decades that prevailing wage surveys have been conducted using the Handbook and related guidance. In addition, because a separate wage rate is the hallmark of a distinct work task, an applicable employer—regardless of size—must pay this rate if it is approved by OFLC as the prevailing wage and is the highest of the applicable wage sources in § 655.120(a).

vii. Section 655.120(c)(1)(iv)

The Department proposed that the surveyor must make a reasonable, good faith effort to contact all employers who employ workers in the crop or agricultural activity and geographic area surveyed or conduct a randomized sampling of such employers. The NPRM explained this requirement is based on general statistical principles and consistent with ETA Handbook 385. 84 FR 36168, 36186 (citing ETA Handbook 385 at I-114). The NPRM proposed to continue the use of a random sample and clarified that a random sample or survey of the entire population is a requirement, not a recommendation. It noted this requirement is consistent with the H-2B prevailing wage regulation at § 655.10 and current H-2B prevailing wage guidance interpreting the H-2B appropriations riders. The Department received two general sets of comments on this proposal. Having carefully considered these comments, the Department has decided to adopt the regulatory text proposed in the NPRM, with some revisions.

The first set of comments addressed the requirement to contact all employers in the area or a random sample of such employers. A workers' rights advocacy organization asserted that contacting all employers of workers in a particular

crop or agricultural activity would be impossible for States operating with limited resources because no ready database of this information exists. The commenter asked the Department to clarify what would constitute a "reasonable" attempt to contact all employers in the universe and stated it would be clearer to ask the States to perform a random sample of employers of which they have knowledge, rather than a sample of all "such employers." The commenter also suggested the regulations allow States to propose an alternative sampling method that aligns with the conditions and resources in that State. An agent claimed that allowing a reasonable, good faith attempt to contact all employers to substitute for statistically valid sampling "severely limits" the validity of resulting wages. A trade association stated it did not oppose the use of random samples if the survey produces reliable, statistically valid data and wages are not separated by task or otherwise discriminates against smaller operations.

The Department agrees with the workers' rights advocacy organization that the surveyor may not know the universe of all relevant employers at the beginning of a survey. This final rule therefore clarifies that the surveyor may estimate the universe of relevant employers and make a reasonable, good faith effort to contact these employers based on the estimated universe. This final rule also clarifies that under the random sample option, the surveyor must, at a minimum, estimate the universe of relevant employers and workers and then randomly select a sufficient number of employers from the estimated universe to contact in order to satisfy the minimum employer and worker sample size requirements. These minimum requirements or "baseline standards" are discussed in the preamble to § 655.120(c)(1)(vii) through (ix). The Department's interpretation of the random sample option is consistent with its interpretation of a similar requirement for employer-provided surveys in the H-2B program.<sup>53</sup>

The NPRM proposed that a survey must include the wages of U.S. workers employed by at least five employers, among other baseline standards. As explained in the preamble discussing § 655.120(c)(1)(vii) through (ix), it is the

<sup>53</sup> See, e.g., 2015 H-2B Final Rule, 80 FR 24146, 24173 ("Proper randomization requires the surveyor to determine the appropriate 'universe' of employers to be surveyed before beginning the survey and to select randomly a sufficient number of employers to survey to meet the minimum criteria on the number of employers and workers who must be sampled.").

Department's understanding that some crop or agricultural activities and distinct work task(s) in a geographic region may have a smaller number of employers. The Department made changes to § 655.120(c)(1)(vii) through (ix) so that States may still determine a prevailing wage in such a situation. Consistent with those changes, the Department amends this provision to clarify that if the estimated universe of employers is fewer than five, the surveyor must contact all employers in the estimated universe, instead of contacting a random sample or making a reasonable, good faith attempt to contact such employers. This final rule adds two clarifying edits: first, to replace "conducted" with "contacted" in regard to a randomized sample for consistency with the language in other parts of the provision, namely the "contact all relevant employers" option, and with the purpose of this provision, which is to set forth how the surveyor should contact employers in the estimated universe. Second, this final rule amends the regulatory text to clarify that the estimated universe is for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks within that activity. This clarification recognizes there may be a PWD for a distinct work task or tasks within a crop activity or agricultural activity in certain situations, and is consistent with changes to other portions of § 655.120(c) in this final rule.

Consistent with SWAs' current practice, the surveyor may estimate the universe of relevant employers from information obtained from sources such as UI databases, open and closed job orders, State labor market information, and information provided by State agricultural extension offices. The surveyor has the option to conduct a statistically valid sampling or stratified random sampling by employer size. However, the Department is not requiring enhanced sampling methods. Though the minimum standards in this final rule may not return statistically valid results in all cases due to the reduced sample size requirements,<sup>54</sup> the Department believes that the requirements in this provision, along with other safeguards in § 655.120(c), will allow for the increased availability of State-specific data and crop/task categorical granularity, and are aimed at ensuring surveys that are sufficiently

<sup>54</sup> As noted further below, the sample size requirements in this final rule are consistent with or exceed the OEWS survey requirements as well as the "safety zone" standards used by the DOJ and Federal Trade Commission (FTC) in the anti-trust context.

representative and do not rely on selective sampling or other techniques that may produce wage estimates that are not representative of wages paid to workers in the United States similarly employed. In addition, these minimum standards are intended to provide more options for SWAs to make decisions about whether to prioritize precision, accuracy, granularity, or other quality factors in the data they use to inform prevailing wages. The Department will provide technical assistance to the SWAs, as needed.

In response to the suggestion to allow an alternative sampling method, the Department concludes that this final rule balances the need to provide the surveyor with the flexibility to determine the type of survey to conduct with the need to ensure the results of the survey are as reliable as possible. The Department does not believe there is a reasonable alternative sampling method that consistently balances these goals, and the commenter did not suggest any.

With regard to requests for clarification on what constitutes a “reasonable” attempt to contact relevant employers, the NPRM explained that a reasonable, good faith effort might mean the surveyor sends the survey through the mail or other appropriate means to all employers in the geographic area and then follows up by telephone with all non-respondents. 84 FR 36168, 36186; *see also* 2015 H–2B Final Rule, 80 FR 24146, 24173. However, a surveyor can make a “reasonable, good faith” attempt to contact relevant employers in other ways and the Department believes an assessment of reasonable contact methods will be determined most effectively on a case-by-case basis, depending on the facts before the OFLC Administrator. The Department disagrees with the agent’s comment that allowing a reasonable, good faith attempt to contact all employers “severely limits” the validity of the resulting wage. Surveys often are based on samples from a population and are not “severely limited” merely because the surveyor did not contact the entire population. Rather, the validity of a survey will depend on factors such as the number of responses received. As mentioned above, the minimum standards in § 655.120(c) are aimed at ensuring surveys that are sufficiently representative and do not rely on selecting sampling or other techniques that result in biased prevailing wages.

The second set of comments addressed the perceived elimination of the in-person interview requirement. Specifically, commenters, including two trade associations, claimed that in-

person interviews of employers and employees are needed to obtain and verify accurate wage data. A workers’ rights advocacy organization stated in-person interviews of workers are likely necessary for reforestation and pine straw work. In contrast, another workers’ rights advocacy organization and a commenter from academia agreed that in-person interviews are no longer practical.

In response to comments that in-person employer and employee interviews are necessary, the Department notes, as it explained in the NPRM, that in-person interviews are unnecessarily burdensome and inconsistent with modern survey methods. 84 FR 36168, 36179, 36185. Neither the FLS nor OEWS survey requires in-person interviews of employers as the primary collection method. Both the FLS and OEWS survey, moreover, rely solely on employer-reported data and do not canvass workers directly. The Department’s current standard practice for conducting prevailing wage surveys does not require SWAs to interview employers in person.<sup>55</sup> The commenters did not explain why telephone, mail, or electronic methods of contacting employers are insufficient to collect verifiably accurate results. The Department’s current standard practice also does not require SWAs to conduct worker interviews.<sup>56</sup> Therefore under this final rule, SWAs are not obligated to conduct in-person interviews of employers or worker interviews. Finally, because reforestation and pine straw workers are not covered in the H–2A program under this final rule, the workers’ rights advocacy organization’s comment that in-person interviews may be required for these industries is no longer applicable.

#### viii. Section 655.120(c)(1)(v)

The NPRM proposed to limit prevailing wage surveys to the wages of U.S. workers. It also proposed to require the SWA or other State entity to determine prevailing wages based on the unit of pay used to compensate at least 50 percent of the U.S. workers included in the survey and that the rate of pay must be based on the average wage of all the U.S. workers within the selected unit of pay. This final rule adopts these provisions with changes, explained below.

<sup>55</sup> This practice is based on public guidance issued by the Department to SWAs that amended the guidance in ETA Handbook 385. *See, e.g.*, TEGL No. 21–20, *Fiscal Year (FY) 2021 Foreign Labor Certification Grant Planning Guidance* (May 10, 2021).

<sup>56</sup> *See id.*

#### Limiting the Survey to the Wages of U.S. Workers

Limiting prevailing wage surveys to the wages of U.S. workers applies to both determining the universe of workers’ wages to be sampled and the universe of workers’ wages reported. The NPRM explained that this limitation is consistent with current policy<sup>57</sup> and reflects the Department’s longstanding concern that including the wages of non-U.S. workers may depress wages.

Several trade associations and an agent urged the Department not to limit survey responses to the wages of U.S. workers because of the potential legal implications for employers, including that employers may not know whether workers are undocumented. These commenters and others also opposed the proposal on the basis that the Department does not similarly exclude from survey responses the wages paid to H–2A workers and workers in corresponding employment, which the commenters claim may inflate or skew the prevailing wage. Another trade association suggested the inclusion of non-U.S. workers would allow the Department to determine whether foreign workers are adversely affecting the wages of U.S. workers. An employer and trade association requested the Department add a provision that would make H–2A workers part of the prevailing wage survey if more than 10 percent of the agricultural workforce in a State is composed of H–2A workers or workers in corresponding employment. After careful consideration of the comments, the Department has decided to adopt the proposal to limit the survey to U.S. workers. This final rule clarifies that “determining the universe of workers’ wages to be sampled” means the survey instrument must ask employers to report the wages of U.S. workers only.

As explained above and in the NPRM, this survey limitation is a continuation of the Department’s current policy. Employers already have experience verifying worker eligibility prior to employment, and they have the obligation to continue to do so. Moreover, the Department is not aware of cases where employers have been exposed to liability based on the wages they have provided in response to SWA survey requests. Survey results should exclude the wages of H–2A workers, but

<sup>57</sup> The NPRM noted that ETA Handbook 385 uses the terms “domestic workers” and “U.S. workers” in describing the sample to be conducted, and the previous version of the Form ETA–232 similarly limits the survey to U.S. workers. 84 FR 36168, 36186 n. 50.

should include the wages of U.S. workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area. As noted above, the prevailing wage rate is intended to reflect the average wage of U.S. workers in a geographic area and a given crop or agricultural activity and, if applicable, distinct work task(s) within that activity. If prevailing wage surveys determine employers are paying a certain average rate for an activity or distinct task(s) in an area and the Department validates this finding, then that rate is the prevailing wage rate and must be paid to applicable workers when it is the highest of available wages sources listed in § 655.120(a).

The Department declines to adopt the suggestion to include the wages of non-U.S. workers in a survey, or include the wages of H-2A workers in surveys when they are concentrated in an area, because it is contrary to the purpose of prevailing wage rates, which are intended to reflect the wage paid to U.S. workers in a given crop or agricultural activity and geographic area. As explained in the NPRM, limiting the survey to U.S. workers reflects the Department's longstanding concern that including the wages of non-U.S. workers in a prevailing wage finding may depress wages. 84 FR 36168, 36186. To the extent U.S. workers in corresponding employment are covered by a prevailing wage survey, the Department concludes that the survey will sufficiently represent the wages paid by that employer to its H-2A workers as well. This is because H-2A employers must offer to U.S. workers no less than the same benefits, wages, and working conditions the employer is offering, intends to offer, or will provide to their H-2A workers. See § 655.122(a).

#### Unit of Pay Determinations

The NPRM proposed that a prevailing wage be issued only if a single unit of pay is used to compensate at least 50 percent of the U.S. workers included in the survey, similar to the current requirement in ETA Handbook 385.<sup>58</sup> The Department proposed this requirement both to verify that the rate structure reflected in the survey is actually prevailing and to allow the wages included in the survey to be averaged, as it would not be possible to average wages using different units of measurement.

<sup>58</sup> ETA Handbook 385 at I-117 (noting that, if a survey includes more than one unit of pay, a prevailing wage rate is issued based on the unit of pay that represents the largest number of workers).

A trade association expressed support for this proposal. A workers' rights advocacy organization requested the Department revise the regulatory text to clarify that the survey must report the unit of pay used to compensate at least 50 percent of the workers represented in the survey responses, not 50 percent of all workers in the estimated survey universe.

This final rule adopts the NPRM proposal with changes to the regulatory text in response to the above comments and after the Department's own further consideration. First, the Department has revised the provision to require the PWD to be based on the unit of pay used to compensate the largest number of workers, rather than "at least 50 percent of the workers," which is consistent with the current unit of pay provision in the Handbook. The Department made this change in this final rule because the proposed "50 percent of U.S. workers" would impose a requirement that is more stringent than the language in the Handbook for crop or agricultural activities involving several units of pay (e.g., per hour, per pound with no bonus, per pound with a bonus). While uncommon, the Department acknowledges there are instances where the survey results reflect more than two units of pay for a crop or agricultural activity and distinct work task(s) in that activity, if applicable. In such situations, there will be at least one unit of pay that is paid to the "largest number of workers" whose wages are reported in the survey, but it is possible that no single unit of pay will account for "at least 50 percent" of such workers. Because the unit of pay that is paid to the largest number of workers in the survey can be considered prevailing, the Department believes this proposed change better aligns with its goal of encouraging more prevailing wage surveys through the adoption of standards that are as reliable as possible, while also accounting for the realities of a modern budget environment.

The Department made some minor revisions to the regulatory text for clarity and conformity with other provisions. The Department added "U.S." before "workers" in the regulatory text for clarification and consistency with the requirement that prevailing wage surveys include only wages of U.S. workers. The Department also changed the phrase from "whose wages are surveyed" to "whose wages are reported in the survey," to address the workers' rights advocacy organization's request that the Department clarify that this language refers to survey responses received. Finally, the Department added the

language "and distinct work task(s), if applicable" after "crop activity or agricultural activity," for clarity and consistency with other changes to the regulatory text in § 655.120(c). As applied to this provision, this change clarifies that if the surveyor determines that a task (or tasks) within a crop or agricultural activity is paid differently (i.e., there is a distinct work task or tasks within the activity), then the survey should report the average wage of U.S. workers in that distinct work task(s).

#### Rate of Pay Determinations

The NPRM proposed that the survey must report the average wage of all workers within the prevailing unit of pay, which departed from the current requirement in ETA Handbook 385 to use a "40 percent rule" and a "51 percent rule" to determine the prevailing rate of pay. The NPRM proposed using the average wage because it is consistent with the method the Department proposed to determine the AEW, as well as the current methodology for determining prevailing wage rates in the H-2B program. The NPRM solicited comments on the proposal, as well as possible alternatives, including whether the Department should retain the "40 percent rule" or "51 percent rule" from the Handbook or whether the Department should, instead, establish the prevailing wage at the median wage based on wages in the prevailing unit of pay.

An employer, a SWA, and several trade associations urged the Department to use the median wage rather than the average wage on the basis that the former lessens the impact of outliers. A trade association recommended retaining the 40 percent and 51 percent rules without additional explanation. A SWA supported replacing the 40 and 51 percent rules with this proposal as a way to simplify the methodology for determining the prevailing wage rate and potentially reduce confusion among stakeholders regarding how the prevailing wage is determined, but it asked for clarification on whether the SWA must collect "piece rate dimensions (i.e., specific linear dimensions of apple bins)."

After consideration of these comments, the Department has decided to adopt the NPRM proposal to use the average or mean wage. As explained in the 2015 H-2B Final Rule, the mean is the appropriate wage to use to avoid immigration-induced labor market distortions.<sup>59</sup> The mean is the arithmetic

<sup>59</sup> See 80 FR 24146, 24159-24160; see also Interim Final Rule, *Wage Methodology for the*

average of all wages surveyed in a crop or agricultural activity—and distinct work task(s) within that activity, if applicable—in the geographic area. If the applicable prevailing wage is set below the mean, it could result in a depressive effect on U.S. workers' wages overall because the average wage of U.S. workers in the relevant activity or task(s) would be drawn down. See 2015 H–2B Final Rule, 80 FR 24146, 24159–24160. Use of the mean is also consistent with the Department's determination of prevailing wages for other foreign worker programs. See 20 CFR 655.10(b)(2), (f)(2) (setting the prevailing wage in the H–2B program at the mean for the OEWS and employer-provided surveys); see also 20 CFR 656.40(b)(2) (similar for PERM); 20 CFR 655.731(a)(2)(ii) (similar for H–1B); 20 CFR 655.410(b)(1) (similar for CW–1).

Finally, this final rule clarifies that it may be appropriate to collect piece rate dimensions in some situations, such as when the unit of measurement of a piece is not standardized and can have differing dimensions. However, these determinations should be made on a case-by-case basis by the SWA or State entity conducting the survey. If necessary, the Department will provide technical assistance to the SWAs.

#### Other Comments on § 655.120(c)(1)(v)

Several trade associations and an agent opposed the “50 percent of U.S. workers” proposal because they believed it would impose an unrealistic wage level on employers as piece rate work may be converted to hourly compensation. They urged the Department, without additional explanation, to establish piece rate and hourly wages separately to avoid piece rate compensation for those who are most productive from inflating hourly wages. An employer and another trade association claimed that piece rates are effectively “double counted” when they are incorporated into the calculations of both the AEWR hourly rate and prevailing piece rates.

The commenters' specific concern regarding the conversion of units of pay is unclear. Under the Department's approach, a prevailing wage is issued when a unit of pay is used to compensate the largest number of U.S. workers in the survey, assuming the survey meets other applicable requirements. For example, if 75 percent of U.S. workers included in the survey results are paid hourly, OFLC would issue an hourly prevailing wage rate for

that activity. If those workers were paid, instead, by the piece based on the same unit of measurement (e.g., bushel), OFLC would issue a prevailing wage based on a piece rate. As such, in calculating a prevailing wage, OFLC would not convert one unit of pay to another (e.g., converting piece rates to hourly rates) because the “largest number of workers” standard must be for the same unit of pay.

The Department declines to adopt the suggestion to establish separate piece rate and hourly wages because a wage rate based on one unit of pay can be prevailing for a crop or agricultural activity and distinct work task(s), if applicable, in the relevant geographic area even if there are other units of pay.<sup>60</sup> Establishing both a prevailing hourly rate and piece rate for an activity or task(s) in every instance would be at odds with the Department's current regulations and guidance under ETA Handbook 385. However, there could be a situation in which there are different units of pay, each one accounting for an equal number of U.S. workers whose wages are reported in the survey. Should this rare situation occur and the survey meets other applicable requirements, a separate prevailing rate would be determined for each unit of payment. This clarification is consistent with the guidance in ETA Handbook 385. See ETA Handbook 385 at I–117.

To the extent commenters are suggesting that piece rates, as incentive pay, not be included in the calculations of the AEWR, the Department declined to adopt this suggestion in the 2020 H–2A AEWR Final Rule. As that rule explains, some agricultural jobs guarantee only the State or Federal minimum wage and otherwise pay based on a piece rate; advertising an hourly wage that does not include “incentive pay” is not a reasonable “base rate” for H–2A employers to advertise to U.S. workers.<sup>61</sup>

Finally, some comments stated prevailing wage surveys should account

for the fact that H–2A employers pay expenses not borne by non-H–2A employers, such as housing, transportation, visa costs, and subsistence. The Department does not agree. Prevailing wage surveys measure the wage rates paid to U.S. workers, not wage rates paid to H–2A workers or total labor costs employers may incur to ensure workers are available when and where needed to perform the labor or services an employer requires. As such, adopting the commenters' suggestion would be inconsistent with the purpose of the prevailing wage and may, instead, depress the wages of workers in the United States similarly employed.

#### ix. Section 655.120(c)(1)(vi)

The Department proposed that a prevailing wage survey cover an appropriate geographic area based on (1) available resources to conduct the survey; (2) the size of the agricultural population covered by the survey; and (3) any different wage structures in the crop or agricultural activity within the State. The Department stated in the NPRM that it intended to codify existing practice in which OFLC receives prevailing wage surveys of State, sub-State, and regional geographic areas based on the factors listed above. The NPRM solicited comments on whether the Department should consider other factors in determining the appropriate geographic area for prevailing wage surveys.

A workers' rights advocacy organization requested the Department clarify what would constitute an appropriate area to survey, including an explanation of the relevance of the “size of the agricultural population” and how it factors in these determinations. The commenter claimed that, in practice, prevailing wages are calculated by SWAs within the boundaries of their respective States because they do not have the capacity or authority to survey across State lines. The commenter also asserted that SWAs appear to rely on agricultural reporting areas, as the term is used in ETA Handbook 385, and suggested the Department codify the asserted reliance on agricultural reporting areas rather than the AIE. An agent expressed concern that the provision would permit SWAs to survey “truncated” areas based on resource constraints alone.

After careful consideration of the above comments, the Department has decided to retain the provision as proposed. As noted in the NPRM, the Department intends for this provision to codify existing practice, which allows for surveys based on State, sub-State, and, in some cases, regional areas.

<sup>60</sup> See ETA Handbook 385 at I–117 (guidance on determining the prevailing wage rate when there is more than one unit of payment). Moreover, § 653.501(c)(2)(i) of the Wagner-Peyser Act regulation states that “[i]f the wages offered are expressed as piece rates . . . [the Employment Service staff] must check if the employer's calculation of the estimated hourly wage rate is . . . not less than the prevailing wage rate.” This provision covers clearance of both H–2A and non-H–2A agricultural job orders and requires the SWA to ensure that wages offered by an employer are not less than the higher of several wage sources, as applicable. By explicitly referencing different units of pay, this regulation recognizes that the prevailing wage rate may not be in the unit of payment that the employer offers in its job order.

<sup>61</sup> 2020 H–2A AEWR Final Rule, 85 FR 70445, 70463; see also 2021 H–2A AEWR NPRM, 86 FR 68174, 68182.

SWAs currently rely on modernized agricultural wage reporting areas that are consistent with principles in ETA Handbook 385. This geographic area does not necessarily coincide with the AIE.<sup>62</sup>

In completing the updated Form ETA-232, the SWA must explain how the surveyor determined the geographic area to survey. This final rule lists factors that guide this selection, namely available resources, the size of the agricultural population covered by the survey, and different wage structures in the crop or agricultural activity within the State. To use the “size of the agricultural population” as an example, this factor may affect the scope of the surveyed area because of the need for sufficient survey responses. A surveyor may undertake a survey in one selected area that yields an insufficient response. In such cases, the surveyor can decide to increase the survey area and either make a reasonable, good faith effort to contact all employers employing workers in the crop or agricultural activity in the expanded area, or contact a new, randomly selected sample of such employers in the expanded area.

In response to the agent’s comment, the Department disagrees that this provision would permit SWAs to survey “truncated” areas based only on available resources. First, the commenter did not explain what constitutes a “truncated” area. Current practice, as noted above, permits a SWA to survey areas of different sizes based on considerations such as available resources.<sup>63</sup> Second, this provision does not permit a surveyor to base its selection of the geographic area on only one factor. Instead, the surveyor must consider all three factors enumerated in the provision. Third, the Department will continue to review and approve SWA survey plans under this final rule, and the Department can work with SWAs to accommodate resource considerations while ensuring planned surveys are as reliable as possible.

x. Section 655.120(c)(1)(vii) Through (ix)

The Department proposed that the survey must include the wages of at least 30 U.S. workers and five employers, and the wages paid by a single employer must represent no more than 25 percent of the wages included

in the survey. The NPRM stated the 30-worker standard is consistent with minimum reporting numbers for the OEWS and requirements for H-2B PWDs.<sup>64</sup> The requirement to include wage data from at least five employers is a change from ETA Handbook 385, which does not have a minimum number of employers that must be included in the survey. The five-employer standard also exceeds the number of employers (three) required to establish prevailing wage rates under the H-2B program. As explained in the NPRM, prevailing wages in the H-2B program based on the OEWS are generally set based on the local AIE, but H-2A prevailing wages are typically determined based on a larger geographic area, and this difference in geographic area makes a higher number of employer responses appropriate for the H-2A program. *Id.*

The Department also proposed that the wages paid by a single employer represent no more than 25 percent of the sampled wages so that the prevailing wage is not unduly impacted by the wages of a dominant employer. The NPRM stated the five-employer and 25 percent dominance standards are consistent with the “safety zone” standards for exchanges of employer wage information established by the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the antitrust context. Specifically, absent extraordinary circumstances, DOJ or FTC will not challenge as a violation of antitrust law the exchange of information regarding employer wages that meet the requirements for the safety zone. Although created for a different purpose, the safety zone standards establish levels at which the DOJ and FTC determined an exchange of wage information is sufficiently anonymized to prevent the wages of a single employer from being identified because the reported wage results too closely track the wages paid by that employer. The NPRM explained it is the Department’s preliminary conclusion that safety zone standards are consistent with the Department’s aim of requiring that the wages reported from a prevailing wage survey be sufficiently representative and that the wages of a single employer not drive the wage result. The Department solicited comments on the proposed requirements in § 655.120(c)(1)(vii) through (ix), including whether the

proposed sample size requirements, and any recommended alternative requirements, should apply to the survey, overall, or to the prevailing unit of pay. The Department also sought comment on the proposed statistical standards and any alternate standards that might be used to meet the Department’s goals of establishing prevailing wage rates that are as reliable as possible but still consistent with the realities of a modern budget environment. After full consideration of the comments, the Department is adopting the proposals in § 655.120(c)(1)(vii) through (ix) with amendments to the regulatory text, as explained below.

Several commenters representing employers, agents, and trade associations expressed concern that the sample size requirements were too small to be representative. For example, a trade association said 30 workers from five employers could set the prevailing wage for “possibly thousands of workers and hundreds of employers” and urged the Department to expand the thresholds to “a reasonable percentage of workers and employers,” without explanation of what might constitute a reasonable percentage. Similarly, an agent urged the Department to consider a broader sample size while another association recommended the use of a statistically valid sample size, claiming the “breadth and scope of agricultural employment” exceeds the scope of PWDs under the H-2B program. In contrast, a commenter from academia and a SWA supported smaller sample sizes as a way to produce more PWDs. The SWA also believed it would eliminate the SWA’s responsibility to estimate the universe of employers and workers. A State agency association asserted, without additional explanation, that requiring specific minimum response rates should increase the validity of surveys.

The Department does not agree with comments that claimed larger minimum sample sizes are necessary to produce accurate and representative PWDs. No commenter asserted that the Handbook’s much larger sample sizes were necessary, and no commenter proposed an alternative required worker or employer sample size that would be necessary to produce a reliable survey. The NPRM explained that the proposed sample size requirements were consistent with the OEWS survey requirements, as well as the “safety zone” standards used by the DOJ and FTC in the anti-trust context, points that no commenter specifically refuted. As stated in the NPRM, the Department has used a baseline of three employers and

<sup>62</sup> See 84 FR 36168, 36187 (NPRM noting that while prevailing wages in the H-2B program are generally set based on the AIE, H-2A prevailing wage rates are generally set based on a larger geographic area).

<sup>63</sup> See also TEGL No. 21-20, *Fiscal Year (FY) 2021 Foreign Labor Certification Grant Planning Guidance*, at III-10 (May 10, 2021).

<sup>64</sup> 84 FR 36168, 36187 (noting BLS requires wage information from a minimum of 30 workers before it deems data of sufficient quality to publish on its website); § 655.10(f)(4)(ii) (employer-provided surveys for the H-2B program must include wage data from at least 30 workers and three employers).



30 workers for employer-provided wage surveys in the H-2B program since the 2015 H-2B Final Rule (80 FR 24146). In recognition that H-2A prevailing wage rates are generally set based on a larger geographic area than prevailing wages in the H-2B program, the Department proposed to increase the number of employer responses from three under the H-2B program to five under the H-2A program. The Department also proposed the 25 percent standard as an additional safeguard to ensure prevailing wages are as reliable as possible. With regard to the SWA's comment, the surveyor must still estimate the universe of relevant employers and workers under this final rule, as discussed in the preamble to § 655.120(c)(1)(iv).

A workers' rights advocacy organization stated it may be difficult for SWAs to meet the minimum thresholds for survey areas that are smaller than the State level due to high employer non-response rates. Another workers' rights advocacy organization said random sampling of reforestation and pine straw workers may be difficult because such workers are hard to reach, lists of relevant employers or contractors are likely unavailable, and employers are often reluctant to respond to surveys. As explained elsewhere in the preamble, the Department has declined to adopt the proposal to expand the definition of "agricultural labor or services" under § 655.103(c) to include reforestation and pine straw activities. The comment related to surveys of forestry worker wages is therefore no longer applicable. Moreover, the area surveyed may need to be expanded if the surveyor is not able to obtain wage results for at least five employers and 30 workers. If the estimated universe is less than five employers or 30 workers, a surveyor may use the alternative option described below or expand the area surveyed as needed.

The Department solicited, but did not receive, comments on whether the baseline standards should apply to responses received for the survey overall or the prevailing unit of pay. However, after due consideration, the Department has decided to clarify that the baseline standards apply to survey responses received for the unit of pay that is used to compensate the largest number of workers whose wages are reported in the survey. Because the prevailing wage is determined based only on wage data within the prevailing unit of pay, the baseline standards should also apply to that unit of pay to increase the reliability of the survey findings as much as possible. Especially

when there are multiple units of pay and a small number of employers or workers in the universe, this approach could require surveyors to increase the overall sample size and may result in fewer survey findings than if the baseline standards applied to the survey overall. However, the Department believes this approach best achieves its goal of establishing prevailing wage rates that are as reliable and accurate as possible, while still encouraging more prevailing wage surveys than under the Handbook.

Based on the above comments and the Department's further assessment of past prevailing wage surveys, the Department recognizes the estimated universe of employers or workers may be very small for some crop or agricultural activities and distinct work task(s) in a geographic area. For example, some distinct work tasks or activities in a particular area may have one or two employers in the estimated universe. In such a situation, applying the 25 percent or 5-employer standard would mean there can never be a prevailing wage finding for this task or activity, unless the number of employers in the estimated universe increases. Similarly, the estimated universe of workers employed to perform particular distinct work tasks or activities may be less than 30 in some cases. Applying the 30-worker standard would not result in a wage determination, unless the number of workers in the estimated universe increased.

As such, the Department has decided to revise the regulatory text to address the limited situations where the estimated universe of employers or workers is less than the baseline standards, while leaving the baseline standards unchanged in other situations. For example, where the estimated universe of U.S. workers is at least 30, the survey must include the wages of at least 30 U.S. workers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. In situations where the estimated universe of U.S. workers is less than 30, the survey must include the wages of *all* such U.S. workers. Similarly, where the estimated universe of employers is fewer than five, this final rule requires the survey to include wage data from *all* employers in the estimated universe. Finally, the 25 percent standard will apply where the estimated universe of employers is four or more, but will not apply when the estimated number of employers in the universe is less than four. These revised requirements encourage additional prevailing wage

findings and are consistent with the Department's goal of producing prevailing wage survey results that are as representative as possible by requiring the PWD to be based on data from all workers or employers where the universe of workers or employers is limited.

xi. Other Comments on § 655.120(c)(1) Special Procedures for Sheep Shearing and Reforestation Employers

Commenters including a trade association urged the Department to promulgate a provision allowing regional or national prevailing wage surveys for the sheep shearing industry because "there are not enough shearers in any one area" to establish a piece rate wage through a valid survey. According to the association, the survey instrument used should be able to account for differing types of shearing services in different regions, which result in separate wage rates. The association stated some regions have a larger number of "small flock" or "farm flock" sheep producers whose operations typically have smaller numbers of sheep than commercial producers, resulting in a higher "per head" price and wage than for a commercial producer.

The Department declines to adopt the commenters' suggestion because it does not believe that a variance in the form of a separate provision is needed for prevailing wage surveys for the sheep shearing industry. This is because the commenters' concerns can be addressed through other requirements in this final rule. As discussed in the preamble to § 655.120(c)(1)(iii) and (vi), this final rule allows for regional prevailing wage surveys that are able to capture distinct work tasks as applicable. It is also possible to obtain a prevailing wage for activities with a small number of estimated workers under circumstances explained in the preamble to § 655.120(c)(1)(vii) through (ix). Lastly, as noted in the preamble to § 655.120(c)(1)(iv), the surveyor has the option to conduct a statistically valid sampling or stratified random sampling by employer size, though these enhanced sampling methods are not required.

A workers' rights advocacy organization recommended the Department use the QCEW to set prevailing wages for reforestation workers in the short term on the basis that this data source counts reforestation workers more accurately than the OEWS surveys. Because reforestation is not covered in the H-2A program under this final rule, the workers' rights advocacy

organization's comment is no longer applicable.<sup>65</sup>

#### Rescission of ETA Handbook 385

An agent and a trade association supported what they believed to be the Department's proposal to "rescind" ETA Handbook 385. A State agency urged DOL to update ETA Handbook 385 to conform to the new regulations or provide supplemental guidance. Two other State agencies and a State agency association supported replacing the Handbook.

This final rule does not formally rescind ETA Handbook 385, but SWAs and other surveyors must follow the methodological requirements in § 655.120(c) when conducting prevailing wage surveys. In this way, the survey standards in § 655.120(c) replace the standards in ETA Handbook 385 for H-2A prevailing wage surveys. This final rule clarifies, however, that SWAs and other surveyors may refer to the Handbook and other applicable authorities for additional guidance on issues related to the prevailing wage survey methodology not explicitly addressed in the Department's regulations at 20 CFR part 655, subpart B, and 29 CFR part 501.

#### Data Collection Period

The NPRM did not propose a required wage data collection period. In particular, the Department did not propose requiring or prohibiting SWAs from capturing the wages paid to workers during the "peak" period of a crop or agricultural activity, rather than the wages paid over a season or a year. Several employers and trade associations urged the Department to require surveys cover a longer period than a peak week. According to the commenters, surveying a peak period "spike[s]" the results and does not produce prevailing wage findings that measure wages paid over a season or a year.

After consideration of the comments, the Department declines to adopt the commenters' suggestion. There is no requirement that surveys cover a longer time period to measure the wages paid over a season or a year. While ETA Handbook 385 directs SWAs to estimate the beginning and end of the harvest for each crop and the "period of peak activity" for State grant plans, SWAs need not include that information in reporting prevailing wage rate results. Recent guidance no longer direct SWAs to identify the period of "peak activity,"

nor even the anticipated start and end dates for the harvest of each crop, but simply request SWAs provide an anticipated timeframe for the prevailing wage survey.<sup>66</sup> The requirement suggested by the commenters could further deter employers from responding to the survey, given the length of a season or a year and the possible number of unique wage rates paid during that time that an employer would have to report. It would also likely increase the cost of survey administration for SWAs or other State surveyors, without a corresponding compelling justification for such an increase.

In response to the comments received, this final rule clarifies that SWAs continue to have discretion over when to conduct wage surveys and the data collection period. This is because SWAs or other State entities are best positioned to determine the most effective data collection period. To the extent it is helpful, the Department recommends the use of a peak week or peak period. A peak week is generally defined as the week where a commodity activity is the busiest. For harvesting, it would be when an agricultural employer is doing the most harvesting for a given commodity. Some surveys may gather data from a peak period of time that is longer than a week. The use of a peak week or period can afford several advantages. It allows, for example, the collection of data when the most workers are working in order to obtain the most robust amount of data. However, the use of a peak period is not required and may not be appropriate in all cases. For instance, some activities such as irrigation do not have a clearly defined peak week.

#### Presumption of Validity

A workers' rights advocacy organization suggested that as long as SWAs follow the defined procedures to carry out a prevailing wage survey, the findings should enjoy a presumption of validity. After consideration, the Department declines to adopt the commenter's suggestion. OFLC will review the prevailing wage survey documentation submitted by a SWA to ensure that the survey satisfies the enumerated requirements in § 655.120(c). If these requirements are met, OFLC will issue a prevailing wage for the crop or agricultural activity or distinct work task(s) in question. Based on this regulatory scheme—which continues the Department's current

practice—a presumption of validity is not needed and would instead cut against the comprehensive review requested by other commenters.

#### Timelines for Prevailing Wage Determinations

A SWA suggested adding a requirement that OFLC issue a PWD within 10 days of the SWA's submission of a survey to the Department. The SWA also requested the Department add a regulatory provision requiring OFLC to notify the SWA of any irregularities or deficiencies in the survey within the same 10-day period so the SWA may make corrections expeditiously. After consideration of the SWA's comments, the Department declines to adopt these recommendations. The Department did not propose to set timeframes or solicit comments on setting timeframes for the prevailing wage survey review and approval process and, therefore, the SWA's recommendations are beyond the scope of this rulemaking. The Department understands the importance of timely review and communication and it strives to review the surveys it receives in an expeditious manner. Imposition of a maximum period to review prevailing wage surveys, however, would undermine the Department's ability to conduct a thorough review without a corresponding compelling justification. In particular, the SWA's suggested timeframe would create an impediment to the type of comprehensive review needed to ensure prevailing wage surveys satisfy all methodological requirements, especially in cases where OFLC requests additional information from SWAs in order to complete its review.

#### Piece Rate and Wage Enforcement Suggestions

Because § 655.120(c) discusses the use of piece rates, some commenters took the opportunity to suggest changes to how piece rates are treated within the H-2A program. A workers' rights advocacy organization recommended the Department make explicit that the employer must pay workers by the piece, rather than by the hour or using another method, if the prevailing wage is a piece rate and payment of the prevailing piece rate would yield a higher average hourly rate than the AEW. A trade association stated the Department does not include hourly guarantees when reporting prevailing wages by piece rates and asserted this is contrary to standards in ETA Handbook 385. The association added that the Department does not recognize that a piece rate with an AEW hourly

<sup>65</sup> Moreover, the Department has addressed the use of the QCEW as a wage source for the H-2A program above and in prior rulemaking. See 2020 H-2A AEW Final Rule, 85 FR 70445, 70446 n.6.

<sup>66</sup> See, e.g., TEGL No. 21-20, *Fiscal Year (FY) 2021 Foreign Labor Certification Grant Planning Guidance*, at III-10 (May 10, 2021).

guarantee (e.g., \$25 bin rate with a \$16.34 per hour guarantee) differs from a piece rate with a State minimum wage hourly guarantee (e.g., \$25 bin rate with a \$13.69 per hour guarantee).

The Department's proposed changes to the prevailing wage methodology under revised § 655.120(c) did not intend to change the prior application of the offered wage provision at § 655.120(a) or the longstanding procedures for the regulation of piece rates. As such, the workers' rights advocacy organization's suggestion that the Department make explicit that an employer must pay workers by the piece, rather than by the hour or using another method, if the prevailing wage is a piece rate and payment of the prevailing piece rate would yield a higher average hourly rate than the AEW, is beyond the scope of the Department's proposal. The trade association's comment does not specify if the reporting it references is the Department's posting of prevailing wages to the Agricultural Online Wage Library (AOWL). To the extent the comment is referring to the posting of prevailing wages on AOWL, the Department reports piece rates that contain an hourly guarantee for a crop or agricultural activity or a distinct work task(s) within this activity when such a rate is reported by a SWA and validated by the Department. These piece rates with an hourly guarantee can represent different units of pay under certain circumstances, as discussed below.

Moreover, as relevant to both comments, the Department posts prevailing wage rates on AOWL, not wage information from all applicable sources an H-2A employer must consider when evaluating whether its wage offer meets H-2A requirements under §§ 655.120(a) and 655.122(l). When the prevailing wage rate is hourly, an H-2A employer must compare this hourly rate to the other wage sources listed in § 655.120(a) to determine which is the highest and ensure that its wage offer is at least equal to the highest applicable hourly rate. Similarly, in limited situations where a prevailing wage rate is a piece rate in combination with an hourly guarantee (e.g., \$25 bin rate with a \$16 per hour guarantee), the H-2A employer must still engage in the comparison of other wage sources and ensure that it offers an hourly wage guarantee that is at least equal to the highest applicable hourly rate. As a result, an H-2A employer may be required to offer at least the prevailing piece rate (e.g., \$25 bin rate) and an hourly wage guarantee (e.g., \$16.34 per hour guarantee, the applicable AEW) that is higher than the hourly guarantee

listed in the PWD. To the extent either commenter is suggesting the Department add all or some other wage sources to the AOWL, the Department declines to adopt this suggestion, as it could increase, rather than decrease, confusion.

The same workers' rights advocacy organization proposed requiring the employer to attest that neither U.S. nor H-2A workers will be paid at a piece or hourly wage that is less than the rate that was paid for comparable work performed at that location in the prior season, or that is being offered by other employers in the AIE. The organization also requested that the regulations clarify the Department will review and require a change to the rate of pay after certification if presented with worker complaints or "clear, persuasive evidence" that the H-2A employer is paying less than the prevailing wage based on information such as UI data and job service listings.

The Department declines to adopt these recommended changes. The Department did not propose or solicit comments on requiring an attestation that wages are not less than those paid for comparable work in the prior season. In addition, the commenter's suggestion would add a wage source to those listed in § 655.120(a), which is a change the Department similarly did not propose in the NPRM. This suggestion is therefore outside the scope of the Department's rulemaking. This final rule requires that H-2A employers pay H-2A workers and workers in corresponding employment the highest of wage sources listed in § 655.120(a)—in particular, the higher of the AEW and the prevailing wage rate approved by OFLC, as applicable—and thus already includes a prevailing wage concept intended to ensure that H-2A employers pay at least those wages found to be prevailing in the area, where applicable. While the specific change requested by the commenter's second suggestion is unclear, the Department notes that its program integrity measures provide for review and enforcement of H-2A wage requirements. In the event of an audit, OFLC reviews an employer's payroll information. When WHD conducts its investigations, it will enforce the appropriate wage rate for the work performed even when an employer misrepresented the duties on its application or employed workers in classifications not listed on its application. In the event an audit or investigation discovers substantial violations, OFLC or WHD may pursue debarment of the employer.

xii. Section 655.120(c)(2)

The Department proposed that a prevailing wage rate remain valid for 1 year after the wage is posted on the OFLC website or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed on the job order expires during the contract period, the employer must continue to guarantee at least the expired prevailing wage rate. As the Department explained in the NPRM, this proposal is generally consistent with OFLC's current practice. See 84 FR 36168, 36188. The NPRM solicited comments on this proposal, including whether an alternate duration for the validity of prevailing wage surveys would better meet the Department's goals of basing prevailing wage rates on the most recent data and making prevailing wage findings available where the prevailing wage rate would be higher than the AEW. The NPRM also sought comment on whether the Department should index prevailing wage rates based on either the CPI or Employment Cost Index (ECI) when the OFLC Administrator issued a prevailing wage rate in one year for a crop or agricultural activity but a prevailing wage finding is not available in a subsequent year, and whether the Department should set limits on the age of the survey data. As discussed below, paragraph (c)(2) is adopted without change from the NPRM.

Commenters generally supported the proposed 1-year validity period. A few commenters including trade associations recommended that a prevailing wage "expire on its anniversary," without clarifying if "anniversary" referred to the date the wage was posted by OFLC. Another trade association stated, without additional explanation, that the Department should not use surveys that include data older than 12 months. Citing the current "dynamic" business environment, other commenters suggested the Department should not use surveys that include data collected more than 6 months prior to the wage determination. One of these commenters claimed, without additional explanation, that such data should be excluded due to a limited pool of workers and variations in commodity markets, weather changes, and other variables.

Several of these commenters also provided general suggestions regarding indexing prevailing wage rates between determinations. Some commenters recommended that prevailing wage rates not be indexed based on the CPI or ECI when the prevailing wage finding is not

available, without explaining why prevailing wages should not be indexed based on these sources. Other commenters suggested that if the Department is considering indexing the prevailing wage rate to any metric, it should consider metrics that “reflect the agricultural economy such as wholesale or retail fruit and vegetable prices.” None of these commenters provided additional explanation.

After consideration of these comments, the Department has decided to adopt the validity period provision as proposed. Under this final rule, a prevailing wage will expire either 1 year after OFLC posts the wage or on the date an adjusted prevailing wage is issued, whichever is earliest. This change is consistent with the specific comments on the 1-year validity period, based on the information provided in those comments. The Department declines to adopt the suggestion to exclude data older than 6 months from prevailing wage findings. The commenters did not explain why survey findings must exclude such data, beyond a general reference to the “dynamic” business environment and broad variables in that environment. Nor did the commenters provide evidence suggesting the exclusion of data older than 6 months is necessary for a survey to yield more accurate results or otherwise be an efficient use of a SWA’s limited resources. Instead, the commenters’ suggestion could elevate form over function—for example, excluding data that are 6½ months old—and may unnecessarily preclude States from producing a valid PWD. The commenters’ suggestion is also at odds with the Department’s intent to establish survey results that are as reliable as possible using standards that are realistic for SWAs in a modern budget environment. If adopted, the commenters’ suggestion would impose more onerous data requirements on SWAs than those mandated by OFLC’s prior guidance on prevailing wage surveys and OFLC’s current requirements for employer-provided surveys under the H–2B program.<sup>67</sup>

The Department has decided not to adopt the suggestion to index the prevailing wage rate to address subsequent years in which a prevailing wage finding is not available. The commenters either did not provide any recommendation for index sources or did not address why a particular index would be sufficient to accurately reflect

the prevailing wages of similarly employed workers. Without additional information, it is not clear what existing metric, if any, would reflect the information the commenters believed should be considered, and it is therefore difficult to evaluate the feasibility or desirability of this type of indexing for SWA prevailing wage survey findings.

#### xiii. Section 655.120(c)(3)

The current regulation at § 655.120(b) requires the employer to pay a higher prevailing wage upon notice to the employer by the Department.<sup>68</sup> The Department’s current practice is to publish prevailing wage rates on its website and directly contact employers covered by a higher prevailing wage. In the NPRM, the Department proposed to continue this current practice of notifying employers directly. The Department also proposed that new higher prevailing wage rates would become effective 14 days after notification, which paralleled the Department’s proposal to codify current practice of providing an adjustment period of up to 14 days to start paying a newly issued higher AEW. Although the January 2021 draft final rule would have adopted the 14-day proposal for prevailing wages, this final rule does not adopt the proposal for the reasons discussed below, but it otherwise adopts the proposed language from the NPRM with minor conforming changes.

An employer and trade association stated a 14-day effective date is an improvement over the current requirement for prevailing wages. An agent and another trade association commented that 14 days do not allow employers adequate time to plan for costs, especially if there is a “significant increase” in wages. A SWA opposed the 14-day proposal on the basis that workers can be deprived of up to 2 weeks of pay to which they are entitled. Instead, the SWA suggested that employers should pay any increases retroactively, such as in the pay period after the new wage becomes effective, to alleviate potential burdens associated with adjusting wages mid-pay period.

In response to comments that even 14 days is not enough time for employers to plan for costs, the H–2A regulations already require the employer to pay a higher wage if the prevailing wage rate is adjusted during the work contract and the new adjusted wage is higher than the required wage at the time of certification. The NPRM retained this

underlying requirement, which employers have been able to follow since 2010, while proposing to provide employers a brief period to adjust to a higher wage. When the Department added the provision to account for an increase in prevailing wages during a contract period, it recognized these wage adjustments may alter employer budgets for the season. *See* 2010 H–2A Final Rule, 75 FR 6884, 6901. As the Department explained at that time, the change is intended to ensure workers are paid throughout the life of their contracts at an appropriate wage, and the Department encouraged employers to include into their contingency planning certain flexibility to account for any possible wage adjustments. *Id.*

After further consideration of the comments and in conformity with its decision not to adopt a 14-day adjustment period in connection with the AEW, the Department declines to adopt the proposed delayed implementation of a prevailing wage update to workers’ pay. The 14-day grace period proposal was intended to help ensure workers are paid at an appropriate wage throughout the life of their contracts while giving employers a brief window for updating their payroll systems and to simplify the program through the adoption of consistent adjustment periods for wage-related updates. The Department is sensitive both to the worker protection concerns the SWA raised and to adopting an approach that could add complexity, which is inconsistent with the Department’s goals in this rulemaking to enhance worker protections while simplifying the program to facilitate compliance and administration. As such, the Department has decided against adopting the proposed adjustment period for prevailing wage updates in this final rule. Not adopting the proposal maintains current prevailing wage adjustment requirements, which help ensure workers are paid at an appropriate wage upon notification of a new, higher wage obligation.

#### xiv. Section 655.120(c)(4)

The NPRM proposed that if the prevailing wage is adjusted during the contract period and is higher than the previous certified offered wage rate, the employer must pay the higher wage rate, but may not lower the wage rate if OFLC issues a prevailing wage that is lower than the offered wage rate. This proposed change discontinues the current practice permitting employers to include a clause in the job order stating that it may reduce the offered wage rate if an adjustment during the contract

<sup>67</sup> *See* 2015 H–2B Final Rule, 80 FR 24146, 24175 (requiring the wages reported in employer-provided surveys in the H–2B program be no more than 24 months old).

<sup>68</sup> This provision, codified at § 655.120(b) under the 2010 H–2A Final Rule, was redesignated as paragraph (c) in the 2020 H–2A AEW Final Rule. *See* 85 FR 70445, 70477.

period reduces the highest wage rate among all applicable wage sources. The NPRM also proposed to remove language from § 655.120(b) that requires an employer to pay the wage “in effect at the time work is performed” because the presence of that reference may create confusion about the existing requirement to continue to pay a previously offered wage if the new “effective” wage is lower. As discussed below, this final rule adopts paragraph (c)(4) as proposed in the NPRM except for a minor conforming change.

The Department received comments from various entities, including employers, trade associations, and agents, in response to this provision. Many employer and trade associations opposed the Department’s current requirement mandating mid-contract wage adjustments if a new prevailing wage rate is higher than the required wage at the time of certification. Commenters explained, for example, that mid-season increases make planning impossible, are not fair to employers, and the government should not require employers to change a contract after it has been “approved.” A trade association stated it may not be possible to verify the sources of the wage data with no ability to challenge these data under the final rule. An agent and another trade association commented there is no valid basis to require payment of a higher wage that is not the AEWR if the AEWR is supposed to represent the exact wage that protects U.S. workers at that time. Other commenters offered four alternatives to the Department’s proposal, including (1) allowing employers to pay the rate(s) listed in a certified application for the duration of the employment period (*i.e.*, a fixed wage with no upward adjustments); (2) authorizing downward wage adjustments; (3) permitting an annual adjustment of prevailing wage rates on a date certain; and (4) placing limitations on in-season prevailing wage increases, including a 10-percent cap. One of these commenters recommended the notice provided by the Department to the employer regarding “changes in wages be adequate to hand out to workers to meet the disclosure requirement.”

Having carefully considered the comments received, the Department has decided to retain this provision with a minor change to the regulatory text to recognize that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations. This modification is a technical, conforming change with other portions of § 655.120(c). Under this

provision, because the employer advertised and offered the higher wage rate, the wage cannot be reduced below the wage already offered and agreed to in the work contract. Accordingly, if a prevailing wage for a geographic area and crop activity or agricultural activity and, if applicable, distinct work task(s) is adjusted during the work contract, and the new prevailing wage is lower than the rate guaranteed on the job order, the employer must continue to pay at least the offered wage rate. Employers who disagree with a wage adjustment after their applications have been certified can continue to challenge the adjustment in Federal court.

The Department does not agree with the comment claiming there is no valid basis to require payment of a higher wage when that wage is not the AEWR. Employers participating in the H–2A program must offer and pay the highest of the AEWR, the prevailing wage, the Federal or State minimum wage, or the agreed-upon collectively bargained wage rate, as applicable, for every hour or portion worked during a pay period. *See* §§ 655.120(a) (excluding certain employment), 655.122(l). The wage adjustment provisions are intended to ensure that workers in the program consistently receive at least the highest of these applicable wages, whether that wage be the AEWR, the prevailing wage, or another wage source listed in § 655.120(a). Moreover, PWDs determined by State-conducted prevailing wage surveys for a particular geographic area can serve as an important additional protection for workers in the United States in crop and agricultural activities with piece rates or higher hourly rates of pay than the AEWR. In such instances, the wage adjustment provisions ensure the wages received by applicable workers reflect the wage paid to similarly employed workers in that area.

The Department declines to adopt the suggested alternatives, as they are not sufficient to ensure workers are paid at an appropriate wage commensurate with the baseline market value of their services throughout the life of their contracts. In addition, an annual adjustment of prevailing wage rates on a certain date each year is not in line with current practice. States do not conduct prevailing wage surveys at the same time each year in all cases, and consequently, OFLC validates PWDs throughout the year. The NPRM did not propose to change this practice. The Department also declines to adopt proposals to impose a 10-percent cap and similar limitations on PWDs. The Department establishes wages based on data representing actual wages paid to

workers, including prevailing wages based on wages paid to U.S. workers in a particular geographic area and crop or agricultural activity and if applicable, distinct work task(s). The commenter did not provide a sufficient economic rationale to impose a cap that is unrelated to employer costs or wages paid and such a cap would produce wage stagnation, most significantly in years when the wages of U.S. workers are rising faster due to strong economic and labor market circumstances.

The agent’s comment regarding the use of notice(s) of wage adjustment to satisfy “the disclosure requirement” did not specify the disclosure requirement to which the comment referred. To the extent the comment refers to the MSPA disclosure requirements under 29 U.S.C. 1821 and 1831 and 29 CFR 500.75 and 500.76, OFLC’s notice to the employer of prevailing wage rate adjustment(s) may be sufficient to satisfy the required disclosure of wage rates under MSPA (provided that, if multiple wage adjustments are included in the notice, it is clear which applies to the specific worker), but will not satisfy the required disclosure of other information, such as the place or period of employment. *See* 29 U.S.C. 1821, 1831; 29 CFR 500.75, 500.76. Without additional information, however, the Department cannot assess the agent’s recommendation and, therefore, is unable to adopt the recommendation.

#### d. Section 655.120(d) Appeals

Although the Department employs the same Notice of Deficiency (NOD) and appeal framework regardless of the deficiency noted in an *Application for Temporary Employment Certification*, the NPRM proposed to include an appeal provision at paragraph (d) for clarity. Specifically, if an employer does not include an appropriate offered wage on the H–2A application, the CO will issue a NOD requiring the employer to correct the wage offer. Such a situation may occur, for example, when the employer offers less than the highest of the sources applicable to the job opportunity under § 655.120(a) because it selected an incorrect SOC code for the job opportunity. If the employer disagrees with the wage rate associated with the SOC required by the CO and does not correct the wage offer in its response to the NOD, the application will be denied, and the employer may appeal the denial of its application on this basis (and other bases noted in the denial, as applicable) by following the appeal procedures at § 655.171. As discussed below, this provision remains unchanged from the NPRM.

The Department received several comments on this proposal. An employer expressed concern that an employer who disagrees with the required wage rate cannot appeal unless its application is denied. A trade association expressed concern that the proposal adds inefficiencies to the program and affects employers' due process rights, and it claimed that applications would have to be denied based on a factor other than the wage in order to be appealed.

As the Department explains below in the preamble to § 655.141, the removal of the ability to appeal a NOD better conforms with the statutory requirements under the INA. This change also helps to promote efficiency by providing that all possible grounds for denial are appealed at once, rather than allowing for separate appeals of multiple issues. The appeal process continues to include an expedited administrative review procedure, or an expedited *de novo* hearing at the employer's request, in recognition of the INA's concern for prompt processing of H-2A applications. Further, it is not true that an employer's application has to be denied based on a factor other than the wage in order for the employer to challenge a wage rate required by the CO. An employer that does not correct a wage deficiency—or any other deficiency—noted in a NOD, may appeal a denial on that basis (and any other bases noted in the denial, as applicable).

A workers' rights advocacy organization noted SOC codes will be critical to determining the AEWR and the Department should allow the SWA to determine the appropriate code because SWAs, according to the organization, are the most knowledgeable about the different work in a certain agricultural industry in a geographic region. The organization requested that § 655.120(d)(1) be revised so that either the SWA or the CO can issue a NOD requiring the employer to correct the offered wage rate on its application. This concern is misplaced. The NPRM did not propose to change the SWA's role in reviewing the offered wage rate and other information in an employer's job order for compliance with 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B. *Compare* § 655.121(b)(1) (2010 H-2A Final Rule) with § 655.121(e)(2). Specifically, if the SWA notes any deficiencies with the job order, including with the offered wage rate or SOC code, it must notify the employer and offer the employer an opportunity to respond. *See id.* Upon receipt of a response, the SWA will review the response and notify the

employer of its acceptance or denial of the job order. *See id.* After the employer files its *Application for Temporary Employment Certification*, whether under the emergency filing procedures at § 655.134 or the normal filing procedures at § 655.130, the CO will review the employer's application. If the CO determines the application contains an incorrect offered wage rate, the CO will issue a NOD under § 655.141 noting the incorrect rate, SOC code, and any other deficiencies that prevent certification, as applicable. *See id.*; § 655.120(d)(1). As such, the commenter's concern is addressed through the SWA's authority to review and respond to deficiencies in the job order, which this final rule retains in §§ 655.121(e)(2) and 655.134(c)(1).

An agent proposed "an appeal process in connection with the prevailing wages," without additional explanation. To the extent the commenter intended to address an employer's disagreement with, and appeal of, the CO's application of a particular PWD to an employer's job opportunity, such appeals are available in this final rule. *See* §§ 655.120(d), 655.142(c). To the extent the commenter intended to suggest the Department implement an appeals procedure for PWDs set or adjusted in accordance with paragraph (c), the Department respectfully declines, as employers can continue to challenge PWDs and post-certification adjustments in Federal court.

After consideration of these comments, the Department has retained the provision as proposed. This provision provides a process to appeal the required offered wage rate for an employer's job opportunity, both the CO's application of the wage sources in paragraph (a) and determination of which is highest. This process is consistent with other provisions in this final rule that add express authority for the CO to issue multiple NODs and to eliminate appeals of NODs. *See* §§ 655.142(a), 655.141.

## 2. Section 655.121, Job Order Filing Requirements

In the NPRM, the Department proposed amendments to this section to modernize the process by which employers submit job orders to the SWA for review and clearance in order to test the local labor market and determine the availability of U.S. workers before filing an *Application for Temporary Employment Certification*. Specifically, the Department proposed new standards and procedures requiring employers, unless a specific exemption applies, to electronically submit job orders to the NPC for processing; minor revisions to

the timeframes and procedures under which the SWA reviews and circulates approved job orders for intrastate and interstate clearance; and reorganization of several existing provisions to provide clarity and conform to other changes proposed in the NPRM. The Department received several comments on this section, none of which necessitated substantive changes to the regulatory text. However, the Department's decision not to adopt the proposed optional pre-filing positive recruitment provision at § 655.123 necessitated the removal of the proposed pre-filing interstate job order circulation language from paragraph (f). Therefore, as discussed in detail below, the provisions of § 655.121 remain unchanged from the NPRM, except for paragraph (f). The Department will retain the parameters of pre-filing job order circulation from the 2010 H-2A Final Rule in paragraph (f), with minor revisions to conform to the electronic submission and transmission procedures adopted in this final rule, as discussed below.

### a. Submission and Transmission of the Job Order

The INA requires employers to engage in the recruitment of U.S. workers through the employment service job clearance system administered by the SWAs. *See* 8 U.S.C. 1188(b)(4); *see also* 29 U.S.C. 49 *et seq.* and 20 CFR part 653, subpart F. The Department proposed to modernize and streamline the process by which employers submit job orders, *H-2A Agricultural Clearance Order* (Form ETA-790/790A), to the SWA for review and clearance to place job orders into intrastate and interstate clearance. Job orders are a required component of testing the labor market for the availability of U.S. workers before filing an *Application for Temporary Employment Certification*. The Department proposed to require all job orders, Form ETA-790/790A, be signed with an electronic signature (*i.e.*, an electronic (scanned) copy of the original signature or a verifiable electronic signature method, as directed by the OFLC Administrator) and submitted electronically to the NPC, using the electronic method(s) designated by the OFLC Administrator.

Currently, the Department's FLAG system, available at <https://flag.dol.gov>, is the OFLC Administrator's designated electronic filing method. Only employers the OFLC Administrator authorizes to file by mail due to lack of internet access or using a reasonable accommodation due to a disability under the proposed procedures in § 655.130(c) would be permitted to file

using those other means. Upon receipt in the electronic filing system, the NPC would transmit Form ETA-790/790A to the SWA serving the AIE for review. If the job opportunity is located in more than one State within the same AIE, the NPC would transmit a copy of the electronic job order, on behalf of the employer, to one of the SWAs with jurisdiction over the place(s) of employment for review.

For job orders submitted to the NPC in connection with a future master application to be submitted under § 655.131(a), the Department proposed the agricultural association would continue to submit a single Form ETA-790/790A in the name of the agricultural association as a joint employer. In the Form ETA-790A, as well as in the future *Application for Temporary Employment Certification*, the agricultural association would identify all employer-members by name.

Where two or more employers are seeking to employ a worker or workers jointly, as permitted by § 655.131(b) (*i.e.*, joint employers other than an agricultural association and its employer-members filing a master application under § 655.131(a)), the Department proposed that any one of the employers may continue to submit the Form ETA-790/790A as long as all joint employers are named on the Form ETA-790A and the future *Application for Temporary Employment Certification*.

Commenters generally expressed strong support for the proposals to modernize the job order filing process by requiring job orders to be signed electronically and submitted through the Department's electronic filing system, absent authorization to file by mail due to lack of internet access or using a reasonable accommodation due to a disability under the proposed procedures in § 655.130(c). A SWA viewed the proposal as a way to improve program efficiency, eliminate paper applications, reduce errors, and streamline the job posting process, and a workers' rights advocacy organization agreed it may streamline the process and reduce paperwork burdens. The workers' rights advocacy organization and a trade association recognized it as a way to improve communication between agencies involved in H-2A processing and improve response times. Several associations stated the ability to submit the job order electronically and to pre-populate certain information for future job orders will help streamline the application process, while the utilization of standardized terms and conditions of employment on the form

and electronic data checks will enhance the efficiency of the program for users.

However, some commenters opposed the Department's proposal to require employers submit the Form ETA-790/790A to the NPC, rather than to the SWA directly. Some comments urged the Department to maintain the existing filing procedures and expressed concern the proposed change would strain OFLC resources, hinder the employer's ability to communicate directly with the SWAs, and transfer primary responsibility for job order review to the CO or otherwise diminish the role of the SWAs. Some commenters also asserted the Department failed to explain why this change was necessary and how it would improve the program.

As explained in the NPRM, the Department determined the proposed changes, including submission to the NPC in the Department's electronic filing system, will modernize the job order filing process resulting in more efficient use of SWA and Department resources. The SWAs generally do not have adequate capacity to provide for the full electronic submission and management of agricultural job orders in the OMB-approved format, which may create uncertainty for employers that need to submit job orders within regulatory timeframes. Further, given that an employer must provide a copy of the same job order to the NPC at the time of filing the *Application for Temporary Employment Certification*, the current job order filing process requires duplication of effort for employers, especially those with business operations covering large geographic areas that need to coordinate job order submissions with multiple SWAs; a single electronic submission location simplifies the application process. For the Department and SWAs, electronic submission of job orders to the NPC will decrease data entry, improve the speed with which job order information can be retrieved and shared, reduce staff time and storage costs, and improve storage security. Since the new Form ETA-790/790A will be stored electronically, it also eliminates the need for manual corrections of errors and other deficiencies and improves the efficiency of posting and maintaining approved job orders on the Department's electronic job registry. The Department therefore determined that this process will result in more efficient use of Department and SWA staff time.

The most common concern among commenters with respect to the requirement to submit job orders to the NPC through the Department's electronic filing system, rather than to the SWA directly, related to potential

delay in the SWA's receipt of the job order. Commenters expressed concern the proposal might not streamline the job order filing and distribution processes; rather, it might add a "layer of bureaucracy," with the NPC serving as an unnecessary intermediary between employers and the SWAs and causing delays between NPC's receipt of a job order and its transmission of the job order to the SWAs. Commenters noted the NPRM did not impose deadlines by which the CO would be required to transmit the job orders to the SWAs, and an agent and workers' rights advocacy organization stressed the need for the SWA to receive the job order immediately. A few commenters specifically asked the Department to clarify whether the SWA will receive immediate notification and receipt of the job order submission and whether the employer will receive confirmation when the SWA receives the job order. One commenter urged the Department to create a shared platform for electronic submission of the job order that ensures the SWAs have access to the job order without requiring the NPC to provide the SWA notice of the submission. Several commenters also urged the Department to ensure the FLAG electronic filing and application processing system provide notice to employers when the SWA takes action on a job order. A workers' rights advocacy organization requested the Department provide an objectively measurable deadline by when the NPC must transmit job orders to SWAs, rather than the term "promptly."<sup>69</sup>

Under this final rule, there will be no duplication of processes and no delay between an employer's submission of a job order to the NPC and the SWA's access to the job order. As noted in the NPRM, the Department already provides the SWAs with access to OFLC's FLAG system to electronically communicate any deficiencies with job orders associated with employer-filed H-2A and H-2B applications and uploading inspection reports of employer housing. That access has been enhanced so the SWA has access to the job order in the FLAG system upon submission. As a

<sup>69</sup>This comment expressed concern with the term "promptly" in relation to the Department's proposal in paragraph (f) to begin interstate clearance after the SWA's approval of the job order, which the Department has not adopted, as discussed below. Both the commenter's underlying concern with the term "promptly" and the Department's response apply to the NPC's transmission of a job order to a SWA, regardless of whether the transmission is for initial review or related to interstate clearance, and regardless of whether the transmission occurs pre-filing under paragraph § 655.121(f) or post-filing under § 655.150(a); therefore, the Department acknowledges the comment here.



result, “transmission” of the job order from the NPC to the SWA in FLAG is automatic and virtually instantaneous. Once the employer submits the Form ETA-790/790A in the FLAG system, the FLAG system will notify the SWA of the new job order available for its review and will send the employer a confirmation email that includes a generated case number the employer can use to track the submitted job order. The SWA may also send email correspondence to the filer as needed. When the SWA issues a decision on the job order, the case status in the filer’s queue will change to reflect that decision (e.g., NOD Issued, Job Order Approved, or Job Order Denied). In addition, if a job order is modified during processing of the *Application for Temporary Employment Certification*, the CO will add a case note directed to the SWA, advising the SWA an amendment has been made to the job order that both the NPC and SWA may access.

The Department also received several comments about § 655.121(e)(1) that suggested a mistaken belief the Department intended for the NPC to choose which SWA would receive the job order in cases where more than one SWA has jurisdiction over the AIE, rather than continuing to allow the employer to make that selection. Agents and agricultural associations urged the Department to continue to permit employers to choose the SWA, while a workers’ rights advocacy organization urged the Department to provide specific criteria that the CO and employer must use to determine the SWA to receive the job order to guard against employers using their freedom of choice to avoid SWAs that have identified deficiencies in their past filings. The commenter recommended the Department require the CO to send the job order to the SWA with jurisdiction over the first work location under the contract, which it stated was important because positive recruitment is most likely to be effective in the State where work begins.

Under this final rule, the employer will continue to identify the SWA to which its job order will be submitted for review under § 655.121. When an employer prepares and submits a job order in the FLAG system, the employer will be asked to identify the SWA to receive the job order by selecting a SWA from a drop-down list of SWAs with jurisdiction over that job order. The drop-down list will be consistent with the parameters at § 655.121(e)(1): Where only one SWA has jurisdiction over the AIE, the drop-down list will include only one option; where more than one

SWA has jurisdiction over the AIE (i.e., the AIE crosses State lines), the drop-down list will include more than one option. For employers permitted to file by mail, the employer may identify the SWA to receive the job order, consistent with the parameters at § 655.121(e)(1), in a cover letter attached to that job order. Upon submission in the FLAG system, the job order will be electronically transmitted to the SWA the employer identified.

The Department declines to revise § 655.121(e)(1) to restrict an employer’s choice among the SWAs sharing jurisdiction in an AIE that crosses State lines by requiring the employer to select the SWA with jurisdiction over the place where work is expected to begin. As a preliminary matter, these job orders may not involve work that begins in one State or another; work may begin simultaneously throughout the AIE and across State lines. Further, an employer’s choice in this scenario is limited; the employer has the option to choose only among those SWAs that share State lines in the AIE. In addition, the difference in recruitment exposure in each of the States involved is minimal. As soon as the employer-selected SWA approves the job order and begins intrastate recruitment, it will notify the NPC through the FLAG system to transmit the job order in the FLAG system to the other SWAs with jurisdiction over the AIE, in accordance with § 655.121(f). Adding the suggested restriction to § 655.121(e)(1) would increase the complexity of filings without adding significant value. However, the Department has clarified the SWA selection criteria applicable to a job opportunity that involves work in multiple AIEs along a planned itinerary, where there is a true beginning location for the work to be performed under the contract, in § 655.302.

#### b. SWA Review of the Job Order

The Department proposed minor revisions to the timeframes and procedures under which the SWA performs a review of the employer’s job order. Specifically, the Department proposed that where the SWA issues a notification of deficiencies, the notification the SWA issues must state the reason(s) the job order fails to meet the applicable requirements and state the modifications needed for the SWA to accept the job order. In addition, the Department proposed that the job order be deemed abandoned if the employer’s response to the SWA’s notification is not received within 12 calendar days after the SWA issues the notification. Finally, the Department proposed that any notice sent by the SWA to an

employer must be sent using a method guaranteeing next-day delivery, including email or other electronic methods, and must include a copy to the employer’s representative, if applicable.

Two commenters expressed concern that the Department was diminishing the role of the SWAs in the job order review process. One commenter believed the Department intended to transfer authority for job order review from the SWAs to OFLC, which the commenter asserted would set a “dangerous precedent” that would undermine the SWA’s role by influencing how and when a SWA receives the job order. Similarly, a workers’ rights advocacy organization believed the proposed changes would diminish the SWA’s ability to promptly recruit and advise U.S. workers of job opportunities and compromise the SWA’s ability to issue a notification of deficiencies when the job order violates State law or fails to conform to local prevailing wages and practices. The commenter emphasized the importance of the SWAs in conducting review of job orders, noting the SWAs have greater knowledge than the CO of actual labor needs, crop needs, and local practice and, therefore, are more likely to identify flaws or fraud in job orders. This commenter further urged SWAs not to accept job orders, and OFLC to deny *Applications for Temporary Employment Certification*, that do not list use of crew leaders as a prevailing practice or that do list qualifications or requirements (e.g., experience requirements, background checks, or productivity standards), unless there has been a determination as to “whether or not these requirements are, in fact, the prevailing practices of non-H-2A employers in the industry and area.”

Contrary to the concerns of the commenters, the Department is not changing the roles or responsibilities of the SWAs with respect to review and approval of job orders in this rulemaking. The SWAs will continue their traditional role in the recruitment process and work with employers on the specifics of the job order. Section 655.121(e)(2) in the NPRM and this final rule retains the language from the 2010 H-2A Final Rule that explains the SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653 and this subpart. As the Department has noted in prior rulemaking, processing job orders has been an essential function of the SWAs since the inception of the H-2A program, and posting job orders in the employment service system and referring individuals to those jobs is a

core function of the SWAs that remains at the State level in this rule. The Department agrees the SWAs are especially effective arbiters of the acceptability of job orders due to their experience in providing services to farmworkers and their unique expertise in assisting employers in preparing job orders and making determinations regarding their sufficiency. The Department will continue to rely on the SWAs to apply their broad, historical experience in administering our nation's public workforce system and understanding of the practical application of program requirements to the process of clearing job orders.

Further, this final rule continues the CO's existing authority and responsibility with respect to review of job orders after the *Application for Temporary Employment Certification* has been filed. Section 655.121(h) in this final rule is substantively the same as § 655.121(e) in the 2010 H-2A Final Rule. As was the case under the 2010 H-2A Final Rule, § 655.121(h) of this final rule explains that H-2A job orders continue to be subject to CO review and that the CO may require the employer to make modifications to the job order prior to certification. As the Department explained in the 2010 H-2A Final Rule, it has the ultimate authority to ensure that a job order submitted in connection with an *Application for Temporary Employment Certification* satisfies applicable requirements. COs have always had the authority to review job orders; SWA acceptance of a job order has never obligated a CO to overlook any apparent violations or deficiencies the SWA may not have identified. However, in the overwhelming majority of cases, CO determinations about job orders will be consistent with those of the SWA, as is true of these determinations under the 2010 H-2A Final Rule.

Two commenters also asserted some SWAs add an ever-growing and unnecessary list of attestations and assurances. One of the commenters believed this is inconsistent with the Department's goal to streamline the program and expressed concern that the additional attestations may be incompatible with the new streamlined Forms ETA-790/790A and ETA-9142A. The commenters did not cite specific unduly burdensome requirements or state specifically which attestation requirements they consider inappropriate or burdensome.

In the Department's experience, some disagreements about job order content are attributable to differences in experience with the local industries and labor markets, and the resulting content

requirements are legitimate outgrowths of those differences. The Department will continue to provide training and ongoing guidance for the SWAs, as necessary, to foster a clear understanding of program and other regulatory requirements and ensure uniformity in the job order review and determination processes. With the newly designed Form ETA-790/790A, the Department anticipates fewer inconsistencies between SWA determinations in various States. However, should a disagreement between the SWA and employer arise regarding attestations, assurances, or other job order content, which the SWA and employer are unable to resolve, the Department reminds employers that they can submit an *Application for Temporary Employment Certification* pursuant to emergency filing procedures contained in § 655.134. See § 655.121(e)(3).

Under this final rule, the SWA will provide written notification to the employer of any deficiencies within 7 calendar days from the date the NPC transmitted the job order to the SWA. The notification issued by the SWA, which will be sent using a method ensuring next-day delivery, including email or other electronic methods, will state the reasons the job order fails to meet the applicable requirements and state the modifications needed for the SWA to accept the job order. The employer will continue to have an opportunity to respond to the deficiencies within 5 calendar days from the date the SWA issues the notification, and the SWA will issue a final notification to accept or deny the job order within 3 calendar days from the date the SWA receives the employer's response. To ensure a timely disposition of all job orders, a job order will be deemed abandoned if the employer's response to the notification of deficiencies is not received within 12 calendar days after the SWA issues the notification. In this situation, the SWA will provide written notification and direct the employer to submit a new job order to the NPC that satisfies all the requirements of this section. The 12-calendar-day period provides an employer a reasonable maximum period within which to respond, given the Department's concern for timely processing of the employer's job order.

If the SWA does not respond to the employer's job order submission within the stated timelines, or if after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the Department will continue to permit the employer to file its *Application for*

*Temporary Employment Certification* and job order to the NPC using the emergency filing procedures contained in § 655.134. The Department continues to encourage employers to work with the SWAs early in the process to ensure their job orders meet applicable State-specific laws and regulations and are accepted in a timely manner for intrastate and interstate clearance.

#### c. Clearance of Approved Job Orders

The 2010 H-2A Final Rule provided for the SWA to review a job order and, after determining the job order was acceptable, to begin intrastate clearance and, in multi-State AIEs, circulate the job order to the SWAs in other States with jurisdiction over the place of employment. Under the 2010 H-2A Final Rule, however, the SWA does not begin interstate clearance until the CO instructs it to do so through the Notice of Acceptance (NOA). Upon receipt of the NOA, the SWA transmits the job order to SWAs in other States, following the CO's instructions.

In the NPRM, the Department proposed changes to the job order circulation process, in part, to bolster the optional pre-filing recruitment procedures proposed at § 655.123. The Department proposed to expand job order circulation to interstate clearance upon SWA approval, rather than upon CO issuance of the NOA. In addition, consistent with the proposed electronic transmission of job orders, the Department proposed that the SWA would notify the CO of the SWA's approval, after which the CO would electronically transmit the job order to other SWAs for interstate clearance.

Although the January 2021 draft final rule would have adopted the pre-filing interstate circulation of job orders, after further consideration of comments that addressed the Department's pre-filing recruitment proposal and the Department's resulting decision not to adopt that proposal, as discussed in the preamble regarding § 655.123, the Department has determined not to revise the timing of job order clearance in this final rule. In particular, and consistent with the Department's reasoning for not adopting the proposed optional pre-filing recruitment provision, the Department has determined that the potential benefits of pre-filing interstate circulation of the job order are outweighed by the potential for confusion regarding job offer details and additional communication (e.g., between the CO and SWA or SWA and farmworker) if the job order is modified before the CO issues a NOA. Retaining the 2010 H-2A Final Rule's timing is consistent with the Department's goal of

simplifying the program and is responsive to comments indicating the importance of clear, accurate, and fixed job offer information for recruitment of U.S. workers. As a result, this final rule retains the 2010 H-2A Final Rule's timing for intrastate and interstate clearance, with procedural modifications to conform to the electronic job order submission and transmission proposals adopted in this final rule. As revised, paragraph (f) provides that the SWA will review a job order and, if approved, will place the job order in intrastate clearance to commence recruitment of U.S. workers within its jurisdiction. In addition, if appropriate, the SWA will notify the NPC that the job order must be transmitted to other SWAs with jurisdiction over the place of employment (*i.e.*, a place of employment located in a multi-State AIE) for intrastate clearance. Subsequently, upon the CO's review and acceptance of the *Application for Temporary Employment Certification*, as provided in § 655.143, interstate circulation of the job order will begin, in accordance with § 655.150.

#### d. Other Comments Related to § 655.121

To clarify procedures, and as a result of other proposed changes, the Department proposed reorganization of several components of § 655.121. In addition, the Department proposed a technical correction in paragraph (g) of this section, changing "*Application for Temporary Employment Certification*" to "application" to reflect that the term "application" refers to a U.S. worker's application for the employer's job opportunity during recruitment, not the *Application for Temporary Employment Certification*.

The Department received a comment from an agent suggesting an amendment to § 655.121(h)(2) to allow employers to request a modification of the job order to the NPC after filing an *Application for Temporary Employment Certification* and prior to receiving a NOA, rather than limiting employer-requested modifications to the period prior to filing the *Application for Temporary Employment Certification*. The commenter believed its suggestion would be consistent with the fact the NPC may require the employer to modify the job order during the review process through a deficiency notice. However, the Department did not propose changes to this provision, which appeared in the 2010 H-2A Final Rule at paragraph (e)(2) of this section; therefore, the suggestion is beyond the scope of this rulemaking. Further, unlike CO-ordered modifications,

employer-requested modifications would confuse and complicate the CO's analysis and ability to identify deficiencies within 7 business days of receipt or, alternatively, issue a NOA as the first action.

Another individual commenter suggested the Department allow employers "to file 120 days from the date of need," which presumably refers to the filing timeframe for submitting a job order in § 655.121(b). As the Department proposed no changes to the filing timeframe, this suggestion is outside the scope of this rulemaking.

#### 3. Section 655.122, Contents of Job Offers

##### a. Paragraph (a), Prohibition Against Preferential Treatment of H-2A Workers

The Department's current regulation at § 655.122(a) prohibits the preferential treatment of H-2A workers and requires that an employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Section 655.122(a) further prohibits job offers from imposing on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. The Department did not propose any changes to or request comments on § 655.122(a) in the NPRM, but the Department received one comment on this section. An agent requested that the Department "clarify" that the U.S. workers referenced in this section are those U.S. workers engaged in corresponding employment because, it asserted, "U.S. workers not in corresponding employment are not, in fact, entitled to the same H-2A wage rate as this provision appears to suggest." The commenter, however, is incorrect because the requirements of this section are not limited to U.S. workers in corresponding employment. Under this section, for example, an H-2A employer may not impose on prospective U.S. workers applying for the H-2A job opportunity a minimum weight-lifting requirement that it will not and does not impose on H-2A workers. Therefore, this final rule retains the current regulatory language without change.

##### b. Paragraph (d), Housing

Pursuant to the statute and the Department's regulations, an employer must provide housing at no cost to all H-2A workers and to those non-H-2A workers in corresponding employment who are not reasonably able to return to their residences within the same day. See 8 U.S.C. 1188(c)(4); § 655.122(d)(1).

Generally, an employer may meet its housing obligations either by providing its own housing that meets the applicable Federal health and safety standards, or by providing rental and/or public accommodations that meet the applicable local, State, or Federal standards.<sup>70</sup> The statute further requires that the determination whether the housing meets the applicable standards must be made not later than 30 days before the first date of need. See 8 U.S.C. 1188(c)(3)(A) and (4).

The NPRM proposed several amendments to this section governing housing inspections and certifications. Specifically, the Department proposed to reinforce the statutory requirement that housing certification must be made not later than 30 days prior to the first date of need; clarify that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs; and authorize the SWAs (or other appropriate authorities) to inspect and certify employer-provided housing for a period of up to 24 months. The Department received many comments on the proposed amendments to these sections. After carefully considering these comments, the Department has adopted with minor revisions some of the regulatory text proposed in the NPRM and decided not to adopt the proposals that would have permitted a 24-month housing certification period and employer self-certification of housing, as discussed below.

##### Employer-Provided Housing

Preoccupancy inspections are a vital step in determining whether employer-provided housing actually meets applicable health and safety standards, allowing the Department to ensure that the housing is safe and sufficient for the number of workers to be housed prior to their arrival for the work contract period. Under the current regulation, employers are required to obtain preoccupancy inspections of their housing for every temporary agricultural labor certification without exception. This requirement can lead to delays in the labor certification process, given the high demand for preoccupancy inspections and the SWAs' finite resources.

To address such delays, the Department proposed to allow the SWAs to inspect and certify employer-provided housing for a period of time up to a maximum period of 24 months. Under this proposal, the SWAs would

<sup>70</sup> Housing for workers principally engaged in the range production of livestock must meet the minimum standards required by § 655.122(d)(2).

be required to provide prior notice to the Department of their intention to certify employer-provided housing for extended periods of time, up to 24 months, and develop their own criteria for determining when such certifications are appropriate. Although the Department proposed to allow the SWAs to develop their own criteria, in recognition of their longstanding expertise in conducting housing inspections, the Department also requested comments as to whether a final rule should include specific criteria that the SWAs must consider in determining whether to certify employer-provided housing for longer time periods. The proposal also stated that when an employer files a subsequent *Application for Temporary Employment Certification* during the validity period of the official housing certification previously received from the SWA (or other appropriate authority), the employer would have been required to conduct its own inspection of the housing and provide the SWA and CO with a copy of the still-valid housing certification, which must be valid for the entire work contract period, and a signed and dated statement that the employer has inspected the housing, that the housing is available and sufficient to accommodate the number of workers requested, and that the housing meets all applicable health and safety standards. Additionally, the NPRM proposed to add language reiterating the statutory requirement that determinations with respect to housing must be made no later than 30 days prior to the first date of need. The NPRM also proposed to clarify that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs, in accordance with the regulatory provisions at § 653.501(b). As discussed below, the Department has decided to adopt with minor revisions some of the regulatory provisions proposed in the NPRM.

The Department received comments from a range of stakeholders regarding the proposed changes to the employer-provided housing inspection requirements. Employers and employer representatives expressed broad support for the proposal to allow certifications of employer-provided housing for a period of up to 24 months with employers self-inspecting their housing for further applications during this period. They indicated that this proposed revision would reduce delays in the application and certification process that they say harm agricultural

businesses and create uncertainty for employers and workers. Some State agencies also expressed support for this proposal, indicating that it would improve their ability to allocate their resources for housing inspections. However, many of these commenters expressed concern that the SWAs would have discretion to determine the criteria for determining when such housing certification periods would be appropriate, indicating that the SWAs should be precluded from continuing inspections on an annual basis. Several commenters indicated that the final rule should require the SWAs to allow agricultural employers to have their housing certified for a period of 24 months, or at least provide incentives to the SWAs to encourage them to certify employer-provided housing for a 24-month period as often as possible. Other commenters stated that the Department should require the SWAs to certify employer-provided housing for a 24-month period when previous inspections of housing provided by that employer had found that the housing complied with all applicable standards.

Employers and their representatives were more divided in their comments regarding the proposed clarification that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs. Several commenters stated that allowing agencies other than the SWAs to conduct housing inspections, as is already done in some States, reduces the logistical burden on the SWAs. They also noted that in some States, employer-provided housing is already inspected by other agencies due to State laws regarding migrant worker housing. If those agencies also conducted housing inspections for H-2A housing certifications, it would reduce the burden on employers for the same agency to conduct both inspections. Other employer associations expressed concern over the proposed language, particularly the possibility that Federal agencies might conduct housing inspections, as they felt such inspections were more appropriately conducted at the State or local level.

In contrast, workers and workers' rights advocacy organizations generally opposed the proposal to allow the SWAs to certify employer-provided housing for a period of up to 24 months, with employers conducting self-inspections of the housing for any subsequent *Applications for Temporary Employment Certification* filed during that timeframe. Workers, workers' rights advocacy organizations, and some government agencies stated that

employer-provided housing frequently fails to meet applicable health and safety standards even when inspected annually under the current rule, and that moving to a 24-month certification period would thus increase the risk that workers would be exposed to unsafe housing conditions. Several commenters also noted that housing conditions can deteriorate significantly over the course of a year, citing examples of housing that passed inspection but was found to have health or safety violations when subsequently investigated during the certification period, making it even less appropriate to certify housing for a longer time period. Workers' rights advocacy organizations also questioned whether the employers' self-inspection of their housing during the 24-month certification period would motivate employers to ensure that their housing continues to meet applicable health and safety standards, given the high rate of violations even when employers know that their housing will be inspected by a government agency annually. Some commenters stated that if the Department allows the SWAs to certify employer-provided housing for a 24-month period, the regulation should include criteria that must be met for employers to receive a longer certification period, such as compliance with Federal, State, or local housing laws, age of the housing, and whether the housing is in a populated, easily accessible area. Two other commenters suggested that if the SWAs were unable to certify housing in a timely manner, the Department itself should inspect the housing.

After consideration of the comments received, the Department has decided not to adopt the proposal to permit certifications of employer-provided housing for a period of up to 24 months, with employers self-inspecting their housing for further applications during this period. Although the Department recognizes that preoccupancy housing inspections must be conducted in a timely manner, the Department concludes that achieving greater expediency in the certification process must not come at the cost of reduced housing compliance monitoring and increased risk to worker health and safety. As several commenters noted, the Department frequently encounters post-certification violations of the housing safety and health requirements even under the current rule; reducing the frequency of housing inspections would likely further exacerbate the frequency and severity of such violations. To do so would be inconsistent with the statute's

requirement that worker housing meet applicable safety and health standards. And while the January 2021 draft final rule would have accepted the proposal, after further consideration of the comments, and for the reasons discussed above, the Department has declined to do so.

The Department has also considered the comments regarding the proposed clarification that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs. As stated above, the proposed language merely reflected the existing regulatory provisions of § 653.501(b)(3), which already allow other appropriate agencies to conduct preoccupancy housing inspections on the SWAs' behalf, and are included with the other housing provisions at § 655.122(d) for clarity and convenience. Indeed, as several commenters noted, preoccupancy inspections are already carried out by agencies other than the SWA in several States. As the proposed language merely reiterated the current regulatory position that preoccupancy inspections may be conducted by any appropriate public agency, the Department did not find that any change to this language was warranted and therefore has adopted the proposed language without change in this final rule. Similarly, the Department is adopting without change the proposed language in paragraph (6)(i) of this section, reiterating the statutory requirement that the determination as to whether housing provided to workers meets the applicable standards must be made not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification*.

#### Rental and/or Public Accommodations

Where employers choose to meet their H-2A housing obligations by providing rental and/or public accommodations, the statute explicitly states that the accommodations must meet local standards for rental and/or public accommodations. In the absence of applicable local standards, State standards for rental or public accommodations must be met, and in the absence of applicable local or State standards, Federal temporary labor camp standards must be met. See 8 U.S.C. 1188(c)(4).<sup>71</sup> The current

<sup>71</sup> “The employer shall be permitted at the employer’s option . . . to secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation: Provided, That in the absence of applicable local standards, State standards for rental and/or public accommodations or other

regulations at 20 CFR 655.122(d)(1)(ii) reflect the statutory language, incorporating the Occupational Safety and Health Administration’s (OSHA) temporary labor camp standards at 29 CFR 1910.142, and additionally state that “[t]he employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.” Currently, employers may meet that requirement by several methods, including, but not limited to, providing a copy of a housing inspection report or certification by the SWA, or another local, State, or Federal agency, where such an inspection is required by applicable rental or public accommodation standards, or by providing a signed and dated written statement confirming that the accommodation complies with applicable local, State, and/or Federal standards.<sup>72</sup>

This patchwork of applicable standards creates several challenges to protecting the health and safety of H-2A and corresponding workers housed in rental and/or public accommodations, such as hotels, motels, and other public accommodations that are available to the general public to rent for relatively short-term stays. Under the current regulations, in the absence of any local or State standards applicable to rental and/or public accommodations, the full set of OSHA temporary labor camp standards at § 1910.142 apply. However, several of these standards address health and safety concerns that generally do not arise in rental and/or public accommodations and thus are impractical or infeasible to apply in this context (for example, § 1910.142(a)(1), which addresses drainage of camp sites), leading to inconsistent application and enforcement of the standards overall. Conversely, where any local or State standards applicable to rental and/or public accommodations do exist, those standards apply to the complete exclusion of the OSHA temporary labor camp standards. Even where local and State standards for rental and/or public accommodations exist and address basic health and safety concerns for the general population, such as maximum occupancy, these standards are often silent on health and safety concerns unique to agricultural

substantially similar class of habitation shall be met: Provided further, That in the absence of applicable local or State standards, Federal temporary labor camp standards shall apply.”

<sup>72</sup> See OFLC FAQ, *What do I need to submit to demonstrate the [rental and/or public accommodations] complies with applicable housing standards?* (June 2017), <https://www.foreignlabor.cert.doleta.gov/faqsanswers.cfm#q1917>.

worker housing that are otherwise addressed in the OSHA temporary labor camp standards at § 1910.142.

These gaps in protection can lead to significant health and safety concerns. In particular, overcrowding is one of the most common problems the Department encounters when inspecting hotels or motels used to house H-2A and corresponding workers. Workers have been found to be required to share a bed, sleep on the floor in a sleeping bag, share a single room where as many as eight people may be sleeping, or sleep on mattresses on the ground in laundry rooms or living rooms. In addition, where workers have to cook their own meals, hotels and motels may not have sanitary facilities or adequate cooking equipment, which can lead to worker health issues, rodent or pest infestations, and fire hazards. Workers housed in hotels and motels also may not have access to laundry facilities, a serious concern for workers whose clothing regularly comes into contact with pesticides or herbicides. These issues are all addressed in the OSHA temporary labor camp standards but are not frequently covered in local or State standards for rental and/or public accommodations.<sup>73</sup>

To address these concerns, the Department proposed certain changes to its regulations interpreting the statutory requirements for rental and/or public accommodations standards. The Department identified specific OSHA temporary labor camp standards that are applicable to rental or public accommodations, specifically: § 1910.142(b)(2) (“[e]ach room used for sleeping purposes shall contain at least 50 square feet of floor space for each occupant”), (b)(3) (“[b]eds . . . shall be provided in every room used for sleeping purposes”), (b)(9) (“In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.”), (b)(11) (heating, cooking, and water heating equipment installed properly), (c) (water supply); (f) (laundry, handwashing, and bathing facilities), and (j) (insect and rodent control). Where local health and safety standards for rental and/or public

<sup>73</sup> Beginning on March 13, 2020, continued on February 24, 2021, and again on February 18, 2022, the President has declared a national emergency concerning the novel coronavirus disease (COVID-19) pandemic. The Department encourages H-2A employers to regularly consult Federal, State, and local guidance on the COVID-19. At the time of this publication, OSHA’s regulations and guidance relevant to COVID-19 are available at <https://www.osha.gov/coronavirus>. OFLC’s guidance on COVID-19 for H-2A employers is available at <https://www.dol.gov/agencies/eta/foreign-labor>.

accommodations exist, the local standards apply in their entirety. However, if the local standards do not address one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant State standards on those issues will apply. If both the local and State standards are silent on one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant OSHA health and safety standards will apply. If there are no applicable local or State standards at all, only the OSHA health and safety standards listed in the regulation will apply. OSHA temporary labor camp standards that are not specifically mentioned in 20 CFR 655.122(d)(1)(ii) will not be applicable to rental or public accommodations.

The following is an example of how local, State, and OSHA health and safety standards would be applied to a specific rental or public accommodation under the regulation. An employer provides housing for workers in a motel located in a county with a local code that includes health and safety standards for public accommodations that address all but one of the health and safety standards in the listed OSHA standards, *i.e.*, a requirement for a minimum number of square feet per occupant for sleeping rooms, one of the applicable OSHA health and safety standards listed in the regulation. The existing local code applies in its entirety to the motel, but since the local code has no applicable standard for a minimum number of square feet per occupant for sleeping rooms, the State standard for the minimum number of square feet per occupant for sleeping rooms, if any, would be applicable to the housing as well. If the State has no standard for the minimum number of square feet per occupant for sleeping rooms that is applicable to public accommodations, then the OSHA standard at 29 CFR 1910.142(b)(2), which states that sleeping rooms must contain at least 50 square feet per occupant, will apply (or, where cooking facilities are present, § 1910.142(b)(9), which requires 100 square feet per occupant in rooms where occupants live, sleep, and cook, would apply), in addition to other requirements of the local code. However, if the local standard (or State standard, in the absence of any local standard) contains a standard for the minimum number of square feet per occupant for sleeping rooms (or, where cooking facilities are present, a standard for the minimum feet per occupant for rooms where occupants live, sleep, and cook) that is applicable to public

accommodations, that standard would apply, regardless of whether that local standard was more or less stringent than the applicable OSHA standard, because the listed OSHA standards apply only in the absence of local or State standards addressing those health and safety issues. Similarly, a local or State standard need not explicitly provide for a minimum number of square feet per occupant, provided the standard addresses the relevant area required for a given number of people. For example, a local standard that provides a maximum occupancy of three persons to a room that measures 100 square feet would constitute an applicable local standard, as it provides for a minimum area for each occupant. Alternatively, if there were no local or State health and safety codes applicable to the motel, only the OSHA standards listed in 20 CFR 655.122(d)(1)(ii) would apply. Any other OSHA standards listed at 29 CFR 1910.142 would not be applicable to the motel, because only the OSHA standards specifically listed in 20 CFR 655.122(d)(1)(ii) are applicable to rental or public accommodations, and then only when neither the locality nor the State have applicable standards addressing those issues.

The Department also proposed to modify the current regulatory language, which states that “[t]he employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards” (§ 655.122(d)(1)(ii)), to specify how an employer must document that the rental or public accommodations meet local, State, or Federal standards. The proposed language states that an employer must submit to the CO a signed, dated, written statement, attesting that the rental and/or public accommodations meet all applicable standards and are sufficient to accommodate the number of workers requested. This statement must include the number of beds and rooms that the employer will secure for the worker(s). The proposal language further required that, where the applicable local or State standards under § 655.122(d)(1)(ii) require an inspection, the employer also must submit a copy of the inspection report or other official documentation from the relevant authority. Where no inspection is required, the employer’s written statement must confirm that no inspection is required. The proposed language generally reflects current OFLC guidance as to how the employer may document that applicable health

and safety standards have been met,<sup>74</sup> with the additional requirements that employers submit a written statement even if they are also submitting a copy of an inspection report, where required, and that the written statement must contain the number of beds and rooms that will be provided in the rental or public accommodations. As discussed below, the Department has decided to adopt the regulatory provisions as proposed in the NPRM, with a few modifications.

Several employers and employer associations opposed the proposed changes. These commenters generally stated that there is no basis for requiring employers to ensure that rental or public housing complies with any of the OSHA temporary labor camp health and safety standards, because standards designed for temporary labor camps are inappropriate for rental or public accommodations. They commented that requiring employers to find rental or public accommodations that meet the listed OSHA standards (in the absence of local or State standards addressing those issues) would be very difficult, possibly even preventing H–2A employers from using rental or public accommodations. These employers requested that the regulations no longer require the application of OSHA temporary labor camp standards. At least one commenter stated that the option to provide rental or public accommodations was made available to employers to give them the flexibility to provide housing that does not comply with OSHA health and safety standards in areas where compliant housing may be scarce. Some commenters expressed further concern that employers should be expected to attest to the compliance of rental or public housing accommodations provided to their workers, as it would be too confusing for them to determine which set of standards should apply. One employer association, while generally supportive of the proposed changes, indicated that employers are frequently unable to use public accommodations because the accommodations fail required inspections for minor issues, such as lack of window screens, and urged that employers should have greater access to public accommodation options.

In contrast, workers’ rights advocacy organizations, and at least one State agency expressed support for the proposed changes, indicating that specifically requiring the application of

<sup>74</sup> See OFLC FAQ, *What do I need to submit to demonstrate the [rental and/or public accommodations] complies with applicable housing standards?* (June 2017), <https://www.foreignlabor.cert.doleta.gov/faqsanswers.cfm#q!917>.

Federal OSHA health and safety standards addressing important issues such as overcrowding, or inadequate sleeping, bathing, or laundry facilities, in the absence of such local or State standards, would result in modest improvements to worker health and safety. However, these commenters also stated that these improvements would not be sufficient without a strong commitment to inspections and enforcement of housing violations, with one workers' rights advocacy organization further urging that Federal OSHA should be required to inspect rental or public accommodations in areas where local or State laws do not require such inspections. Another workers' rights advocacy organization stated that the regulations should require the employer to at least use a more detailed self-inspection form, such as Form ETA-338, and identify the applicable standards for DOL or the SWA to review prior to issuing a temporary agricultural labor certification. In addition, most of these commenters expressed general support for additional protections or standards to be included in the regulations, but did not identify specific standards for inclusion. As addressed further below, only one commenter suggested specific additional standards for inclusion in the regulation.

Having reviewed the comments on these issues, the Department adopts the proposals on rental and/or public accommodations at § 655.122(d)(1)(ii) and (d)(6)(iii), with a few modifications. With respect to the concerns raised by employers and employers' associations that requiring compliance with applicable OSHA temporary labor camp health and safety standards may reduce the number of acceptable rental or public housing options, particularly in more rural areas, the Department notes that the statute requires that rental or public accommodations comply with applicable Federal temporary labor camp standards in the absence of applicable local or State standards. Thus, even under the Department's current regulations, in many instances, rental and public accommodations must comply with applicable OSHA temporary labor camp standards if used to satisfy an H-2A employer's housing obligations. The Department therefore cannot, through regulation, remove employers' statutory obligations to comply with applicable Federal temporary labor camp standards in the absence of applicable local or State standards. The Department can, however, identify *which* OSHA temporary labor camp health and safety

standards are applicable to rental or public accommodations. Rental and public accommodations are different structures than temporary labor camps, and some temporary labor camp standards are not applicable to such accommodations. However, rental and public accommodations generally are not designed to house groups of unrelated adult agricultural workers for an extended period of time, especially not in only one or two rooms. Accordingly, local or State standards governing rental or public accommodations may not address serious health and safety issues that arise in such worker housing. The regulation thus identifies which OSHA standards employers must meet in the absence of applicable local or State standards on those issues, to prevent serious health and safety issues more likely to occur where rental or public housing is used to house H-2A and corresponding workers, while eliminating confusion about whether such rental or public housing must comply with other OSHA temporary labor camp standards that are not feasibly applied to hotels and motels and other rental or public accommodations.

Similarly, the Department notes that it cannot "simply require that regardless of local and state standards applicable to public accommodations, the housing must meet the basic minimum standards" set forth in OSHA's temporary labor camp standards, as one workers' rights advocacy organization suggested, because the statute permits employers to secure housing that meets applicable local or State standards for rental and/or public accommodations. As noted above, the Department also asked for comment specifically as to whether the regulation should identify any additional health and safety standards addressed in the DOL OSHA standards at 29 CFR 1910.142 as applicable to rental or public accommodations. Only one commenter, a workers' rights advocacy organization, provided examples of additional OSHA temporary labor camp standards for inclusion in the regulations. Specifically, the commenter advocated for the addition of § 1910.142(b)(7) ("[a]ll living quarters shall be provided with windows"), (b)(10) ("stoves (in ratio of one stove to 10 persons or one stove to two families) shall be provided"), (d) (toilet facilities), (g) (lighting), (h) (refuse disposal), and (i) (construction and operation of kitchens, dining, and feeding facilities).

The Department appreciates the suggestions set forth in this comment. The Department has decided to include

some, but not all, of the suggested OSHA standards in the list of applicable OSHA temporary labor camp standards. First, the commenter argued for the inclusion of § 1910.142(b)(10), which states that "[i]n camps where cooking facilities are used in common, stoves (in ratio of one stove to 10 persons or one stove to two families) shall be provided in an enclosed and screened shelter. Sanitary facilities shall be provided for storing and preparing food." The commenter argued that the inclusion of this standard was necessary when employers claim that they are providing cooking and kitchen facilities to workers housed in rental or public accommodations, as rental or public accommodations frequently have inadequate cooking facilities that are either lacking in stoves or have an insufficient number for all workers to have sufficient access to cook their own food. The commenter further pointed out that without sufficient access to stoves, workers often must use microwaves or hot plates for all of their cooking needs, resulting in potential fire hazards. The Department agrees. Where employers choose to meet their meal obligations by providing kitchen and cooking facilities to workers, the facilities must include, among other things, working cooking appliances, an obligation that is not met merely by the provision of one or more electric hot plates, microwaves, or outdoor community grills. The failure to provide adequate cooking appliances when attempting to meet meal obligations through the provision of cooking and kitchen facilities would in itself be a violation of 20 CFR 655.122(g), as was discussed in the preamble to the NPRM and is addressed further below. Including this standard as an applicable OSHA temporary labor camp standard may help employers determine whether rental or public accommodations have adequate kitchen and cooking facilities to enable employers to meet their meal obligations. Moreover, local and State codes applicable to rental or public accommodations are not likely to address this issue, since, in most instances, this type of housing is not generally intended to house groups of people over an extended period of time who need to be able to cook their own meals. This standard has therefore been included in the regulation as one of the applicable OSHA temporary labor camp standards, although it will be applicable only where an employer has chosen to meet its meal obligations by providing kitchen and cooking facilities to workers rather than by providing three meals per day to workers.



The commenter also advocated for the inclusion of § 1910.142(g), “Lighting,” which provides that where electric service is available:

- Each habitable room in a camp shall be provided with at least one ceiling-type light fixture and at least one separate floor- or wall-type convenience outlet.
- Laundry and toilet rooms and rooms where people congregate shall contain at least one ceiling- or wall-type fixture.
- Light levels in toilet and storage rooms shall be at least 20 foot-candles 30 inches from the floor.
- Other rooms, including kitchens and living quarters, shall be at least 30 foot-candles 30 inches from the floor.

The commenter stated that worker health and safety requires at least one light fixture and outlet in each sleeping room, as well as adequate lighting in other rooms. It is likely that this issue will be addressed in applicable local or State codes, as various building codes published by the International Code Council, including the International Property Management Code, have standards regarding the number of electrical outlets and light fixtures required in sleeping rooms and other rooms, and these codes have been adopted by most States and/or localities.<sup>75</sup> However, as this standard does address a basic health and safety need, and employers can fairly easily determine whether the rental or public accommodations they intend to use meet this standard, the Department has included § 1910.142(g) in the regulation as one of the applicable OSHA temporary labor camp standards that will apply in the absence of any applicable local or State standard addressing this issue.

The commenter also recommended that the entirety of § 1910.142(d), containing various standards for toilet facilities, should be included in the regulation as one of the applicable OSHA temporary labor camp standards, arguing that requirements for a minimum ratio of toilets per person, as well as provisions for lighting, a supply of toilet paper, and cleanliness, are essential for workers’ health. The Department agrees that having adequate and sanitary toilet facilities is clearly necessary for workers’ health, but several of the standards included in this section are impractical or less necessary for many types of rental or public accommodations, as the standards were designed for temporary labor camp

facilities. For example, in hotels or motels, it may not be practical or necessary to require that toilet rooms be accessible without passing through sleeping rooms, as bathrooms in hotels and motels tend to be accessed directly off of the lone sleeping area and thus there is no other way to access the bathroom. Similarly, it may be impractical to require that there be a minimum of two toilets for every shared facility, since one shared hotel room is likely to have only one toilet. In addition, some of the issues addressed by this standard are covered by other OSHA temporary labor camp standards that are already specified in the regulation. For instance, § 1910.142(d)(8), which requires that each toilet room have natural or artificial light available at all hours, is not necessary when § 1910.142(g), which is included in the regulation as discussed above, requires all toilet rooms to have at least one ceiling or wall-type light fixture. However, some of the standards in this section are more feasibly implemented in rental or public accommodations, are more within the employer’s ability to control, and are key to maintaining a sanitary bathroom environment. Section 1910.142(d)(1), which states that “[t]oilet facilities adequate for the capacity of the camp shall be provided,” would be sufficient to require employers to ensure that the rental or public accommodation has sufficient toilets for the number of workers housed, without specifying a layout that may be impractical for rental or public accommodations. Section 1910.142(d)(9), requiring that an adequate supply of toilet paper be provided for each toilet, clearly serves a critical sanitary purpose. Section 1910.142(d)(10), requiring toilet rooms to be kept in a clean and sanitary condition and cleaned daily, also ensures that toilet facilities are maintained in a manner adequate for worker health and safety, and employers can ensure that this standard is followed in almost all types of rental or public accommodations. Accordingly, the Department has incorporated § 1910.142(d)(1), (9), and (10) into this final rule as applicable OSHA temporary labor camp standards.

However, the Department declines to include in this final rule all of the other OSHA temporary labor camp standards recommended by the workers’ rights advocacy organization (§ 1910.142(b)(7) (ventilation), (h) (refuse disposal), and (i) (kitchens, dining halls, and feeding facilities)). First, § 1910.142(b)(7) states that “[a]ll living quarters shall be provided with windows the total of

which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.” The commenter claimed that this standard should be incorporated because rental and public accommodations may otherwise not have sufficient ventilation to combat a damp indoor environment, which can lead to serious health and safety issues such as mold, cockroach infestations, and rodent infestations. Although the Department certainly acknowledges the importance of ventilation in housing, this standard may be too restrictive for rental and public accommodations. In many instances, rental or public accommodations will have mechanical ventilation through a heating, ventilation, and air conditioning system or by other mechanical ventilation, which can provide ventilation at least as adequate as the ventilation provided by windows. An employer is unlikely to be able to require that hotels and motels additionally provide for windows that open. The U.S. Environmental Protection Agency has stated that mechanical ventilation is preferable to ventilation through windows or other openings,<sup>76</sup> making it even less appropriate to require windows that can be opened when the rental or public facility has other adequate means of ventilation. In addition, because windows (natural light) and ventilation are addressed by the various model building, residential, and maintenance codes published by the International Code Council, which have been incorporated by the majority of States,<sup>77</sup> State and local codes are likely to have provisions addressing this standard. Moreover, if a lack of adequate ventilation leads to damp conditions that foster pest infestations or similar unhealthy conditions, the rental or public accommodations would not meet the requirement of § 1910.142(j), already included in this final rule, which states that effective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests.

Second, § 1910.142(h)(1) requires fly- and rodent-tight containers for the storage of garbage, and that at least one container be provided within 100 feet of each “family shelter.” Section 1910.142(h)(2) requires that garbage containers be kept clean, and § 1910.142(h)(3) requires that garbage be

<sup>76</sup> See *Mechanical Ventilation: Breathe Easy with Fresh Air in the Home*, [https://www.energystar.gov/ia/new\\_homes/features/MechVent\\_062906.pdf](https://www.energystar.gov/ia/new_homes/features/MechVent_062906.pdf) (last visited Dec. 14, 2021).

<sup>77</sup> See <https://www.iccsafe.org/wp-content/uploads/Master-I-Code-Adoption-Chart-DEC-2021.pdf> (last visited Dec. 14, 2021).

<sup>75</sup> See <https://www.iccsafe.org/wp-content/uploads/Master-I-Code-Adoption-Chart-DEC-2021.pdf> (last visited Dec. 14, 2021).

emptied when full, but at least twice a week. The workers' rights advocacy organization argued that this standard should be included to prevent rodents and insect infestation, stating that the inclusion of § 1910.142(j) regarding rodent and insect control is undercut by the failure to incorporate this standard. While adequate facilities for containing and disposing of garbage are important to maintaining a healthy living environment, the Department does not believe that the requirements of this standard are always practical in the context of rental or public accommodation, where refuse collection for the worker housing may be conducted very differently than for a temporary labor camp but in a safe and sanitary manner. For example, where workers are housed in several rooms in a hotel, trash may be collected from their rooms along with trash from other rooms and placed into the hotel dumpsters. Although there might not be at least one dumpster for each worker shelter and the dumpster may not be within 100 feet of the shelter, such a system could nevertheless adequately deal with the garbage in a safe and sanitary manner. Moreover, the Department does not agree that the inclusion of § 1910.142(j) regarding rodent and insect control is undercut by the failure to incorporate all elements of this standard, particularly in the context of rental and public accommodations. On the contrary, if accumulating garbage encourages rodents or insects, the employer would not be ensuring that "[e]ffective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests," and would be in violation of § 1910.142(j). However, upon further consideration, the Department concludes that certain aspects of § 1910.142(h), specifically paragraphs (h)(2) and (3) requiring that garbage cans be kept clean and be emptied regularly, address significant safety and health concerns aside from the potential for rodent or insect infestation, and that these standards are easily implemented even in the context of hotels and motels, and are within an employer's control to ensure compliance. Accordingly, the Department has included § 1910.142(h)(2) and (3) in the regulation as two of the applicable OSHA temporary labor camp standards that will apply in the absence of any applicable local or State standard addressing these issues. Though the Department did not include this standard in the January 2021 draft final rule, upon further consideration of the rulemaking record and for the reasons

stated above, the Department has concluded it is appropriate to do so here.

Finally, § 1910.142(i) establishes certain standards for central dining halls or multiple family feeding operations and food handling facilities in temporary labor camps. The workers' rights advocacy organization commented that this standard should be applicable to public and rental accommodations because these accommodations often do not have adequate cooking and kitchen facilities. Moreover, even where rental or public accommodations have cooking and kitchen facilities, the commenter alleged that the facilities often have improper refrigerator temperatures, pest infestations, or contaminated water. However, the Department does not agree that the inclusion of § 1910.142(i) as an applicable OSHA temporary labor camp standard is necessary to ensure that workers have adequate and safe cooking facilities when housed in rental or public accommodations. As explained in the preamble discussion of 20 CFR 655.122(g) the Department has addressed the issues that arise when kitchen and cooking facilities in rental or public accommodations are insufficient. The inclusion of § 1910.142(i) would incorporate standards that were designed primarily for larger centralized cooking and dining facilities, such as a large labor camp where an employer has a centralized dining hall and employs people to cook for the workers, and are therefore not appropriate for many rental or public accommodation situations. For example, even when a hotel room or suite has adequate kitchen or cooking facilities, it would not be practical to require that there be no opening from the kitchen into the living or sleeping quarters, as would be required by § 1910.142(i)(2). Moreover, several of the potential harmful conditions mentioned by the commenter are either sufficiently addressed in the context of rental or public accommodations by other standards that were already included in the proposed provisions, such as § 1910.142(b)(9) ("[s]anitary facilities shall be provided for storing and preparing food" in rooms where workers cook), (c) ("[a]n adequate and convenient water supply, approved by the appropriate health authority, shall be provided in each camp for drinking, cooking, bathing, and laundry purposes"), or (j) ("[e]ffective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests"), or would be further addressed by the additional

incorporation of § 1910.142(b)(10), as discussed above.

The Department has made additional minor, nonsubstantive revisions to 20 CFR 655.122(d)(1)(ii) to better describe the applicable OSHA temporary labor camp standards.

With respect to employers' concerns regarding self-attestation under § 655.122(d)(6)(iii) that the rental or public accommodations they furnish to workers comply with applicable local, State, or OSHA standards,<sup>78</sup> the Department notes that under both the statute and the current regulations, employers are responsible for ensuring that if they choose to use rental or public accommodations to meet their housing obligations, those rental or public accommodations must meet applicable standards, and for documenting to the CO that these standards have been met during the application process. By requiring employers to provide a signed and dated statement attesting that the rental and/or public accommodations meet all applicable standards and are sufficient to accommodate the number of workers requested, specifically noting the number of rooms and beds to be provided for the workers, along with any required inspection reports, the proposed changes merely attempt to ensure that employers have considered the applicable standards and verified that the rental or public accommodations comply with the standards prior to workers' arrival. However, the Department will not require that employers use a particular self-inspection form in providing the required statement because doing so would be impracticable. The applicable standards will vary depending upon the locality or State in which the rental or public accommodations are located.

Housing for Workers Covered by 20 CFR 655.200 Through 655.235

The Department is making clarifying edits to paragraph (d)(2) to reflect that §§ 655.230 and 655.235 establish the housing requirements for workers employed in herding and range production of livestock occupations under §§ 655.200 through 655.235. The Department has established separate requirements for these workers due to the unique nature of the work performed. The Department is also making a technical, conforming edit to paragraph (d)(2) to reflect that § 655.304

<sup>78</sup> To the extent that commenters had concerns related to inspections of rental or public housing by SWAs or other agencies, it should be noted that those inspections are not required by these regulations, but by State or local laws, with their own requirements.

establishes the housing standards applicable to mobile housing for workers engaged in itinerant animal shearing or custom combining, as defined and specified under §§ 655.300 through 655.304.

c. Paragraph (g), Meals

The Department did not propose any changes to the current regulation at § 655.122(g), which requires an employer to provide each worker three meals a day or furnish free and convenient cooking and kitchen facilities so that the worker can prepare meals, and further states that where an employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. However, due to the high incidence of violations of this provision, the Department provided additional clarification of these requirements in the preamble to the NPRM. The Department adopts that guidance in the preamble to this final rule, with some additional clarifications in response to comments received. In addition, as explained below, the Department has revised § 655.122(g) in this final rule to reiterate certain requirements in § 655.173 regarding meal charges.

Specifically, the NPRM clarified that kitchen facilities provided in lieu of meals must include clean space for food preparation, working cooking and refrigeration appliances, and dishwashing facilities. Although no specific cooking appliances are required, the appliances provided must be sufficient to allow workers to safely prepare three meals per day, a requirement that is not met if the employer merely provides an electric hot plate, a microwave, or an outdoor community grill, or if workers are required to purchase cooking appliances or accessories, such as portable burners, charcoal, propane, or lighter fluid. The Department adopts that guidance here.

In addition, the Department noted that public accommodations such as hotels or motels frequently do not have adequate cooking facilities to satisfy an employer's obligations under this section, and, in those instances, employers must provide three meals a day to workers to meet their obligations under § 655.122(g). The Department further explained that, where workers are housed in rental or public accommodations that provide meals, the provision of such meals may be sufficient to satisfy part of the employer's obligations under § 655.122(g). However, upon further consideration of the fact that such meals are unlikely to be sufficient to satisfy the employer's obligations under

§ 655.122(g), the Department is further clarifying this guidance. Some public accommodations may provide complimentary breakfast (e.g., continental breakfast, buffet, etc.) during a specific allotted time, such as 6 a.m. to 10 a.m. Such complimentary breakfast will generally not satisfy one of the three required daily meals since the daily start time for the workday will frequently preclude the workers from having meaningful access to the meal prior to departing the public accommodation for the place of employment. In addition, and as noted below, the employer should consider whether the meal is nutritionally and calorically adequate given the work performed and the weather conditions. For example, simply providing a muffin or cold cereal for breakfast would not be sufficient to meet an employer's obligation to provide a nutritionally adequate meal. Therefore, the employer may only consider such complimentary breakfast to meet its obligation to provide meals when the breakfast is readily accessible to the workers and is nutritionally adequate.

The Department further explained in the NPRM that where an employer elects to provide meals, the meals must be provided in a timely and sanitary fashion. For example, prepared meals requiring refrigeration that are delivered hours before an anticipated mealtime would not meet the employer's meal obligation. In addition, providing access to third-party vendors but not paying the vendors directly for the workers' meals does not constitute compliance with the requirement to provide meals or facilities, even if the employer provides a meal stipend.<sup>79</sup> An employer who wishes to use a third-party vendor to provide meals may instead arrange for a third-party vendor and pay for the workers' meals or use a voucher or ticket system where the employer initially purchases the meals and distributes vouchers or tickets to workers to obtain the meals from the third-party vendor. For such arrangements, the employer may deduct the corresponding allowable meal charge only if previously disclosed and in compliance with the procedures described under proposed § 655.173. The Department further emphasized that an employer may only deduct meal charges actually incurred up to the

amount permitted under § 655.173. The Department adopts that guidance here.

As the Department did not propose any changes to this section, it received comparatively few comments. Several workers' rights advocacy organizations and one State government agency pointed out that employers frequently provide insufficient meals or overcharge workers for those meals. In response to these concerns, the State agency suggested that the Department adopt additional standards to ensure that meals provide adequate nutrition and caloric intake. One workers' rights advocacy organization also suggested that the Department amend § 655.122(g) to include a statement that meal charges remain subject to limitations imposed by the FLSA and to require employers to retain records demonstrating the actual cost of providing meals. One agent<sup>80</sup> commented that employers should be permitted to provide a meal stipend for workers to purchase their own meals, in lieu of providing the meals themselves, particularly if that is the workers' own preference.

After further reviewing these comments, the Department agrees with the workers' rights advocacy organization that the job order should explicitly state the existing requirements in § 655.173 that any meal charges remain subject to limitations and recordkeeping obligations imposed by the FLSA. Although these substantive requirements are not new, as § 655.173 already includes language explaining that meal charges are subject to the FLSA and incorporates the recordkeeping requirements at 29 CFR 516.27, the Department concludes that explicitly reiterating these requirements in the job order will better inform workers of the full terms and conditions of any meal plan offered by the employer. Accordingly, this final rule revises § 655.122(g) to reiterate § 655.173's requirement that when a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of the FLSA at 29 U.S.C. 203(m), including the recordkeeping requirements found at 29 CFR 516.27.

In addition, the Department agrees that where an employer chooses to meet

<sup>79</sup> See *Wickstrum Harvesting, LLC*, 2018-TLC-00018 (May 3, 2018) (affirming an ETA determination denying temporary agricultural labor certifications based on the employer's practice of providing workers with a stipend for meals instead of providing meals or furnishing free and convenient cooking facilities).

<sup>80</sup> The Department received many comments from employers in the reforestation industry noting that the remote, mobile nature of the work makes it difficult to access kitchen facilities or caterers, and that this was one reason why they felt it was inappropriate to include reforestation in the H-2A program. Those comments were reviewed earlier in this document, in the section discussing reforestation.

its meal obligations by providing three meals per day to workers, those meals must be calorically and nutritionally adequate. An employer's determination as to the adequacy of the meals must be reasonable—merely providing snacks such as chips or crackers, for example, would not meet an employer's meal obligations. The Department has declined to adopt any particular standard for nutritional balance and caloric sufficiency at this time but encourages employers to consult the USDA, National Institutes of Health, or other credible sources of nutrition and caloric intake guidelines.

In addition, the Department believes that providing employers with examples of established guidelines for ensuring that meals are calorically and nutritionally adequate will offer employers greater certainty when developing meal plans that such plans comply with the requirements of § 655.122(g). For example, the USDA's Dietary Guidelines for Americans 2020–2025 provide estimated calorie needs per day by age, sex, and physical activity level. They also suggest daily and weekly amounts of food groups, subgroups, and components, which may assist employers in the development of an adequate meal plan. Since the provision of adequate meals is essential to workers' health, employers must exercise care in preparing meal plans. The Department encourages employers to consult workers, when practical, about their own preferences for such plans. The Department further notes that sanctions and remedies for an employer's failure to provide sufficient meals may include, as appropriate, the recovery of back wages, the assessment of civil money penalties, and where warranted, debarment and/or revocation.

Finally, in response to the comments received regarding meal stipends, the Department notes that, as stated above, the provision of a meal stipend is not sufficient to meet an employer's meal obligations. The meal requirement is intended to ensure that workers receive adequate meals and contemplates the cost-effective preparation of such meals by the worker in their own kitchen or by an employer cooking or providing for a group. Workers who receive a stipend rather than three meals per day and do not have kitchen and cooking facilities will generally not be able to obtain equivalent meals, as they will not be able to purchase their individual meals with similar cost-effectiveness, exacerbating the problem of inadequate meals. This problem is even more acute when workers are working or living in more remote or rural locations, as is

frequently the case, particularly where they are without transportation to procure their own meals, or where they do not have time during the workday to easily reach shops or restaurants from their worksite.

The Department notes that the January 2021 draft final rule would have left § 655.122(g) unchanged. However, after further consideration of the comments received, and for the reasons discussed above, the Department has revised § 655.122(g) to reiterate certain requirements of § 655.173 regarding meal charges.

d. Paragraph (h), Transportation; Daily Subsistence

i. Paragraph (h)(1), Transportation to Place of Employment

The Department's current regulation at § 655.122(h)(1) requires, in part, that if the employer has not previously advanced transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means, and if the worker completes 50 percent of the work contract period, the employer must reimburse the worker for the reasonable transportation and subsistence costs incurred from the "place from which the worker has come to work for the employer" to the place of employment.<sup>81</sup> The Department currently interprets the "place from which the worker has come to work for the employer" to mean the "place of recruitment." This is frequently the worker's home,<sup>82</sup> but as H–2A workers are often referred and recruited informally, the place of recruitment varies. Additionally, for a worker who completes the work contract period or is terminated without cause, and who does not have immediate subsequent H–2A

employment, § 655.122(h)(2) requires the employer to provide or pay for return transportation and subsistence costs to the place of departure (*i.e.*, recruitment).<sup>83</sup>

The NPRM generally kept the requirements of § 655.122(h)(1) and (2) without change. However, the Department sought to promote the efficiency of the H–2A program by establishing a consistent location and method for calculating a worker's travel and subsistence costs from and to the place of employment. Specifically, the Department proposed to revise § 655.122(h)(1) and (2) to require an employer to provide or pay for inbound and return transportation and subsistence costs (where otherwise required by the regulation) from and to the place from which the worker departed to the employer's place of employment. For an H–2A worker departing from a location outside of the United States who must obtain a visa, the Department proposed that the place from which the worker "departed" would mean the "appropriate" U.S. embassy or consulate. The Department proposed to define the "appropriate" U.S. embassy or consulate as the U.S. embassy or consulate that issued the visa but sought comment on other definitions of "appropriate" U.S. embassy or consulate, given the differences in visa processing procedures among overseas posts. The Department further sought comment on the place of "departure" for those H–2A workers who do not require a visa to obtain H–2A status.<sup>84</sup> See 8 CFR 212.1(a); 22 CFR 41.2. The Department did not propose any changes to the place of departure (*i.e.*, the place of recruitment) for corresponding workers and those H–2A workers departing from locations inside the United States.

The Department received significant comments on this proposal. Employers,

<sup>81</sup> Section 655.122(h)(1) further requires that, when it is the prevailing practice among non-H–2A employers in the area to do so, or when offered to H–2A workers, the employer must advance transportation and subsistence costs to workers in corresponding employment. Section 655.122(h)(1) also places employers on notice that they may be subject to the FLSA, which operates independently of the H–2A program and imposes independent requirements relating to deductions from wages. See also § 655.122(p). The Department did not propose any changes to these requirements and this final rule does not affect an FLSA-covered employer's obligations under the FLSA.

<sup>82</sup> See, e.g., 2009 H–2A NPRM, 74 FR 45906, 45915 ("[T]his Proposed Rule requires the employer to pay the costs of transportation and subsistence from the worker's home to and from the place of employment."); OFLC FAQ (Sept. 15, 2010) (subsistence costs must be paid for costs incurred "during the worker's inbound trip from the point of recruitment to the employer's worksite . . . and during the worker's outbound trip from the employer's worksite to the worker's home or subsequent employment").

<sup>83</sup> Section 655.122(h)(2) further provides that, for those workers who do have immediate subsequent H–2A employment, the initial or subsequent employer must provide or cover the costs of transportation and subsistence for the travel between the initial and subsequent worksites. The obligation to provide or pay for such costs remains with the initial H–2A employer if the subsequent H–2A employer has not contractually agreed to provide or pay for such travel. This section also places employers on notice that they are not relieved of their obligation to provide or pay for return transportation and subsistence if an H–2A worker is displaced as a result of an employer's compliance with the recruitment period described in § 655.135(d). The Department did not propose any changes to these requirements.

<sup>84</sup> Pursuant to DHS regulations, H–2A workers from certain localities need not obtain a visa to be admitted to the United States, including citizens of Bermuda and Canada, Bahamian nationals, and British subjects residing in certain islands. See 8 CFR 212.1(a).

associations, and their representatives largely supported the proposal, stating that it would greatly simplify reimbursement calculations to be able to use a single, consistent place of departure. Several employers also commented that it is more logical to calculate transportation and subsistence from the U.S. embassy or consulate that issues the worker's visa, because only at that point is the worker's travel for the employer's benefit, since workers who are not able to obtain a visa cannot be employed by the H-2A employer. In addition, some employers mentioned that the FLSA requires reimbursement of travel expenses (to the extent that those travel expenses bring employees below the applicable minimum wage) in the employee's first pay period, and stated that the Department should require that the requisite travel reimbursement be made at 50 percent of the work contract period, to reduce the likelihood that a worker would take advantage of travel reimbursement at an earlier point to come into the country and then abandon the H-2A employment. Some employers also suggested that the Department consider revising the regulation to allow the employer to share the transportation costs with the employee, as the work in the United States is mutually beneficial to both the employee and employer.

In contrast, workers, workers' rights advocacy organizations, and other government agencies generally opposed this change, arguing that the cost of workers' transportation from their home to/from the embassy/consulate should be borne by the employer. They stated that transferring this cost to workers would place an undue burden on workers who frequently incur costs to obtain these job opportunities, thus increasing their vulnerability to debt and trafficking. Several commenters also noted that this change would disproportionately affect indigenous workers in rural communities, who live far from any U.S. embassy or consulate. Similarly, a couple of commenters pointed out that this change would encourage employers to either hire workers from countries with embassies that are comparatively close to the United States, such as Mexico, or to require workers to obtain their visas from U.S. consulates or embassies that are closer to the U.S. border. Some workers' rights advocacy organizations and government entities also commented that shifting this cost to workers will disadvantage and thus adversely affect U.S. workers by artificially reducing the cost of employing H-2A workers. A couple of

commenters also stated that the proposed change would cause confusion, as employers would still be liable to reimburse workers for the cost of transportation from their home to the U.S. embassy or consulate under the FLSA. However, one workers' rights advocacy organization commented favorably on the Department's clarification that the employer is required to reimburse employees for all reasonable subsistence costs (including lodging) that arise from the time at which the worker first arrives in the embassy/consulate city, while workers are following the necessary procedures to obtain their visas.

The Department did not receive any comments on how to define the "appropriate" consulate for those workers who must obtain a visa, nor did it receive any comments on the place of departure for those H-2A workers who need not obtain a visa, despite its requests for comments on both points.

After carefully considering all of the comments received, the Department has decided to retain the requirements of the 2010 H-2A Final Rule requiring employers to provide, pay, or reimburse employees for their travel and subsistence to and from the place of recruitment, which in many cases will be the worker's home. See § 655.122(h)(1), (2). Both commenters who supported the proposed change and those who opposed it recognized that the resulting cost allocation change would be significant to both workers and employers. The Department agrees with the several commenters that noted implementation of the proposed changes in the NPRM would impose an undue burden on workers, many of whom are already vulnerable to exploitation, and many of whom live in remote rural areas and incur considerable expenses traveling to the embassy/consulate city. The cost of the worker's inbound and outbound travel and subsistence is the employer's obligation, as such travel is primarily for the benefit and convenience of the employer, who would not have sufficient workers to perform necessary work without this travel due to the lack of willing and qualified local workers. The use of an administratively consistent and efficient point of departure to calculate the extent of such obligations, as proposed in the NPRM, did not alter this analysis. The Department concludes that the proposed changes in the NPRM would improperly shift to workers a significant portion of this obligation that must instead be borne fully by the employer.

The Department also believes that the Department and employers should be

able to ascertain a worker's place of recruitment without significant difficulty; indeed, such a standard has now been in place, with only a brief interruption, for more than 34 years. The recruitment information needed for the current rule generally is not difficult to obtain, and the employer has ready access to its own employees and to the recruiter it hired to acquire this information. To the extent it is difficult in any instance to ascertain the place of recruitment, the Department believes that any such difficulty cannot outweigh the significant burden that would be imposed on the worker by shifting the costs of transportation and subsistence from the place of recruitment to the embassy/consulate city. Moreover, the Department notes that the Department of State (DOS) has, at least temporarily, waived consular interviews for many nonimmigrant visa applicants, thus making it more difficult to determine the appropriate embassy or consulate under the proposal and thereby undermining the desired efficiencies of that proposed standard.<sup>85</sup> In addition, the Department believes it is unlikely that any administrative efficiencies would be achieved through the changes proposed in the NPRM, as the changes would constitute a break with longstanding procedures that are well understood by employers. And even if any such efficiencies might be achieved, the Department believes that they would be minimal in comparison to the additional financial burden shifted onto H-2A workers. In sum, the Department has now determined that, as a matter of policy, any benefits of the proposal set forth in the NPRM are outweighed by the substantial costs imposed upon workers.

Finally, in response to comments regarding the timing of reimbursement for inbound travel costs, the Department notes that the current H-2A regulation requires that inbound transportation and daily subsistence costs must be reimbursed when the worker has completed 50 percent of the work contract period, if reimbursement has not already been made. This requirement remains unchanged. However, the Department reiterates that the FLSA applies independently of the H-2A program's requirements and thus the Department cannot relieve employers of their obligations under the FLSA in this rulemaking. Where an employer has obligations under multiple laws, the employer must comply with the more worker-protective of those obligations. Accordingly, to the

<sup>85</sup> See <https://www.state.gov/expanded-interview-waivers-for-certain-nonimmigrant-visa-applicants/>.

extent that a worker's transportation and subsistence costs bring the worker's pay below the applicable minimum wage during the first pay period of employment, employers will remain responsible under the FLSA for reimbursing workers to that extent during the first pay period. However, relatedly, the Department does not agree with commenters who stated that the proposed regulation would cause greater confusion for employers regarding their FLSA obligations because even under the current regulation, H-2A employers that are also subject to the FLSA must comply with both laws, despite any differences in the amount or timing of any required reimbursements.<sup>86</sup>

#### ii. Paragraph (h)(4), Employer-Provided Transportation

The Department proposed to clarify the minimum safety standards required for employer-provided transportation in the H-2A program. The Department's current regulation at 20 CFR 655.122(h)(4) provides that employer-provided transportation must comply with applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance required under MSPA at 29 U.S.C. 1841, 29 CFR 500.105, and 29 CFR 500.120 through 500.128. However, sec. 1841 of MSPA provides that employers must comply with transportation safety regulations promulgated by the Secretary, which include not only 29 CFR 500.105, providing transportation safety standards for vehicles other than passenger automobiles and station wagons used to transport workers over 75 miles or in day-haul operations, but also 29 CFR 500.104, which provides transportation safety standards applicable to passenger automobiles or station wagons, or other vehicles, for trips of 75 miles or less, not including day-haul operations. The proposed rule therefore slightly modified the language of current 20 CFR 655.122(h)(4) by adding a citation to 29 CFR 500.104, to clarify that either § 500.104 or § 500.105 is applicable, depending upon the type of vehicle that is being used to transport workers, the distance of the trip, and whether the vehicle is being used for a day-haul operation. The Department also sought comments about additional provisions that might help prevent

driver fatigue and other unsafe driving conditions in order to improve safety in the transportation of H-2A and corresponding workers. As discussed below, this final rule adopts paragraph (h)(4) from the NPRM with minor clarifying changes.

Several commenters indicated that they supported the clarification that both §§ 500.104 and 500.105 are applicable to employer-provided transportation, depending on the type of vehicle being used to transport workers. One commenter asked for additional clarification that both standards would not apply simultaneously, but that only the appropriate standard would apply depending on the type of vehicle used to provide worker transportation, *i.e.*, either § 500.104 or § 500.105. This commenter also requested that the language at 20 CFR 655.122(h)(3), which requires the employer to "provide transportation between housing provided or secured by the employer and the employer's worksite at no cost to the worker" (and to which the Department did not propose any changes), be revised to state that employers are required to provide transportation to and from the job site only to those workers for whom the employer must provide housing. One commenter stated that it would be better to have 29 CFR 500.105 apply to all types of vehicles used to provide transportation to workers, rather than having §§ 500.104 and 500.105 apply depending upon the type of vehicle used, indicating that this would be less confusing for employers and more beneficial to workers, as § 500.105 incorporates additional safety standards. Another commenter opposed the application of § 500.104, stating that transportation safety is the concern of the Federal Motor Carrier Safety Administration, and also expressing concern that employers would be responsible for ensuring that these safety standards are met by workers' personal vehicles, when workers choose to use their own vehicles in lieu of employer-provided transportation.

Some commenters also provided feedback on the Department's request for comments about additional provisions that might help prevent driver fatigue and other unsafe driving conditions. Although one commenter indicated that driver fatigue was not a common or serious problem, most commenters acknowledged that driver fatigue and associated accidents can be a serious problem. However, several of these commenters stated that education and outreach would be more helpful than additional regulations on transportation safety. One commenter

suggested that H-2A drivers have rest period requirements similar to bus drivers and other commercial driver's license drivers. Another commenter did not address fatigue specifically but recommended that the regulation require vehicles used to transport H-2A workers to be equipped with seatbelts, as well as certain changes to prevent gaps in insurance coverage where employers rely on workers' compensation policies to meet the regulation's vehicle insurance requirements. Specifically, this commenter recommended employers be required to identify during the application process the types of transportation that will be provided to the H-2A workers (such as inbound transportation from abroad to the U.S. job site, daily transportation between the lodging and worksite, transportation to allow the workers to perform personal errands, transportation between different job sites in different States, and outbound transportation at the conclusion of the contract period). In addition, the commenter recommended that if the employer proposes to satisfy the insurance requirements through a workers' compensation policy, it must provide evidence that the policy covers all of the kinds of transportation identified. If the employer cannot do so, the commenter stated that the employer should be required to purchase liability insurance or provide a liability bond in the amount specified by the MSPA regulations.

After a careful review of the comments, the Department is adopting the regulatory text as proposed, with two minor changes for clarification, as suggested by commenters. The proposed regulatory text stated that all employer-provided transportation "must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.104 through 500.105, and 29 CFR 500.120 through 500.128." (Emphasis added.) At least one commenter was concerned that this language could be read as requiring both §§ 500.104 and 500.105 to apply to all vehicles, as discussed above. However, pursuant to § 500.102, § 500.105 applies to "[a]ny vehicle, other than a passenger automobile or station wagon" used for any trip of a distance greater than 75 miles, or pursuant to a day-haul operation, or in any manner not otherwise specified in § 500.102(a), (b), or (c), while § 500.104 applies to "[a]ny passenger automobile or station wagon" used to transport workers. Therefore, to clarify that §§ 500.104 and 500.105 do

<sup>86</sup> The Department notes that the January 2021 draft final rule would have accepted the NPRM proposal, with some modifications. However, after further consideration of the comments received, and for the reasons discussed above, the Department declines to adopt the proposed changes.

not both apply simultaneously to all vehicles, but apply alternatively depending upon the type of vehicle used, the distance of the trip, and whether the vehicle is being used for a day-haul operation, this final rule provides that all employer-provided transportation “must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.104 or 500.105, and 29 CFR 500.120 through 500.128.” (Emphasis added.) The Department has also made a conforming change to 20 CFR 655.132(e)(2), with respect to the requirements for H–2ALCs.

In addition, the prior H–2A job order form (*i.e.*, Form ETA–790A) provided text fields in which employers must describe the employer’s transportation plans for workers: (a) to the place of employment from the place from which the worker has come to work for the employer (*i.e.*, inbound); (b) from the place of employment to the place from which the worker has come to work for the employer (*i.e.*, outbound); and (c) daily, between the employer-provided housing and the places where work is performed. In response to a commenter’s suggestion, the Department has added a clarification to 20 CFR 655.122(h)(4) to reflect the requirement that employers identify in the job order the mode(s) of transportation (*e.g.*, vans, buses) that will be used for daily transportation and, if known, for inbound and outbound transportation. The Department has also added language to this section of the regulation to require an employer to identify in the job order the mode(s) of transportation that will be used, if any and if known, for other purposes, such as to allow the workers to run personal errands. In addition to apprising workers of the transportation the employer will provide, the Department concludes that this information will improve compliance with applicable transportation safety standards, including those related to vehicle insurance requirements.

In response to a commenter’s concern that these standards would apply to workers’ personal vehicles when workers choose to use their own vehicles in lieu of employer-provided transportation, the Department notes that the regulation specifically states that all *employer-provided transportation* must meet these transportation safety standards. § 655.122(h)(4). If the employer provides transportation that meets all of the requirements, and one or more employees voluntarily choose to use an employee’s personal vehicle instead,

without being directed or requested to do so by the employer, the employer would not be responsible for ensuring that the employee’s personal vehicle meets the transportation safety standards. Therefore, no revision to the regulatory language is necessary to clarify this issue. Similarly, the Department declines to adopt another commenter’s suggestion to modify the regulatory language at § 655.122(h)(3) to state that employers are only required to provide transportation to and from the employer-provided housing and the job site to those workers for whom the employer must provide housing and clarifies here that the transportation to and from the employer-provided or secured housing and job site need only be provided to workers who actually live in the housing.

The Department has chosen not to adopt any additional regulatory provisions to address driver fatigue or other safety conditions at this time. Although one commenter suggested that the Department apply to H–2A drivers rest period requirements similar to those applicable to bus drivers and other commercial driver’s license drivers, such requirements do not adequately address the broad variety of circumstances in which H–2A drivers transport workers, as many trips are short in both duration and distance. Moreover, the Department did not receive any specific suggestions or information concerning ways in which a rest period requirement could be tailored to address the varied circumstances in which H–2A drivers transport workers, and the public has not had an opportunity to comment on a proposal tailored to H–2A drivers. While the Department did not receive many comments on the issue of driver fatigue, several commenters indicated that additional education and outreach could help address driver fatigue, as discussed above. Accordingly, the Department recently published a farmworker transportation safety web page that includes tips and best practices from the U.S. Department of Transportation’s Federal Motor Carrier Safety Administration related to driver fatigue, unsafe driving practices, and driver distractions, available at <https://www.dol.gov/agencies/whd/agriculture/transportation-safety>, and will further consider how it can address this issue.

Although the Department has carefully considered the suggestion that seatbelt requirements should be specifically added to the transportation safety standards, the Department notes that the issue is generally addressed by applicable State and local laws and regulations. The Department reminds

employers that the current transportation safety standards already require compliance with all applicable Federal, State, or local laws and regulations, including applicable State or local seatbelt requirements. Currently, every State except one (New Hampshire) has an applicable seatbelt law, and the majority of States require adults to wear seatbelts in all seats, subject to certain exceptions. See Governors Highway Safety Association, *State Laws by Issue: Seat Belts* (last visited Dec. 14, 2021), <https://www.ghsa.org/state-laws/issues/seat%20belts>. Accordingly, seatbelt regulations will not be issued at this time. The Department also appreciates the insightful analysis of the potential problems that can arise when employers rely on workers’ compensation policies to meet their liability insurance obligations, and the possible regulatory revisions that might address those problems. However, the Department did not propose any changes to the regulation regarding the sufficiency of workers’ compensation to cover vehicle transportation in lieu of vehicle insurance. Many parties who would be affected by any change in these longstanding requirements therefore had no reason to anticipate any such changes or to provide comment or propose alternatives. Accordingly, the Department declines to adopt any regulatory changes to these provisions in this rulemaking.

However, the Department reminds employers that workers’ compensation insurance provides specific coverage that varies from State to State and may not cover all circumstances in which the workers are transported. For instance, transportation for a non-work-related purpose, such as a visit to the grocery store or laundromat, may not be covered under the State policy. Additionally, State workers’ compensation coverage may not apply to travel outside the State, or in some States, it may not apply to travel to and from work. If using a State workers’ compensation policy to meet the insurance requirements, it is important to be aware of precisely what type of travel is covered by the State policy and, if necessary, procure additional coverage through a liability insurance policy or liability bond for transportation not covered by the State law. An employer’s failure to maintain required insurance coverage for vehicles used to transport H–2A workers or workers in corresponding employment may result in the assessment of civil money penalties. A violation of the transportation safety requirements may



also serve as the basis for debarment or for revocation of the temporary agricultural labor certification.

e. Paragraph (i), Three-Fourths Guarantee

Although the Department did not propose, and in this final rule does not adopt, any revisions to § 655.122(i), a few employers and employer representatives provided feedback regarding changes that they would like to see incorporated into this section. Three commenters stated that due to the variability inherent in agriculture based on factors beyond the employer's control, which can make it difficult to predict the amount of work that will need to be performed in a given season, the three-fourths guarantee should be based on the 35-hour per workweek required minimum rather than on the number of hours in a workday as stated in the job order. Another commenter requested the removal of the language in § 655.122(i)(1)(iv) stating that the worker cannot be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or on Federal holidays.

The Department has carefully considered these comments. However, the Department did not propose any changes to this section in the NPRM and did not ask for comments regarding any possible modifications of the three-fourths guarantee. Accordingly, many affected parties did not provide any comments on the topic of the three-fourths guarantee, and the Department declines to make any significant changes to this provision in the absence of input from the regulated community as a whole.

f. Paragraph (j), Earning Records

The NPRM proposed minor amendments to this provision to clarify current regulatory requirements at § 655.122(j)(1), requiring an employer to maintain a worker's home address, among other information. The Department proposed that an employer maintain the worker's actual permanent home address, which is usually in the worker's country of origin. Having the worker's permanent addresses would permit the Department to contact a worker in the case of an investigation or litigation, or to distribute back wages. In its effort to enhance enforcement and modernize the H-2A program, the Department also requested comments on whether to require an employer to maintain records of a worker's email address and phone number(s) in the worker's home country, when available. As discussed below, the Department is

adopting the proposed changes to paragraph (j)(1), as well as a requirement that the employer maintain records of a worker's email address and phone number(s) in the worker's home country, when available.

The Department received very few comments in response to its proposal and request for comments on this section. Three commenters opposed the proposal, expressing concern about an employer's ability to verify the accuracy of the workers' permanent addresses, phone numbers, or email addresses, with one commenter also noting that many H-2A workers may consider that information to be private. Another commenter noted that DHS should already have H-2A workers' permanent addresses and suggested that the Department obtain that information from them. Conversely, another commenter supported the Department's proposal, commenting that it was a useful clarification and suggesting that an employer maintain records of its H-2A workers' landlines if a cellphone number is not available.

Other commenters requested that employers no longer be required to maintain a record of hours offered (as opposed to merely hours worked), as such information is difficult to track and not needed unless the employer wishes to use it towards the three-fourths guarantee. These comments are outside the scope of the Department's proposal and, as such, were not considered at this time.

After consideration of the comments, the Department adopts paragraph (j)(1) as proposed with two modifications. Specifically, paragraph (j)(1) in this final rule requires employers to maintain records of a worker's permanent home address and, when available, the worker's permanent email address and phone number(s). As with the worker's permanent home address, the worker's permanent email address and phone number(s) will usually mean the worker's contact information, usually in the worker's country of origin. Based on its enforcement experience, the Department concludes that maintaining this information, when available, will further enhance the efficiency of the Department's enforcement efforts by providing multiple points of contact for workers once the workers have left the employer's place of employment. And while the Department acknowledges that employers may not have the ability to verify the accuracy of all contact information provided by their workers, which may occasionally result in the Department attempting to contact a worker at an incorrect address, or that some workers may decline to share this

information with an employer, the benefits of maintaining this information outweigh these potential concerns. Finally, the Department notes that the January 2021 draft final rule would have left the regulatory text unchanged from the 2010 H-2A Final Rule. However, upon further consideration of the comments and in light of the substantial benefit that the collection of this information would confer to the Department in its enforcement efforts, the Department adopts the above-described changes in this final rule.

g. Paragraph (l), Rates of Pay

In the NPRM, the Department proposed to remove the statement "[i]f the worker is paid by the hour" and replace it with "[e]xcept for occupations covered by §§ 655.200 through 655.235." As explained in the NPRM, this revision clarifies that the highest applicable wage requirement applies, regardless of the unit of pay, for all employers except those employing workers primarily engaged in the herding or production of livestock on the range (*i.e.*, occupations covered by §§ 655.200 through 655.235), which are the only occupations subject to a different wage methodology. If an employer is certified for a monthly salary because, for example, the prevailing wage rate is a monthly rate, the requirement to pay the highest applicable wage means that the employer must pay the hourly AEWR for all hours worked in a given month, if paying the hourly AEWR for all hours worked in that month would result in a higher wage than the certified monthly salary. The Department did not receive comments on this specific proposal, and therefore adopts the language as proposed.

Additionally, the Department proposed to make corresponding changes to align this paragraph with the proposed changes to § 655.120(a). Those changes, as well as related comments, are discussed in more detail in the preamble to § 655.120(a). For the reasons stated in that section, the Department adopts the language in the NPRM with minor revisions to align with language regarding prevailing wages at § 655.120(c). As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language in this paragraph recognizes that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations.

The Department also received comments urging the Department to revise productivity standards for workers paid by the piece. One of these

commenters suggested the Department exercise more flexibility in its review of productivity standards, while another commenter suggested a more rigorous review. Because the Department did not propose changes to productivity standards, these comments are beyond the scope of this rulemaking.

#### h. Paragraph (n), Abandonment of Employment or Termination for Cause

The Department's current regulation at § 655.122(n) states that if a worker voluntarily abandons employment or is terminated for cause, and the employer notifies the NPC (and DHS if the worker is an H-2A worker), then the employer is not responsible for paying or providing for the worker's subsequent transportation and subsistence expenses, and that worker is not entitled to the three-fourths guarantee described in § 655.122(i). Under the Department's changes related to § 655.153, discussed below, timely notice to the NPC of such abandonment or termination will also relieve the employer from its otherwise applicable obligation to contact those U.S. workers it employed in the previous year who abandoned or were terminated for cause to solicit their return to the job. As discussed below, current § 655.153 does not require the employer to have provided the NPC with such notice in order to be relieved of the duty to contact former U.S. workers who abandoned the worksite or were dismissed for cause. The Department also proposed to revise § 655.122(n) to require an employer to maintain records of the notification to the NPC detailed in the same section, including records related to U.S. workers' abandonment of employment or termination for cause during the previous year, for not less than 3 years from the date of the temporary agricultural labor certification. As discussed below, this final rule adopts paragraph (n) from the NPRM with minor clarifying changes.

The Department received comments from employers, agents, and trade associations addressing this section. Most of these comments suggested that employers should not be required to notify the NPC of the abandonment or termination of U.S. workers. These commenters stated that, although it may be important to notify DHS that H-2A workers are out-of-status, DOL does not similarly need to know the status of U.S. workers, making it unfair to penalize employers for not making such a report, particularly as it is not required under other programs. Commenters also suggested that if the notification requirement for U.S. workers was maintained in the final rule, employers

should not be required to maintain a record of that notification, as that additional recordkeeping burden is an inefficient use of the employer's resources, particularly as the employer will generally have other records of some kind demonstrating that the workers abandoned their employment or were terminated for cause. One commenter also asked the Department to clarify that these notification and recordkeeping requirements apply only to U.S. workers in corresponding employment and suggested that the requirement be even further limited to full-time workers hired during the recruitment period pursuant to the job order, due to the fluid and migratory nature of the agricultural workforce. Another commenter suggested that abandonment, which under the current regulation 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, instead be deemed to begin after a worker fails to report for work at the regularly scheduled time for 3 consecutive working days without the consent of the employer, as workers may need to be replaced quickly due to the perishable nature of agricultural goods.

The Department has reviewed the comments suggesting that employers not be required to notify the NPC of the abandonment or termination for cause of U.S. workers. As an initial matter, the Department notes the requirement to notify the NPC of such U.S. worker abandonment or termination for cause is not new; the current regulations require employers to provide such notice in order to be relieved of the otherwise applicable contractual obligations relating to outbound transportation and the three-fourths guarantee. The Department proposed no changes to the notification requirements currently in place to relieve employers of their transportation and three-fourths guarantee contractual obligations and, accordingly, declines to adopt any changes to those existing requirements as beyond the scope of this rulemaking. As discussed further below, the Department has adopted its proposal providing that such notification to the NPC is required to relieve the employer from its obligation to contact these U.S. workers in the subsequent year under § 655.153. Accordingly, the Department has revised proposed § 655.122(n) in this final rule to clarify such relief by explicitly referencing the employer's obligations under § 655.153. Providing notification to the NPC of the abandonment or termination of U.S.

workers is not a penalty for the employer. On the contrary, it is an opportunity for the employer to cancel its existing obligations to pay for outbound travel and subsistence; ensure that the employer has met the three-fourths guarantee; and to contact former U.S. workers during recruitment, as discussed in reference to § 655.153 below. Requiring notification to the NPC also ensures that the Department is on notice that the employer considers these obligations to be inapplicable to specific workers. This notification also helps the employer establish that a worker abandoned the job or was terminated for cause.

Similarly, the Department has also decided to retain the proposed requirement that the employer must maintain a record of its notification of abandonment or termination for cause to the NPC to be relieved of their further contractual obligations to such U.S. workers. Once the employer has provided the required notification to the NPC for these workers, maintaining a record of such notifications with the employer's other records relating to the workers' abandonment or termination for cause will not substantially increase the employer's recordkeeping burden. In contrast, maintaining these records could greatly assist employers and the Department in establishing that the employer is no longer required to provide outbound travel and subsistence, the three-fourths guarantee, or recruitment contact for such workers. In response to one commenter's request for clarification, the Department confirms that the requirements for notification of abandonment or termination for cause of U.S. workers, including the recordkeeping requirement, are applicable only when the employer wishes to be relieved of further contractual obligations toward those workers; if the employer does not have any contractual obligation to provide outbound travel and subsistence, pay the three-fourths guarantee, or contact that worker for recruitment, the employer need not make such a notification for that worker.

The Department has considered the comment suggesting that the abandonment be deemed to have occurred after a worker fails to report for work at the regularly scheduled time for 3 consecutive working days without the consent of the employer, as opposed to 5 consecutive working days, but has decided to retain the current regulatory language. As the Department did not propose any changes to, or request comments on, the length of time that a worker must fail to report to work before the worker is deemed to have

abandoned their employment, the affected parties had no reason to anticipate that the Department contemplated a change to this provision, or to provide their input as to the appropriate length of time that should elapse before an absence should be considered abandonment and what factors should be considered. Therefore, the Department finds it is not appropriate to adopt such a change at this time.

i. Paragraph (o), Contract Impossibility

The NPRM proposed to retain the contract impossibility provision at paragraph (o) without change. Although the Department did not propose changes to, or invite comments regarding, this paragraph, the Department received comments from agents, trade associations, and a State government agency that addressed the contract impossibility provision. As discussed below, this provision remains unchanged from the NPRM. All of the commenters supported inclusion of the contract impossibility provision in the final rule. Three commenters suggested that the Department modify the provision. One of the commenters requested the Department add a specified timeframe for the CO's determination, such as within 48 hours of receipt. The second commenter requested the Department remove the employer's obligation to make efforts to transfer H-2A workers to comparable work and retain the obligation for U.S. workers only. The third commenter requested the Department revise this provision to clarify that an employer's request for a contract impossibility determination may involve some, but not all, of its workers, depending on the nature of the Act of God involved.

Revisions to paragraph (o) are beyond the scope of this rulemaking and are therefore not being made. A revision to paragraph (o) is not necessary, however, to address the commenter's concern about Acts of God that reduce, but do not eliminate, an employer's need for temporary workers. This provision involves permissible termination of the work contract between the employer and individual workers in the event that an Act of God renders the planned contract inviable. In the interest of striking an appropriate balance between ensuring fairness to workers and minimizing work contract disruptions, the Department does not require that requests for relief under the contract impossibility provision end the contracts with the entirety of an employer's workforce. Rather, employers are encouraged to request reductions in the quantity of workers

needed as best fits their particular circumstances.

j. Paragraph (p), Deductions

The Department's current regulation at § 655.122(p) prohibits unauthorized deductions. An employer must disclose any deductions not required by law in the job offer. The Department noted, however, that employers often fail to disclose deductions by improperly withholding Federal Insurance Contributions Act (FICA) taxes. Alternatively, employers sometimes properly disclose and withhold Federal income tax at the worker's request but fail to remit the withholding to the proper agencies. These actions, even if inadvertent, constitute violations of the H-2A statute and regulations.

The Department did not propose any change to the regulation at § 655.122(p), but clarified in the preamble to the NPRM that according to the IRS, an employer may not withhold FICA taxes from an H-2A worker's paycheck, and that an employer generally is not required to withhold Federal income tax from an H-2A worker's paycheck. In some situations, employers may even be prohibited from withholding Federal income tax under the H-2A program. The Department received no comments in response to this section of the NPRM and has made no changes to the regulation in this final rule.

k. Paragraph (q), Disclosure of Work Contract

The Department's current regulation at § 655.122(q) requires an employer to disclose a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. At a minimum, the work contract must contain all of the provisions required by § 655.122. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract. The time by which the work contract must be provided depends on whether the worker is entering the United States to commence employment or is already present in the United States; however, for most H-2A workers, this must occur by the time the worker applies for a visa. The Department proposed to retain the current disclosure requirements with one minor revision to specify that the work contract must be disclosed to those H-2A workers who do not require a visa to enter the United States under 8 CFR 212.1(a)(1) not later than the time of an offer of employment. This is the same point at which H-2A workers who

are already in the United States because they are moving between H-2A employers receive the work contract. The Department did not receive any comments on this proposed change and therefore retains the language as proposed.

4. Section 655.123, Optional Pre-Filing Positive Recruitment of U.S. Workers

In the NPRM, the Department proposed to add a new provision at § 655.123 to permit an employer to begin to conduct its positive recruitment efforts earlier in the H-2A application process.<sup>87</sup> Specifically, the Department proposed new standards and procedures establishing a "pre-filing" positive recruitment option that would allow an employer to either begin positive recruitment activities after the SWA's acceptance of the job order for clearance under § 655.121 and before submission of the *Application for Temporary Employment Certification* to the NPC (*i.e.*, pre-filing), or wait for the CO's NOA, consistent with current practice. After considering the comments received in response to the NPRM, and the subsequent impact of the Department's decisions in the 2019 H-2A Recruitment Final Rule (effective October 21, 2019) on the proposed optional pre-filing positive recruitment provision, the Department has decided not to adopt § 655.123 in this final rule for the reasons discussed below.

The INA requires the Secretary to deny a temporary agricultural labor certification if "the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed." *See* 8 U.S.C. 1188(b)(4). The requirement for employers to engage in positive recruitment is in addition to, and occurs within the same time period as, the circulation of the job order through the interstate clearance system maintained by the SWAs. *Id.* Under the 2010 H-2A Final Rule, employers begin to conduct required positive recruitment steps after the CO reviews an H-2A application and issues a NOA authorizing such recruitment of U.S. workers to commence.

<sup>87</sup> At the time the NPRM was published, an employer's positive recruitment requirements included the activities set forth in §§ 655.151 through 655.154 of the 2010 H-2A Final Rule. Subsequently, the Department rescinded §§ 655.151 and 655.152 via the 2019 H-2A Recruitment Final Rule to modernize the method(s) used to advertise H-2A job opportunities. 84 FR 49439.

As explained in the NPRM, the Department engaged in the 2019 H-2A Recruitment Final Rule rulemaking to modernize the method(s) used to advertise H-2A job opportunities for compliance with the positive recruitment requirements of the 2010 H-2A Final Rule. On September 20, 2019, shortly before the public comment period for this NPRM closed on September 24, 2019, the Department published the 2019 H-2A Recruitment Final Rule, which became effective October 21, 2019. The 2019 H-2A Recruitment Final Rule rescinded §§ 655.151 and 655.152; in lieu of employer-placed print advertisements in a newspaper of general circulation in the AIE, the Department leverages its enhanced electronic job registry, *SeasonalJobs.dol.gov*, to advertise H-2A job opportunities electronically on the employer's behalf. This change in the recruitment process reduced the employer's mandatory positive recruitment activities, while increasing post-acceptance job order exposure through the Department's electronic job registry. Moving forward, an employer's mandatory positive recruitment activities include contacting former U.S. workers, as required under § 655.153, and following the CO's instructions regarding additional positive recruitment activities for the job opportunity, as applicable under § 655.154. However, the 2019 H-2A Recruitment Final Rule did not change the existing timeframe for an employer's positive recruitment activities. As a result, effective October 21, 2019, the CO instructs employers in the NOA to begin positive recruitment of U.S. workers under §§ 655.153 and 655.154 and, contemporaneously, the CO posts the job opportunity on the Department's electronic job registry.

Applying the changes implemented in the 2019 H-2A Recruitment Final Rule to the optional pre-filing positive recruitment procedures proposed in the NPRM at § 655.123, an employer would have begun positive recruitment activities contained in §§ 655.153 (contact with former employees) and 655.154 (statutorily required recruitment in a multi-State region of traditional or expected labor supply, as designated by the Secretary), as applicable, within 7 days of SWA job order acceptance. Then, no more than 50 calendar days before its first date of need, the employer would have submitted an initial recruitment report to the CO with its H-2A application. If the employer complied with the procedures described in § 655.123 and

its H-2A application met all requirements for certification at the time of submission, the CO would have been able to issue the temporary labor certification as the CO's first action after review. An employer choosing not to begin positive recruitment early, following the proposed procedures at § 655.123, would have waited for the CO to issue the NOA and then begun positive recruitment in compliance with §§ 655.153 and 655.154.

Proposed § 655.123 would not have changed an employer's obligation to consider and hire able, willing, and qualified U.S. workers who will be available at the time and place needed to perform the labor or services involved in the application. Likewise, the proposed provision would not have changed the methods of contacting or recruiting U.S. workers an employer must use before hiring H-2A workers, or the duration of the recruitment period specified in § 655.135(d). Rather, § 655.123 would have allowed the employer to start compliance with its positive recruitment obligations earlier in the labor certification process and to engage in active recruitment of U.S. workers over a longer period of time before certification. In addition, § 655.123 would have streamlined the certification process for employers who demonstrated compliance with pre-filing recruitment obligations and met all other conditions of certification by permitting the CO to issue a certification determination as the first action.

The Department received several comments from employers, employer associations, agents, and trade associations that generally supported the optional pre-filing positive recruitment concept proposed. They viewed the option to begin positive recruitment activities earlier than current procedures allow, and thereby potentially receive a temporary labor certification as the CO's first action, as a way to reduce paperwork and burdens associated with this step, increase efficiency, and help prevent delays in workers' arrival, without undermining the program's integrity. A few also believed that the Department's certification determination would be better informed. A farm owner, for example, opined that beginning the recruitment period earlier would improve notice and access to these job opportunities for U.S. workers. Commenters employed as farmworkers generally noted the importance of notice and access to job opportunities, both in advance for planning purposes and after the work may have begun.

Two workers' rights advocacy organizations opposed the adoption of

the proposed § 655.123. One asserted the proposal would weaken the requirement that employers first try to diligently recruit and hire U.S. workers before hiring H-2A workers. The other expressed concern that positive recruitment activities too far in advance (e.g., 50 days) would waste employer resources and be ineffective because workers are engaged in other work, in other places; if the employer's positive recruitment activities occur earlier than the current regulatory timeline, the intended audience of the recruitment will not "[be] around to hear it." The commenter urged the Department to retain the "traditional systems of recruitment already in place."

Within the proposed pre-filing recruitment provision, two agents, a farm owner, and a workers' rights advocacy organization objected to the proposed timing requirement for submission of the initial pre-filing recruitment report. The agents considered the proposed timeframe requirement artificial and unnecessary due to the requirements that employers continue hiring throughout the recruitment period, update the recruitment report as necessary, and retain a final recruitment report with an account of all applicants and referrals received. In addition, one saw the timeframe requirement as potentially creating delays, for example, if the CO questioned discrepancies between the SWA referral database and the employer's initial recruitment report. The farm owner asserted that in "most years" there are no applicants or referrals. The workers' rights advocacy organization objected on the grounds insufficient recruitment would have taken place before the employer submitted the initial pre-filing recruitment report to the CO.

At least one commenter found the combination of optional procedures and mandatory obligations in proposed § 655.123 confusing and concerning. For example, the commenter feared employers might incorrectly interpret paragraphs (d) and (e) of proposed § 655.123, relating to interviews and consideration and hiring of U.S. workers, as applicable only to pre-filing recruitment, not to all H-2A program recruitment. The commenter urged the Department to return the interview requirements provision to § 655.152(j); however, the Department rescinded § 655.152 in the 2019 H-2A Recruitment Final Rule. Another commenter urged the Department to integrate regulatory changes implemented through the 2019 H-2A Recruitment Final Rule when considering comments under this rulemaking process.

The January 2021 draft final rule would have adopted the Department's pre-filing recruitment proposal at § 655.123, with clarifying modifications. For example, in that draft final rule the Department recognized the necessity of clarifying that the proposed pre-filing recruitment was an optional process. In addition, in the January 2021 draft final rule, the Department sought to clarify that those employers who opted to use the process remained subject to the program's recruitment obligations. After further considering the comments received and the Department's changes to the recruitment process in the 2019 H-2A Recruitment Final Rule, the Department has decided not to adopt the pre-filing recruitment provision and will not include proposed § 655.123 in this final rule. However, the Department has decided to retain but relocate to § 655.135(c) the mandatory recruitment obligation provisions proposed at paragraphs (d) and (e) of § 655.123. The Department recognizes the comments that highlighted potential benefits of the proposed provision but is sensitive to the potential confusion that could result from adoption of the proposed provision. In light of the concerns raised, the Department considers retaining the current system beneficial, as explained below. Therefore, this final rule retains the positive recruitment process and timing of the 2010 H-2A Final Rule, as modified by the 2019 H-2A Recruitment Final Rule. As the Department is not adopting the proposed optional pre-filing recruitment provision, this final rule does not include minor revisions to other sections, like §§ 655.144 and 655.150, that were included in the January 2021 draft final rule to conform those sections to the optional pre-filing recruitment process.

Comments on both this proposal and the proposed recruitment period changes at § 655.135(d) expressed the importance of aligning the timing of the employer's recruitment activities, such as contact with former U.S. workers, with the time periods during which U.S. workers are accustomed to such contact and most likely to be looking for agricultural job opportunities (e.g., close to or after the start date of work). In addition, employers may not be certain whether a potential pool of workers the OFLC Administrator identified through the labor supply State designation process proposed at § 655.154(d), and the related information posted regarding recruitment of that pool of workers, applies to its *Application for Temporary Employment Certification*. Furthermore, specific information about reaching the

workers (e.g., organization point of contact information) may change between the OFLC Administrator's annual posting of traditional or expected labor supply State determinations, which would hinder employers' pre-filing recruitment efforts. In contrast, in a case-specific NOA, the CO can provide current, accurate information regarding additional positive recruitment required to recruit a pool of workers relevant to the employer's job opportunity.

The Department believes that retaining the longstanding requirement that employers contact former U.S. workers and conduct additional positive recruitment activities, as applicable, following the CO's instructions in the NOA, in combination with the Department's decision to retain the requirement that employers continue to hire qualified U.S. workers through 50 percent of the contract period (as discussed in the preamble to § 655.135(d) below) will more effectively ensure U.S. worker access to H-2A job opportunities advertised through positive recruitment activities than the optional pre-filing recruitment proposed in the NPRM. This will also avoid the potential for confusion among U.S. job seekers or employers cited above. Specifically, the Department believes that this final rule will ensure that: (1) recruitment of U.S. workers occurs for a sufficient period of time before and after the first date of need; (2) active employer recruitment occurs during a period of time that is most consistent with the common job seeking practices of U.S. agricultural workers; and, (3) where appropriate, employers receive specific instructions in the NOA regarding the additional positive recruitment activity required and the documentation to retain as evidence of compliance. As discussed above and based on the Department's past experience administering the existing positive recruitment procedures and requirements, the Department believes these provisions effectively provide notice of available job opportunities to U.S. workers.

As a result, through this final rule, the Department retains the positive recruitment timing required in the 2010 H-2A Final Rule. An employer will continue to file a job order no fewer than 60 calendar days before the employer's first date of need, except where the employer files the application under the emergency situations provision at § 655.134, and, upon SWA approval of the job order, intrastate recruitment will begin. Recruitment through the active job order will expand to interstate clearance with the CO's

issuance of a NOA and continue throughout the 50 percent period. When issuing the NOA, the CO will post the job opportunity on the Department's electronic job registry, which will broadcast the job offer information through the Department's enhanced electronic job registry at *SeasonalJobs.dol.gov* and ensure the job opportunity posting is continuously accessible to prospective applicants, regardless of their location, until the recruitment period at § 655.135(d) ends. In addition, upon receipt of the NOA, the employer will follow the CO's instructions and begin to conduct positive recruitment activities by contacting former employees to determine their willingness to accept the employer's job opportunity, as discussed further in the preamble to § 655.153 below, and conducting additional positive recruitment based on the OFLC Administrator's determination that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed, as discussed in the preamble to §§ 655.143 and 655.154.

In addition to the comments addressed above, some commenters offered opinions about matters that had been open for public notice and comment through the 2019 H-2A Recruitment Final Rule; those comments are outside the scope of this rulemaking. Other commenters expressed general concerns about employers' methods of contact, interview procedures, consideration of applicants or referrals, and documentation retention, which are matters that are also outside the scope of the optional pre-filing positive recruitment timing proposed in the NPRM.

##### 5. Section 655.124, Withdrawal of a Job Order

The NPRM proposed to reorganize all withdrawal provisions so that, for example, the procedure for withdrawing the *Application for Temporary Employment Certification* and job order is located in the section of the rule where an employer at that stage of the labor certification process would look for such a provision. Accordingly, the NPRM proposed revisions to move the job order withdrawal provisions at § 655.172(a) of the 2010 H-2A Final Rule to this new section, and to conform with other proposed changes in the NPRM. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as

discussed below, this provision remains unchanged from the NPRM.

In the 2010 H-2A Final Rule, all withdrawal provisions were found at § 655.172, in the “Post-Certification” section of the regulations, regardless of the stage of processing to which they applied. For example, at § 655.172(a), the 2010 H-2A Final Rule addressed the conditions under which an employer could withdraw a job order before it submitted the related *Application for Temporary Employment Certification*. To make the rule better organized and more user-friendly, the Department proposed to reorganize the withdrawal provisions, in part, by moving the content of § 655.172(a) of the 2010 H-2A Final Rule to the “Pre-Filing Procedures” section of the regulations, in a new proposed § 655.124. This change would place the job order withdrawal provision in a more logical location within the regulations—in the “Pre-Filing Procedures” section with the job order filing and review procedures, and before the “Application for Temporary Employment Certification Filing Procedures” section that begins at § 655.130.

In addition to the proposal to relocate the job order withdrawal provision to § 655.124, the Department proposed minor revisions for both clarity and consistency with other proposed changes. In proposed § 655.124(a), the Department continued the 2010 H-2A Final Rule’s reminder in § 655.172(a) that “withdrawal of a job order does not nullify existing obligations to those workers recruited in connection with the placement of a job order pursuant to this subpart” with greater simplicity. In proposed § 655.124(b), consistent with the proposal employers submit their job orders to the NPC, the Department proposed to establish the NPC as the recipient of job order withdrawal requests.

The Department received no comments objecting to the proposed reorganization of the job order withdrawal provision from § 655.172(a) to § 655.124. However, an agent voiced concerns about establishing the NPC as the recipient of job order withdrawal requests, and that agent and a few other commenters remarked on an employer’s continuing obligations after the job order’s withdrawal.

Regarding the Department’s proposal to establish the NPC as the recipient of job order withdrawal requests, the commenter argued that the Department did not consider the costs and benefits of this particular change, particularly that it would result in undue delays in processing, and also that it lacks the authority to perform what the

commenter considers an inherently State function. The Department respectfully disagrees. The costs and benefits of establishing the NPC as the conduit through which job orders are received and transmitted to the SWAs, including technological efficiencies gained in the processing of job orders through the Department’s electronic filing system, are addressed in connection with § 655.121. Those costs and benefits encompass receipt and transmission of job order withdrawal requests. In addition, the Department addressed similar concerns about possible delays in the preamble to § 655.121. The NPC will transmit an employer’s request for withdrawal of a job order within the FLAG system to all SWAs actively recruiting under the job order. The SWAs that received the job order in accordance with § 655.121(e)(1) and, if applicable, § 655.121(f) will receive notice simultaneously and without delay. Further, the SWAs, not the NPC, will initiate procedures to close withdrawn job orders in the clearance system, as appropriate. As with its transmission of the initial job order submission to the SWA for review under § 655.121(e)(1) and transmission of the approved job order to other SWAs for clearance under § 655.121(f), the procedural role proposed in § 655.124 does not exceed the NPC’s authority.

The same agent and a few other commenters objected to employers being “obligated to comply with the terms and conditions of employment contained in the job order with respect to all workers recruited in connection with that job order” after withdrawal of the job order. Two suggested an employer should be required to honor the terms of a job order only if the employer has filed an *Application for Temporary Employment Certification* with the NPC, with one citing emergency circumstances beyond an employer’s control that may prevent the employer from continuing with the H-2A process. The other two commenters objected to continuing obligations beyond withdrawal of the job order, apparently without regard to when the job order is withdrawn. However, these comments overstate the Department’s proposed changes and conflict with the underlying obligation that was continued from § 655.172 of the 2010 H-2A Final Rule.

Although the Department proposed clearer language to express an employer’s continuing obligations to a worker recruited in connection with the job order it seeks to withdraw, the Department proposed no change to the underlying requirement. If an employer successfully recruits workers through

SWA referrals, the employer is bound by the terms and conditions of employment offered in the job order with respect to those workers, including but not limited to wages, housing, and transportation. See § 653.501(c)(3)(viii). As stated in the NPRM, and the 2010 H-2A Final Rule, these obligations attach at recruitment and continue after withdrawal. As a result, these comments recommend changes that are beyond the scope of this rulemaking.

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

#### 1. Section 655.130, Application Filing Requirements

a. Paragraphs (a), What To File; (c), Location and Method of Filing; and (d), Original Signature

The NPRM proposed minor amendments to these sections to clarify the minimum content requirements of a complete *Application for Temporary Employment Certification*; modernize the application process by requiring that employers, unless a specific exemption applies, electronically submit the *Application for Temporary Employment Certification* and all required supporting documentation; and permit the use of electronic signatures by the employer and, if applicable, the employer’s authorized attorney, agent, or surety. The Department received many comments on the proposed amendments to these sections, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed language under paragraph (a) to clarify that the content of a complete *Application for Temporary Employment Certification* for submission to the Department must include a completed *Application for Temporary Employment Certification*; all supporting documentation and information required at the time of filing under §§ 655.131 through 655.135; and, unless a specific exemption applies, a copy of Form ETA-790/790A, submitted as set forth in § 655.121(a). The employer’s valid FEIN, a valid place of business (physical location) in the United States, and a means by which the employer may be contacted for employment must be included in the employer’s submission.

As discussed in the NPRM, OFLC’s FLAG system will assist employers and their representatives in preparing complete submissions, as it will not permit an employer to submit an *Application for Temporary Employment Certification* until the employer

completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all documentation and information required at the time of filing, including a copy of the job order submitted in accordance with § 655.121. For applications permitted to be filed by mail pursuant to the procedures discussed below, if an employer submits an application that is incomplete or contains errors, the Department will issue a NOD identifying any deficiencies, and the employer will be required to mail back a revised application, thus requiring a timely back-and-forth to complete the application.

The Department proposed language under paragraph (c) to require an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator. The Department also proposed procedures that would permit employers lacking adequate access to e-filing to file by mail and would permit employers that are unable or limited in their ability to use or access the electronic application due to a disability to request an accommodation to allow them to access and file the application through other means. Under proposed paragraph (c)(2), employers could request an accommodation if they are limited in their ability to use, or are unable to access, electronic forms or communication due to a disability. Unless the employer requested an accommodation due to a disability or inadequate access to e-filing, the NPC would return, without review, any *Application for Temporary Employment Certification* submitted using a method other than the electronic method(s) designated by the OFLC Administrator. Finally, proposed paragraph (d) of this section adopted the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney, agent, or surety.

The Department received many comments expressing strong support for the e-filing proposals as a way to improve the quality and accuracy of documents the Department receives and reduce processing times and paperwork burdens for employers, the Department, and SWAs. Some of these commenters noted employers in rural and remote areas may not have access to the means to file electronically, and they urged the Department to retain in the final rule proposed paragraphs (c)(2) and (3) of this section that permit filing by mail,

provided the employer submits, in writing, a request for reasonable accommodation. In response to these comments, the Department agrees and has retained these provisions in this final rule.

Commenters also generally supported the proposal to require electronic signatures for all electronically filed applications, though several commenters stated they would not support any provision requiring the filer to electronically sign documents within the FLAG system or prohibiting the filer from using copies of a "wet" signature. One commenter also expressed concern DHS might not accept the electronic signatures required under this final rule.

This final rule does not require employers to sign documents within the FLAG system, and it does not prohibit handwritten "wet" signatures, which filers electronically copy (scan) and upload into the electronic filing system, while retaining the original in the employer's document retention file. Under this provision, in addition to accepting electronic (scanned) copies of "wet" signatures, the OFLC Administrator will permit an employer, agent, or attorney to sign or certify a document required under this subpart using a valid electronic signature method. Consistent with the Government Paperwork Elimination Act (GPEA)<sup>88</sup> and Electronic Signatures in Global and National Commerce Act (E-SIGN Act),<sup>89</sup> the Department is adopting a "technology neutral" policy with respect to the requirements for electronic signatures. That is, the employer, agent, or attorney can apply a required electronic signature on a document using any available technology that can meet the five signing requirements in OMB guidelines: (1) the signer must use an acceptable electronic form of signature; (2) the electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record; (3) the electronic form of signature must be attached to or associated with the electronic record being signed; (4) there must be a means to identify and authenticate a particular person as the signer; and (5) there must be a means to preserve the integrity of the signed record.<sup>90</sup> The OFLC Administrator will accept electronic signatures affixed to required

documents using any available technology that meets the five signing requirements above. DHS will accept electronic signatures that have been accepted by the Department. As noted in the NPRM, the GPEA specifically states electronic records and their related electronic signatures are not to be denied legal effect, validity, or enforceability merely because they are in electronic form, and encourages Federal Government use of a range of electronic signature alternatives. *See* secs. 1704 and 1707 of the GPEA. In addition, this approach is consistent with the Department's conclusion in an earlier rulemaking that these standards for accepting electronic signatures are reasonable and accepted by Federal agencies.<sup>91</sup>

Finally, one SWA that supported the e-filing proposal also urged the Department to use the e-filing process to collect demographic information, including information identifying areas with a high concentration of certified workers and a detailed breakdown of the number of workers certified by occupation. The commenter stated this information is often requested of SWAs and enhanced collection of the information would allow SWAs to better assess farm labor trends and address regional employment needs. The Department agrees it is important to collect H-2A program information and make it available to the public. The Department will continue to collect detailed program information, including information about work locations and certification numbers by occupation, and publish this information on the OFLC website and in periodic reports produced by the agency.

#### b. Paragraph (e), Scope of Applications

The NPRM proposed amendments to this section to clarify the geographic scope of all *Applications for Temporary Employment Certification* submitted by employers to the NPC and permit the filing of only one *Application for Temporary Employment Certification* for place(s) of employment covering the same geographic scope, period of employment, and occupation or comparable work. The Department received many comments on the proposed amendments to these sections. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several revisions discussed below.

<sup>88</sup>Public Law 105-277, Title XVII (Secs. 1701-1710), 112 Stat. 2681-749 (Oct. 21, 1998), 44 U.S.C. 3504.

<sup>89</sup>Public Law 106-229, 114 Stat. 464 (June 30, 2000), 15 U.S.C. 7001 *et seq.*

<sup>90</sup>Federal Chief Information Council, *Use of Electronic Signatures in Federal Organization Transactions*, Version 1.0 (Jan. 25, 2013).

<sup>91</sup>*See* Interim Final Rule, *Labor Certification Process for Temporary Employment in the Commonwealth of the Northern Mariana Islands (CW-1 Workers)*, 84 FR 12380, 12393 (Apr. 1, 2019).



The Department proposed a new paragraph (e) to clarify that each *Application for Temporary Employment Certification* must be limited to places of employment within a single AIE, except where otherwise permitted by the subpart (e.g., under § 655.131(a)(2)), a master application may include places of employment within two contiguous States). This proposal addressed the overall lack of clarity in the 2010 H-2A Final Rule regarding whether an application could include places of employment that span more than one AIE, and ambiguity created by its revisions to § 655.132(a), which specifically limited only H-2ALC applications to places of employment within a single AIE. As stated in the NPRM, limiting the geographic scope of H-2A program job opportunities is an essential component of the labor market test necessary to determine both the availability of U.S. workers for the job opportunity and to ensure that U.S. workers in the local or regional area have an opportunity to apply for those job opportunities located within normal commuting distance of their permanent residences. The Department noted that qualified U.S. workers may be discouraged from applying for these job opportunities if required to perform work at places of employment both within and outside the normal commuting area or where assignment to places of employment outside normal commuting distance was possible, despite the availability of closer work. Furthermore, the Department stated that monitoring program compliance becomes more difficult and the potential for violations increases when workers employed under a single *Application for Temporary Employment Certification* are dispersed across more than one AIE.

After considering the comments received, the Department has decided to adopt this provision, with two modifications. First, the Department split this section into two parts; paragraph (e)(1) addresses the geographic scope limitation, while paragraph (e)(2) maintains the administrative limitation that an employer may file only one *Application for Temporary Employment Certification* covering the same AIE, period of employment, and occupation or comparable work to be performed. Second, as discussed below, the Department modified paragraph (e)(1) to address job opportunities that involve mobility within the workday, after the workday begins.

Employers, agents, and trade associations generally objected to a single AIE limit on fixed-site employer applications. Two commenters viewed

it as a limit on the size of farm that can be included on an *Application for Temporary Employment Certification*, explaining that it is not uncommon for a farm to consist of multiple locations (e.g., fields or packing facilities) that may be in close proximity or may be located more broadly throughout a particular growing region of the State. These commenters argued that incidental travel during the regular paid workday in employer-provided vehicles, for example to pick up or deliver crops, move workers between farm locations, etc., should not be a factor in determining the geographic scope of an *Application for Temporary Employment Certification*. In addition, one commenter added that there should be no limit to distances on travel “as the first worksite location or the employer’s pick-up location are clearly defined and transportation between worksites is provided and paid by the employer.” Other commenters explained that restricting an H-2ALC *Application for Temporary Employment Certification* to one AIE may be justified for monitoring purposes, as such employers provide labor services to various fixed-site growers in different areas according to contracts, unlike a fixed-site grower, which has a known fixed location where the Department can go to perform its monitoring process. One of them objected to what it viewed as a significant change that would apply a restriction reasonable for H-2ALCs but not for fixed-site growers. The commenter urged the Department, without explanation, to retain the single AIE restriction for H-2ALCs only.

Farmworkers and interested private citizens emphasized the importance of local work for farmworkers and generally agreed with the Department’s concern that job opportunities with worksites outside the local commuting area discourage U.S. applicants. These commenters provided examples of the difficulties in getting to job opportunities that are not local, whether due to challenges in arranging rides to work or problems with work-life balance when the commute is too long. A workers’ rights advocacy organization explained that broad determinations of AIE (i.e., “normal commute” to the job) are misused to refuse housing—and related transportation to worksites—to U.S. workers who reside within large AIE.<sup>92</sup>

The Department sought to strike an appropriate balance between the domestic labor market interests served

<sup>92</sup> The Department also addressed these comments in connection with the definition of AIE at § 655.103(b).

by a single AIE geographic limitation on an *Application for Temporary Employment Certification* and the geographic flexibility growers need within a particular workday for certain job opportunities (e.g., truck drivers who deliver crops to market), which do not impact workers’ commute time or distance. To that end, in this final rule, the Department revised proposed paragraph (e)(1) to clarify that where a job opportunity involves work at multiple places of employment after the workday begins, the *Application for Temporary Employment Certification* may include places of employment outside a single AIE. First, this language ensures that any travel outside the AIE occurs during the workday and thus is compensable time.<sup>93</sup> Second, the revised language limits such within-workday mobility to only those job opportunities where it is necessary to perform the duties specified in the *Application for Temporary Employment Certification*. Last, the revised language specifies that this expanded geographic area (i.e., places of employment beyond the AIE after the workday begins) is permitted only if workers can reasonably return to their residence or employer-provided housing within the same workday. This parameter ensures that *Applications for Temporary Employment Certification*, subject to paragraph (e), include places of employment outside a single AIE only where there is no impact to the reasonable, normal, and safe daily commute for all of the employer’s workers who reside within the AIE, whether at their own residence or in employer-provided housing.

Accordingly, the additional language in paragraph (e)(1) accommodates the types of job opportunities commenters described (e.g., truck drivers delivering their employer’s crop to market or storage) as unreasonably limited by a single AIE limitation, without negative impact to workers or the underlying labor market test. This text is consistent with the definitions of AIE and place of employment in § 655.103(b), and with

<sup>93</sup> As the INA does not define “hours worked,” the Department has concluded that it is beneficial for workers, employers, agents, and WHD to ground enforcement of INA program obligations in its decades of experience enforcing the FLSA, which applies to H-2A workers. See 2015 H-2B IFR, 80 FR 24042, 24062. The FLSA clarifies that, unlike normal home-to-work travel, which need not be compensated, time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. See 29 CFR 785.38. The Department also discusses the relationship between the INA and FLSA hours worked principles in its response to public comments on 20 CFR 655.300.

the comments discussed in the preamble for those definitions.

Regarding paragraph (e)(2), as explained in the NPRM, this provision prevents the Department from receiving and processing duplicate applications and reduces duplicative efforts by preventing an employer from filing a new application for the same job opportunity while an appeal is pending. Paragraph (e)(2) also clarifies that filing more than one *Application for Temporary Employment Certification* is necessary only when an employer needs workers to perform full-time job opportunities that do not involve the same occupation or comparable work, or when workers perform the same full-time work but in a different AIE or with different starting and ending dates (e.g., staggered start dates while ramping up). With respect to this provision, the Department did not receive any comments; accordingly, the Department is adopting this portion of the proposed regulatory text into clause (e)(2) without further change.

#### c. Paragraph (f), Staggered Entry of H-2A Workers

Current regulations require an employer to file separate *Applications for Temporary Employment Certification* for each sequential start date of work for each group of job opportunities. The NPRM proposed to add a new paragraph (f) at § 655.130 to allow an employer with an H-2A certification and an approved H-2A Petition to bring H-2A workers into the United States at any time during the 120-day period that follows the first date of need identified on the certified *Application for Temporary Employment Certification* (i.e., staggered entry of H-2A workers for up to 120 days), under certain conditions.

The Department received various comments on the proposed staggered entry provision. Many commenters—including trade associations, employers, agents, individual commenters, two State government agencies, and a State elected official—expressed general support for the Department's proposal to allow the staggered entry of H-2A workers under a single *Application for Temporary Employment Certification*. The Department also received multiple comments on this proposal from public policy organizations, workers' rights advocacy organizations, immigration advocacy organizations, trade associations, individual commenters, a commenter from academia, two State government agencies, and two U.S. Senators. These comments highlighted a need for substantial revision of the proposal, both for clarification and to

better maintain program integrity. After considering these comments, the Department has decided not to adopt the proposed staggered entry provision in this final rule, for the reasons discussed below.

Commenters who expressed support for the staggered entry proposal generally viewed it as a beneficial simplification of the H-2A program, particularly where an employer has labor-need phases within a season or growing cycle and currently files multiple, separate *Applications for Temporary Employment Certification* for each sequential start date. A few commenters explained, for example, that farmers rarely need their entire workforce at the beginning of a season, but instead need a steadily increasing number of workers as the harvest intensifies. An agent asserted that there is no law or regulation that prohibits staggered entry and urged the Department to retain this option in the final rule to enable employers to account for gradual changes to their labor needs through a single H-2A certification. Other commenters viewed staggered entry as a practical method of accommodating unpredictable factors, such as weather, that may change the exact timing of an employer's labor need within the season. A State elected official said staggered entry would help producers remain in compliance with regulations, while adapting to changing needs and conditions. Some commenters stated that the proposal would support efficient use of farm resources, reduce costs and paperwork burdens, both at the border and on the farm, and create efficiencies for the Department by reducing application processing workload. Some commenters remarked that the proposal would also benefit U.S. workers, who could apply for job opportunities during the extended staggered entry recruitment period.

Some of the commenters that supported the proposal urged the Department to provide additional flexibility for employers within the proposed staggered entry provision. For instance, some employers, trade associations, and agents urged the Department to add the word "anticipated" before "latest date on which such workers will enter" in paragraph (f), explaining employers may not know the exact dates when filing requests because of the unpredictable influence of weather on agricultural employers' labor needs. Another commenter urged the Department to extend the staggered entry provision beyond the proposed 120 days to accommodate potential delays while

recruiting workers abroad, without suggesting an alternative end date. As the Department is not adopting the proposed staggered entry provision in this final rule, these suggestions are moot.

Among commenters opposed to the proposal, the primary concern was that permitting staggered entry of H-2A workers at any time up to 120 days after the advertised date of need would undermine the labor market test and negatively impact U.S. worker access to job opportunities. In addition to concerns about a reduced recruitment period, these commenters expressed concern that U.S. workers would lack clear, accurate information about job opportunities, such as start dates and when jobs are available. Two U.S. Senators stated the staggered entry proposal would introduce instability into domestic and foreign labor markets due to the lack of notification around reliable dates of employment. Workers' rights advocacy organizations expressed concern that U.S. workers would be disadvantaged because staggering would make it more difficult for them to learn of and apply for job opportunities. One of these commenters explained that having accurate, fixed information on dates, locations, and numbers of workers is essential to the labor market test, and staggered entry of H-2A workers would invalidate labor market determinations because the key information on which those determinations are based would change. One of the comment submissions consolidated many comments from agricultural workers who described the importance of knowing when seasonal work will begin and expressed concern over the staggered entry provision. A State agency expressed concern the proposal would complicate the recruitment efforts of SWAs. The two U.S. Senators and three State government agencies recognized the benefits of staggered entry for employers, but did not see benefits for workers, other than, perhaps, for those workers who could not commit to the full duration of employment but could commit to a later start date. The Senators and one of the State agencies asserted that extending the recruitment period for employers who chose to stagger entry of H-2A workers would not sufficiently remedy the harm resulting from the provision.

Another commenter urged the Department to continue to require a separate application if an employer decides to bring in more H-2A workers at a later date in a particular harvesting season, asserting that this is an important safeguard for U.S. workers, as

it provides U.S. workers a new, distinct opportunity to apply when H-2A recruitment activity for each subsequent start date commences, particularly in situations where a U.S. worker is not aware of the recruitment for the first start date of need, or is not available on the employer's first date of need. This commenter questioned how a U.S. worker would know whether the employer is still accepting applications for the job opportunity. A commenter from academia suggested that, if the Department were to adopt a staggered entry provision, then the Department should consider imposing additional recruitment requirements on employers, such as requiring employers to provide additional notice to SWAs that coincides with each phase of staggered entry.

Some commenters who opposed the staggered entry provision expressed concern about the potential for misuse. A workers' rights advocacy organization asserted the staggered entry proposal would provide a disincentive for employers to hire U.S. workers for the gradual start of the season and would make it easier for employers to fire workers (both U.S. and H-2A workers) who are not working up to productivity requirements and replace them with new H-2A workers throughout the staggering period. This commenter also envisioned employers establishing early start dates as a method of thwarting the recruitment of domestic workers. Another workers' rights advocacy organization noted many agricultural workers "alter their migration patterns depending on the terms and conditions of employment" and expressed concern that the staggered entry option would allow employers to "manipulate traditional labor and recruitment patterns through massive applications covering multiple start dates and areas of employment" and refuse employment to U.S. workers after the recruitment period ends. One of the State government commenters expressed concern that employers would use the ability to update the terms of employment to bring in foreign workers according to evolving need, which it asserted would violate MSPA's disclosure requirements and limit the ability of U.S. workers to obtain agricultural jobs. Another State government commenter expressed concern about the potential for the unlawful movement of workers, thinking that staggered entry could increase the difficulty in tracking and identifying such movement.

A few State agencies suggested that aspects of the proposed provision could be revised for clarity and efficiency.

Specifically, one State agency noted the proposal did not set a limit on the number of times an employer may notify the NPC of its intent to stagger entry of H-2A workers and expressed the concern that an employer could submit multiple notices identifying different staffing plans. The commenter was concerned that multiple notices would result in increased communication between the Department, the SWA, and field staff, and would offset any efficiencies potentially gained by the staggered entry provision. Another State agency expressed the concern that allowing employers to opt into using the staggered entry up to 14 days after the first date of need could complicate the process of obtaining an H-2A visa, which could lead to unreimbursed travel and subsistence costs between the workers' home and the U.S. embassy or consulate.

In addition, the Department received other comments indicating a need for clarification of the proposal to permit staggered entry, if the Department were to adopt such a provision in this final rule. For instance, a few commenters sought confirmation that employers would not be prohibited from filing multiple, separate applications for sequential needs, rather than opting to use staggered entry. An association mistakenly understood that the proposed language indicated associations filing joint master applications would not be permitted to stagger the entry of H-2A workers or would have less flexibility than other joint employers. Another commenter mistakenly believed that the staggered entry option could be used by livestock employers to have workers arrive whenever needed; for example, to gather livestock in advance of a major storm event, which may occur outside the employer's seasonal need period or more than 120 days after its first date of need. Two U.S. Senators expressed concern that the staggered entry proposal could complicate compliance with the three-fourths guarantee that dictates the minimum number of hours an employer must offer to workers. Two State government agencies and a State elected official thought the proposal would increase SWA burdens and complicate their provision of services to workers, without an increase in funding, while another State government agency and an individual commenter requested guidance on how the staggered entry provision would affect completed certified housing inspections. One of the commenters explained that in some States, such as Oregon, SWA staff

conduct site visits at the beginning of each H-2A contract, in part, to provide information to arriving workers about its services and workers' rights. The commenter believed that if workers were to arrive on multiple start dates, the SWA would be required to conduct multiple site visits per contract to provide the same services, rather than one per contract. Further, the commenter expressed concern that some arriving workers might not receive information through a site visit, as the SWA may not be informed when new workers arrive during the staggering period.

Commenters disagreed as to when the employer's obligation to hire U.S. workers should end (*i.e.*, how long the recruitment period under § 655.135(d)(2) should be) if the employer opted to use staggered entry. Some agreed with the Department's proposal to require the employer to hire U.S. workers through the employer's identified last date for staggering, or 30 days after the first start date, whichever is later. Some commenters clarified that they did not support attempts to extend the proposed hiring period beyond those proposed parameters. One argued that anything beyond 30 days after the last H-2A worker has entered the United States is overregulation, asserting there is no statutory prohibition against staggered entry. However, other commenters generally objected to any reduction in the period during which an employer is required to hire U.S. workers. A workers' rights advocacy organization objected to not including any recruitment obligations past the last date of staggered entry and two commenters suggested the employer's hiring obligation should be tied to the last entry of staggered workers. They urged the Department, for example, to extend an employer's obligation to hire U.S. workers to 30 days after the last H-2A foreign worker enters the United States or 30 days after each sequential staggered start date. In addition, some commenters expressed concern that the combination of proposals in this rulemaking, including staggered entry, would undermine the legitimacy of the labor market test, including the commenter from academia, who asserted the Department failed to evaluate the impact of the provision on the labor market test and urged the Department to evaluate the impact.

The Department also received a few comments addressing issues beyond the scope of the staggered entry proposal. A trade association and an employer involved in the apple production industry discussed the impact of

weather on predicting end dates for employers, and suggested the proposal should allow employers the flexibility to retain workers for an additional period after the anticipated end date of the work order without needing to file an extension. However, the staggered entry proposal involved only start date variability. End date flexibility, as the commenter noted, is already addressed through the extension provision at § 655.170. In addition, a workers' rights advocacy organization suggested the Department should revise the regulations to require a minimum training period in which workers may not be fired for failing to comply with productivity standards, so that employers would not terminate workers who do not initially meet productivity requirements and replace them with staggered workers. However, this suggestion is beyond the scope of this rulemaking.

The Department appreciates the many comments it received on the proposed staggered entry provision. The Department recognizes that in administering the H-2A program, it must strike an appropriate balance between the need to provide U.S. workers notice of available agricultural job opportunities, including clarity regarding the terms and conditions offered, and the opportunity to apply for those job opportunities, and, where insufficient U.S. workers are available to satisfy an employer's temporary agricultural labor need, the need to provide employers access to a pool of foreign labor through effective administration of the H-2A program. The Department is sensitive to comments indicating that the staggered entry provision proposed in the NPRM did not successfully strike this balance and, if adopted without revision, would have weakened the integrity of the labor market test and effective compliance monitoring and enforcement of program obligations, which was not the Department's intent. The Department recognizes that concerns expressed by commenters would require substantial revisions to address the significant limitations of the staggered entry proposal set forth in the NPRM: to address confusing aspects of the proposal; to ensure effective recruitment of U.S. workers for job opportunities, particularly where multiple or mid-season start dates are available; and to include parameters that balance flexibility, efficiency, and notice to prospective applicants, such as a single pre-certification opportunity to submit notice of intent to stagger entry. The Department agrees that additional

guidance would be necessary to clarify how the provision would effectively operate in practice and to clarify the standards for enforcing program compliance.

The Department appreciates the concerns of workers' rights and immigration advocacy organizations, U.S. Senators, agricultural workers, and others that the proposed provision could make it more difficult for U.S. workers to learn of available H-2A job opportunities. For example, the Department is sensitive to commenters' concerns regarding the information provided to U.S. workers during the recruitment period and agrees that substantial revisions to the proposed provision would be required to ensure that sufficient information is collected and made available to prospective U.S. worker applicants in the job order and other recruitment. The provision of such information is critical so that U.S. workers may, for example, apply for their preferred start date within the employer's staggered entry plan. Additional disclosure requirements could better apprise U.S. workers of available job opportunities and start date options, which would, in turn, address concerns about agricultural workers' ability to plan their migration routes.

The Department also is sensitive to the concerns of commenters, including State agencies, that applications with multiple start dates of need may raise administrative challenges that merit further consideration and may increase, rather than reduce, administrative burdens and complicate SWA recruitment efforts. For example, applications with multiple start dates of need may require additional communication between the CO and SWA related to modifications to job orders that are active in the SWA clearance system and the Department's electronic job registry, as necessary to ensure prospective applicants receive clear information about available start dates. Additional parameters on the number and timing of such modifications could minimize the administrative impact of such modifications, while simultaneously supporting clearer information disclosure to prospective applicants.

Although the Department believes that a staggered entry provision may provide beneficial employer flexibilities and program administration efficiencies, the commenters correctly identified many areas in which the proposal would need to be substantially changed in order to properly balance employer and U.S. worker interests. At this time, the Department declines to adopt the

proposed staggered entry provision, even with substantial revisions considered in the January 2021 draft final rule, as it may present significant drawbacks and unintended consequences.<sup>94</sup> If the Department determines it is appropriate to propose a similar provision in the future that better strikes a balance between the need to provide U.S. workers notice of available agricultural job opportunities—including clarity regarding the terms and conditions offered, and the opportunity to apply for those job opportunities—and the need to provide employers access to a pool of foreign labor through effective administration of the H-2A program, it will do so via the notice and comment rulemaking process, providing the public an opportunity to comment on any such proposal. Accordingly, under this final rule, an employer who anticipates a need for different groups of workers to begin work on sequential start dates must continue to file separate *Applications for Temporary Employment Certification*, each reflecting a distinct start date within the employer's temporary or seasonal need for labor, and engage in recruitment tied to each of those start dates, as provided in the 2010 H-2A Final Rule.

#### d. Paragraph (f), Information Dissemination

The Department proposed minor amendments to newly designated paragraph (f) (formerly paragraph (e)) in the 2010 H-2A Final Rule and proposed at paragraph (g) in the NPRM) to clarify that OFLC may provide information received in the course of processing *Applications for Temporary Employment Certification*, or in the course of conducting program integrity measures, not only to the WHD, but to any other Federal agency with authority

<sup>94</sup> In the January 2021 draft final rule, the Department considered adopting the proposal with significant revisions to address the many commenter concerns, such as administrative and enforcement challenges, including revisions clarifying limits on the number of notifications an employer might submit to the CO regarding its staggered entry plan, revising the timeframe in which an employer could submit its single notification of intent to stagger entry, expanding the collection of information regarding the employer's staggered entry plan and corresponding start dates offered to prospective applicants, and bolstering disclosure of information to farmworkers regarding start date options. However, even with these changes, the Department believes the January 2021 draft final rule did not sufficiently address confusing aspects of the proposal; ensure effective recruitment of U.S. workers for job opportunities, particularly where multiple or mid-season start dates are available; and balance flexibility, efficiency, and notice to prospective applicants, such as a single pre-certification opportunity to submit notice of intent to stagger entry.

to enforce compliance with program requirements and combat fraud and abuse. The Department received one comment on this provision, which did not necessitate substantive changes to the regulatory text. Therefore, this provision remains unchanged from the NPRM.

An agent objected to OFLC sharing information with “any other Federal agency” if the information sharing could lead to adverse action, as it could have a “significant chilling effect on workers” and could exceed the Department’s statutory authority. The Department appreciates these concerns; however the administration of the H–2A visa program involves multiple agencies. Information sharing between the agencies is used only as necessary to ensure the integrity of the program. As explained in the 2010 H–2A Final Rule, in this regard, the Department affirmatively shares information with DHS and other agencies, within defined limits, when necessary for those agencies to take action within their jurisdiction. For example, the Department may refer certain discrimination complaints to DOJ, under § 655.185, or refer information related to debarred employers or to employers’ fraudulent or willful misrepresentations to DHS, under §§ 655.182 and 655.184. Further, this provision aligns with current language in WHD regulations at 29 CFR 501.2, which provides “[i]nformation received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H–2A program, other agencies as appropriate, including the Department of State (DOS) and DHS.” Therefore, under § 655.130(g) in this final rule, the Department will share information when it is necessary and appropriate to do so. In all cases, the Department shares only the specific information the agency requires and ensures that all information sharing complies with the Privacy Act of 1974, Public Law 93–579, 88 Stat. 1896 (5 U.S.C. 552a *et seq.*) (Dec. 31, 1974).

## 2. Section 655.131, Agricultural Association and Joint Employer Filing Requirements

The NPRM proposed amendments to this section to: (1) retain current requirements governing the submission of *Applications for Temporary Employment Certification* by an agricultural association on behalf of its employer-members; and (2) codify current standards and procedures governing the submission of

*Applications for Temporary Employment Certification* by two or more individual employers seeking to jointly employ workers to perform agricultural labor or services. The Department received many comments on the proposed amendments to this section. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several revisions, as discussed below.

### a. Paragraph (a), Agricultural Association Filing Requirements

The Department proposed minor revisions to paragraph (a) to clarify the application filing procedures for agricultural associations and to conform with other proposed changes in the NPRM, such as the definition of master application in § 655.103 and the modernization provisions that revise the procedures for issuance of temporary agricultural labor certifications in § 655.162. The Department also proposed to reorganize the procedural provisions applicable to agricultural associations that file *Applications for Temporary Employment Certification* so that paragraph (a)(1) addresses the requirement for an agricultural association to identify the nature of its role in each application it files and retain documentation of its role. Paragraph (a)(2) addresses master application filings; paragraph (a)(3) addresses employer signatures on applications that an agricultural association files; and paragraph (a)(4) addresses certification issuance. As discussed below, the Department is adopting paragraph (a) without change from the NPRM.

An association expressed concern about the interaction of the proposed staggered entry provision at § 655.130(f) and master application filing procedures at § 655.131(a)(2), thinking that agricultural associations that file master applications could not stagger entry of H–2A workers or would have less flexibility than other joint employers. As the Department has decided not to adopt the proposed staggered entry provision, for the reasons discussed in the preamble to § 655.130(f), the concern is moot.

A workers’ rights advocacy organization supported the Department’s proposal to add explicit language in paragraph (a)(3) regarding signature requirements in applications filed by agricultural associations, while a State agency expressed support for electronic signatures, including those required under this section. Other commenters raised liability concerns related to master applications and joint

employment, rather than the procedural provisions in paragraph (a); these comments are discussed in relation to the definitions at § 655.103(b).

Accordingly, this final rule adopts paragraph (a) without change and, as such, continues to permit an agricultural association to file an application as a sole employer, joint employer, or agent, as contemplated in the INA. *See* 8 U.S.C. 1188(c)(3)(B)(iv) and (d).

### b. Paragraph (b), Joint Employer Filing Requirements

The Department proposed a new paragraph (b) to codify its longstanding practice of permitting two or more individual employers to file a single *Application for Temporary Employment Certification* as joint employers. These filing requirements would apply when two or more individual employers operating in the same AIE have a shared need for workers to perform the same agricultural labor or services during the same period of employment, but each employer cannot guarantee full-time employment for the workers during each workweek. This provision is intended to allow smaller employers that do not have full-time work for an H–2A worker and lack access to an employer association to use the H–2A program. In these situations, small employers have established an arrangement to share or interchange the services of the workers to provide full-time employment during each workweek and guarantee all the terms and conditions of employment under the job order or work contract.

The application filing procedures for two or more employers under proposed § 655.131(b) are different from the procedures for a master application filed by an agricultural association as a joint employer in several ways. First, unlike the master application provision, the employers filing a single *Application for Temporary Employment Certification* under proposed paragraph (b) would not be joint employers with an agricultural association of which they may be employer-members. Thus, if an agricultural association assists one or more of its employer-members in filing an *Application for Temporary Employment Certification* under proposed paragraph (b), the agricultural association would be filing as an agent for its employer-members. Second, all employers filing an *Application for Temporary Employment Certification* under proposed paragraph (b) must have the same first date of need and require the agricultural labor or services of the workers requested during the same period of employment in order to offer

and provide full-time employment during each workweek. In contrast, in a master application filed by an agricultural association, each employer-member would offer and provide full-time employment to a distinct number of workers during a period of employment that may have first dates of need differing by up to 14 calendar days. Unlike a master application where the places of employment for the employer-members could cover multiple AIEs within no more than two contiguous States, the employers filing a single application as joint employers under proposed paragraph (b) would have to identify places of employment within a single AIE. Finally, under proposed paragraph (b) all joint employers would be jointly and severally liable for violations by any joint employer for the entire period of need. As previously explained, and codified in § 655.103, while an agricultural association that files a master application is always an employer, a grower that is an employer-member of the agricultural association that filed a master application is only in joint employment with the agricultural association when it is employing the pertinent H-2A workers.

Under proposed paragraph (b)(1)(i), any one of the employers could file the *Application for Temporary Employment Certification* with the NPC, so long as the names, addresses, and the crops and agricultural labor or services to be performed are identified for each employer seeking to jointly employ the workers. Consistent with longstanding practice, any applications filed by two or more employers would continue to be limited to places of employment within a single AIE covering the same occupation or comparable work during the same period of employment for all joint employers, as required by § 655.130(e). As the NPRM noted, the proposal would typically allow neighboring farmers with similar needs to use the program, though they do not, by themselves, have a need for a full-time worker under § 655.135(f).

Per proposed paragraph (b)(1)(ii), each joint employer would be required to employ each H-2A worker the equivalent of at least 1 workday (*i.e.*, a 7-hour day) each workweek. This proposed requirement aimed to fulfill the purpose of the filing model, which is to allow smaller employers in the same area and in need of part-time workers performing the same work under the job order to join together on a single application, making the H-2A program accessible to these employers. The proposed requirement also provided an additional limiting

principle intended to ensure that individual employers with full-time needs would use the established application process for individual employers, that association members would use the statutory process provided for associations, and that joint applications would be restricted to small employers with a simultaneous need for workers that cannot support the full-time employment of an H-2A worker. In this way, the Department could carry out the statutory requirements applicable to individual employers and to associations. The Department invited comments on the 1-workday requirement in the NPRM, and also sought comments on how to best effectuate the purposes of joint employer applications.

The NPRM additionally noted that each employer seeking to employ the workers jointly under the *Application for Temporary Employment Certification* would have to comply with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F. Therefore, proposed § 655.131(b)(1)(iii) would require each joint employer to sign and date the *Application for Temporary Employment Certification*. By signing the application, each joint employer would attest to the conditions of employment required of an employer participating in the H-2A program and would assume full responsibility for the accuracy of the representations made in the application and job order, and for all of the assurances, guarantees, and requirements of an employer in the H-2A program. The Department noted in the NPRM that, in the event of a violation, all of the employers named in the *Application for Temporary Employment Certification* are liable for the violation and may be held jointly or individually responsible for remedying the violation(s) and for attendant penalties.

Finally, the NPRM observed that where the CO grants temporary agricultural labor certification to joint employers, proposed § 655.131(b)(2) would provide that the joint employer that filed the *Application for Temporary Employment Certification* would receive the Final Determination correspondence on behalf of the other joint employers in accordance with the procedures proposed in § 655.162. As discussed below, the Department is adopting paragraph (b) from the NPRM with some changes.

The Department received many comments related to its proposal to include § 655.131(b) in its implementing regulations. The employer comments related to § 655.131(b) all supported the

proposal to permit joint employer applications. However, those employers that commented on § 655.131(b) uniformly criticized the provision's requirement that all joint employers employ the pertinent H-2A workers at least 1 day per workweek. At least four commenters noted that the proposal would unduly complicate joint employer arrangements in which sponsored H-2A workers move from full-time employment at one applicant's farm to full-time employment at another applicant's farm based on growing conditions at the respective farms. Various commenters noted that the proposal would preclude joint applications by growers that need distinct numbers of H-2A workers by compelling a grower that has a lesser need to employ all the workers needed by a grower with a greater need. Some commenters asserted that the requirement would unduly reduce the "flexibility" of farms that wish to use the joint employer application process. Still other commenters asserted that the proposal is unduly restrictive, unworkable, or serves no discernible policy objective.

Four commenters each offered what would amount to a "less stringent restriction" than the 1-day-per-week requirement. Three of the commenters specifically suggested the Department might use other "metrics[,] includ[ing] percentage of hours or days per contract," in lieu of the 1-day-per-week requirement. Another commenter similarly suggested that the Department might "establish a 'minimum' amount of time" that each joint employer must employ the pertinent H-2A workers during the entire period of employment.

A workers' rights advocacy organization supported holding all entities that file a joint employer application under § 655.131(b) accountable for any violation committed by one. It suggested that the Department provide greater clarity that all named employers are accountable as joint employers for any violations committed by one during the period of employment listed on the job order, "not just the dates in which H-2A workers completed work owned or operated by a particular employer." As explained above, the liability of named joint employers is not dependent on the dates on which H-2A workers complete work for a particular named joint employer.

The Department declines to adopt some commenters' recommendation to place no limits on the number of hours each joint employer filing an application under § 655.131(b) may employ H-2A workers sponsored under such an application. The purpose of the

Department's proposal in § 655.131(b), which it is electing to retain in this final rule, is to permit small growers that have a need for H-2A workers but cannot guarantee full-time employment on their own to join together to meet the full-time-job requirement for hiring H-2A workers. Placing no limits on the number of hours each joint employer filing an application under § 655.131(b) may employ H-2A workers sponsored under such an application would undercut this purpose by permitting employers that, individually, can guarantee full-time employment to use § 655.131(b).

Some commenters specifically requested that the Department modify § 655.131(b) to expressly allow use of the provision by joint employers that would provide sequential full-time employment to H-2A workers. As the Department noted in the NPRM, individual employers that can provide full-time employment to H-2A workers can file an individual application under § 655.130 for the individual employer's period of need. In such a case, a joint employment relationship is unnecessary because the employer may file an application for the period of time for which full-time employment is offered. The Department accordingly has concluded that it is appropriate to limit applications under § 655.131(b) to those instances in which no co-applicant can provide full-time employment to H-2A workers. Therefore, the Department declines to adopt the commenters' recommendation to place no limits on the number of hours each joint employer filing an application under § 655.131(b) may employ H-2A workers sponsored under such an application.

While the Department has decided to place numerical limits on the number of hours H-2A workers under a § 655.131(b) application can work for a joint employer, it has closely considered many commenters' suggestion that the proposed 1 day per workweek requirement unduly restricts employer flexibility. It has accordingly sought to determine if there is another less rigid metric that would provide employers greater flexibility and at the same time preserve § 655.131(b)'s purpose to accommodate small growers that cannot alone guarantee full-time employment but wish to use the program. With that dual purpose in mind, the Department has modified § 655.131(b), as proposed in the NPRM, to eliminate the requirement that all H-2A workers must work for each employer for at least 7 hours in each workweek. This final rule allows employers to schedule H-2A workers at their discretion, so long as no single joint employer obtains more than

a total of 34 hours of work in any workweek from all of the H-2A employees it employs. This provision provides maximum flexibility to joint employers in assigning H-2A employees under the rule, while helping to ensure that only employers that cannot provide full-time employment, defined in § 655.135(f) as 35 hours a week, will file under this provision. By limiting the total number of hours of employment of all H-2A workers to no more than 34 hours of work per week for each joint employer, the rule limits the use of this provision to those employers that have a need for part-time work. Employers with a need for 35 hours of work a week or more will be able to guarantee full-time work and will be able to file under the standard process. Those employers that are able to guarantee full-time work will have no need to use this provision, which, as noted above, is designed for applicants that are unable to provide full-time work, and without this provision would be ineligible for the H-2A program.

Finally, the Department notes that the January 2021 draft final rule would have adopted § 655.131(b) as proposed in the NPRM, with the addition of a new § 655.131(b)(1)(ii) and (iii), which would have provided that no employer would employ any H-2A worker for fewer than 7 hours in a pay period and more than 28 hours in any workweek. The January 2021 draft final rule also would have adopted a new § 655.131(b)(1)(iv), which would have provided that the employer, together with its co-applicants, would employ each H-2A worker for at least 70 hours in each 2-week pay period. However, those provisions would have added unnecessary restrictions on the scheduling of H-2A workers while failing to limit joint employment under this provision to employers with a part-time need. Accordingly, and for the reasons discussed above, those provisions were not adopted in this final rule.

### 3. Section 655.132, H-2A Labor Contractor Filing Requirements; and 29 CFR 501.9, Enforcement of Surety Bond

The NPRM proposed amendments to these sections to clarify and enhance requirements governing the submission of *Applications for Temporary Employment Certification* by employers operating as H-2ALCs, including substantive revisions to the standards by which these employers must demonstrate proof of their ability to discharge their financial obligations in the form of a surety bond. The Department received many comments on the proposed amendments to this

section. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several revisions, as discussed below.

Because the Department added a provision at § 655.130(e) to address the geographic scope of *Applications for Temporary Employment Certification*, generally, language addressing that topic was no longer necessary in § 655.132 and retaining it in this section could create confusion. An H-2ALC application and job order continue to be limited to places of employment within a single ALE, except as otherwise permitted by this subpart (e.g., § 655.215(b)(1)). However, by moving the language to § 655.130(e), the Department's proposal clarified that this same limitation applies to all applications and job orders, absent an explicit exception in this subpart. As a result, the Department proposed to eliminate paragraph (a) and redesignate the contents of paragraph (b) of the 2010 H-2A Final Rule, which list the enhanced documentation requirements for H-2ALCs, as paragraphs (a) through (e).

As explained in the NPRM, the Department has determined the enhanced documentation requirements for H-2ALCs continue to be necessary in order to protect the safety and security of workers and ensure basic program requirements are met, particularly given the increased use of the H-2A program by H-2ALCs and the relatively complex and transient nature of their business operations.<sup>95</sup> In proposed paragraph (e)(1), the Department maintained the current rule's requirement that an H-2ALC provide proof that any housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and is certified by the SWA. In proposed paragraph (e)(2), the Department proposed to replace the term "the worksite" with "all place(s) of employment" to clarify that transportation provided by the fixed-site agricultural business between the workers' living quarters and all

<sup>95</sup> Based on an analysis of *Applications for Temporary Employment Certification* processed for FY 2014 and 2017, the number of applications filed by H-2ALCs more than doubled from 660 (FY 2014) to 1,410 (FY 2017), and the number of worker positions certified for H-2ALCs nearly tripled from approximately 24,900 (FY 2014) to 72,400 (FY 2017). Between FY 2014 and 2017, the average annual increase in H-2ALC applications requesting temporary labor certification was 29 percent, compared to only 18 percent for agricultural associations and 11 percent for individual farms and ranches.



locations where work is performed must comply with the requirements of this section. Additionally, the Department corrected the reference for workers' compensation coverage of transportation from § 655.125(h) to § 655.122(h).

The Department has adopted paragraphs (e)(1) and (2) as proposed, with minor changes to paragraph (e)(2) for clarification. As discussed above in the preamble to § 655.122(h), the Department has made a minor revision to § 655.132(e)(2) to clarify that 29 CFR 500.104 and 500.105 do not both apply simultaneously to all vehicles. Instead, 29 CFR 500.104 and 500.105 apply alternatively depending upon the type of vehicle used, the distance of the trip, and whether the vehicle is being used for a day-haul operation. Accordingly, under this paragraph, H-2ALCs will continue to include in or with their *Applications for Temporary Employment Certification*, at the time of filing, the information and documentation listed in redesignated paragraphs (a) through (e) to demonstrate compliance with regulatory requirements.

Many commenters addressed the presence of H-2ALCs in the H-2A program, rather than the Department's proposed amendments to § 655.132. Immigration, public policy, and workers' rights advocacy organizations, trade associations, and an international recruiter raised concerns about H-2ALCs' lack of transparency and about farmers using H-2ALCs as a shield to escape responsibility and maintain lower wages. A workers' rights advocacy organization and numerous farmworkers asserted H-2ALCs offer lower wages, provide reduced or nonexistent benefits, more frequently present challenging or unsafe working conditions, make travel difficult, and provide less certainty regarding work start dates. One farm owner pointed out there is a critical need for H-2ALCs, especially when a crop's harvest or hauling season is very short. These comments provide context for suggestions in this section and others. In addition, the Department will continue to examine the role of H-2ALCs in the H-2A program to determine whether further regulation of H-2ALCs beyond these filing requirements and surety bond requirement (discussed below) is necessary to protect H-2A and U.S. farmworkers.

One commenter mistakenly thought the Department proposed to remove paragraph (a) of the 2010 H-2A Final Rule from this subpart; the commenter expressed concern H-2ALCs would no longer be limited to places of employment within one AIE on a single

*Application for Temporary Labor Certification*, in most cases. The Department repeats that this requirement was moved to § 655.130(e), not removed from the subpart entirely.

A workers' rights advocacy organization expressed support for the revisions to paragraph (e)(2), and it agreed that the changes proposed by the Department are helpful and clarify regulatory requirements.

Although the Department did not propose changes to any of the H-2ALC documentation requirements listed in this section except the surety bond requirement, which is addressed below, a few commenters suggested revisions to the MSPA FLC registration paragraph and process, content requirements for an H-2ALC's work contracts with fixed-site growers, and other additional documentation requirements. An agent requested the Department incorporate the enumerated exceptions to MSPA registration listed at 29 CFR 500.0 through 500.271 in paragraph (b) of this section, a revision the commenter asserted would clarify who qualifies for an exception under MSPA and would ensure proper application of the MSPA registration requirement. Also related to MSPA and FLC registration, an employer recommended that the Department create an online system for employers. The Department respectfully declines. Repetition of MSPA registration exceptions is not warranted and could create confusion, as these exceptions, and any clarification of these exceptions, fall outside this subpart. Similarly, creation of a MSPA registration online system is outside the scope of this rulemaking.

A workers' rights advocacy organization suggested the Department require fixed-site growers to acknowledge their understanding of program and legal requirements when signing work contracts with an H-2ALC, while a trade association suggested the Department require H-2ALCs to provide a signed joint liability agreement for every farm to which they will supply labor. The Department appreciates these suggestions but declines to add these documentation requirements at § 655.132. Except when an agricultural association signs on behalf of its employer-members that are named in a master *Application for Temporary Employment Certification*, each employer of the workers sought must review and sign declarations attesting to the accuracy of the job information and compliance with applicable laws and regulations. To the extent these suggestions raise issues of joint employment and joint liability, those issues are addressed in the Department's

discussion of proposed revisions to the definition of joint employment at § 655.103. Finally, such additional documentation requirements were not presented for public notice and comment and, therefore, are beyond the scope of this rulemaking.

However, with regard to the information H-2ALCs provide on the Form ETA-790A to identify their clients (*i.e.*, the growers who contract with the H-2ALC to provide labor or services for their agricultural operations), the Department clarifies that an H-2ALC must identify each fixed-site agricultural business to which it will provide labor or services, as provided in § 655.132(a) of this final rule and collected in an addendum to the Form ETA-790A, by providing the agricultural business's full legal name and full trade names or "Doing Business As" names (DBAs) (if applicable). Full disclosure of legal and trade names or DBAs is consistent with the Department's requirements for employer and agricultural association names on the Form ETA-790A. In addition, full disclosure of business names both appraises prospective applicants of the work to be performed and supports the Department's efforts to protect workers.

The workers' rights advocacy organization also suggested the Department require additional recruitment-related documentation of H-2ALCs, such as evidence the H-2ALC recruited all U.S. workers, FLCs, and crew leaders employed directly by the fixed-site grower in the prior year. In response to the comment, the Department addressed this issue in the discussion of an employer's contact with former U.S. workers under § 655.153, and in relation to the definition of joint employment at § 655.103.

In proposed paragraph (c), the Department retained the requirement that an H-2ALC submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations in the form of a surety bond. This bonding requirement, which became effective in 2009, was created because the Department's experience indicated that H-2ALCs can be transient and undercapitalized, thus making it difficult to recover the wages and benefits owed to their workers when violations are found.<sup>96</sup> By ensuring that

<sup>96</sup> See 2008 H-2A Final Rule, 73 FR 77110, 77163; see also 2010 H-2A Final Rule, 75 FR 6884, 6941 ("The Department's enforcement experience has found that agricultural labor contractors are more often in violation of applicable labor standards than fixed-site employers. They are also less likely to

these employers can meet their payroll and other program obligations, the Department is better able to prevent program abuse and limit any adverse effect on U.S. workers. See 20 CFR 655.132(b)(3); 29 CFR 501.9. Following a final finding of violation, the WHD Administrator may make a claim to the surety for payment of wages and benefits owed to H-2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced, up to the face amount of the bond. 29 CFR 501.9(b).

Based on its experience implementing the bonding requirement and enforcement experience with H-2ALCs, the Department proposed revisions intended to clarify and streamline the existing requirements and strengthen the Department's ability to collect on such bonds. To address the large proportion of the surety bonds submitted by H-2ALCs that do not meet the requirements of 29 CFR 501.9, the Department proposed moving the substantive requirements governing the content of H-2ALC surety bonds to 20 CFR 655.132(c) so that these requirements can be found in the same section as other requirements for the *Application for Temporary Employment Certification*. The Department also proposed to expand the capabilities of the online application system (historically the iCERT Visa Portal System (iCERT) and now the FLAG system) to permit electronic execution and delivery of surety bonds both as a means to address the issue of noncompliant bonds and to streamline its review of bond submissions. Under this proposal, electronic surety bonds will eventually be required for all H-2ALCs subject to the Department's mandatory e-filing requirement. However, until such time as the Department's proposed process for accepting electronic surety bonds is operational, the Department will accept the submission of an electronic (*i.e.*, scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the temporary agricultural labor certification is issued. To ensure that the original bond is received during this time period, the Department proposed to revise § 655.182 to specify that failure to timely submit a compliant, original surety bond constitutes a substantial violation, providing grounds for debarment or revocation of the

meet their obligations to their workers than fixed-site employers.").

temporary agricultural labor certification.

To further improve compliance with the bonding requirement and streamline its review, the Department proposed to adopt a bond form with standardized language. Currently, the bonds received by the Department vary in wording and form, making it difficult to ensure that the bonds are sufficient and resulting in confusion regarding the legal requirements. The language used in the Department's proposed bond form, ETA-9142A—Appendix B, which was included in the Paperwork Reduction Act (PRA) package of the NPRM, largely incorporated the existing bond requirements with certain clarifications for the regulated community and minor changes. For example, the proposed bond language clarified that the wages and benefits owed to workers may include the assessment of interest. Similarly, the proposal clarified the time period during which liability on the bond accrues ("liability period"), as distinguished from the time period in which the Department may seek payment from the surety under the bond ("claims period"). The Department proposed changing the bond requirement to cover not only liability incurred during the period of the temporary agricultural labor certification, but also liability incurred during any extension of the temporary agricultural labor certification, thus eliminating the need for H-2ALCs to amend the applicable bond or seek an additional bond (*i.e.*, automatically extending the liability period to reflect any extension of the temporary agricultural labor certification). Additionally, the Department proposed extending and simplifying the claims period from "no less than 2 years" to 3 years. Because this standardized language provides more specificity as to the length of the claims period, the Department proposed omitting language permitting the cancellation or termination of the claims period with 45 days' written notice. The Department explained that some sureties have mistakenly interpreted this language as permitting the early termination of bonds during the period in which liability accrues.

Additionally, the Department proposed adjustments to the required bond amounts because current bond amounts, which range from \$5,000 to \$75,000 depending on the number of H-2A workers to be employed under the applicable temporary agricultural labor certification, often are insufficient to cover the wages and benefits owed by labor contractors. The Department

proposed two distinct changes to the required bond amount computation.

First, it proposed adjusting the required bond amounts annually to account for wage growth as measured by increases in the AEWR. Specifically, the Department proposed adjusting the existing required bond amounts proportionally on an annual basis to the degree that a nationwide average AEWR exceeds \$9.25, the wage rate used to establish new bond amounts in the Department's 2009–2010 rulemaking. 2009 H-2A NPRM, 74 FR 45906, 45925; 2010 H-2A Final Rule, 75 FR 6884, 6941. The "average AEWR" used in this adjustment would be calculated and published when the Department calculates and publishes the AEWR by State in accordance with § 655.120(b).

Second, in response to dramatic increases in the crew sizes certified in the last decade, the Department proposed increasing the required bond amounts for temporary agricultural labor certifications covering a significant number of H-2A workers. Currently, the highest bond amount, \$75,000, applies to temporary agricultural labor certifications covering 100 or more H-2A workers. Under the proposal, the bond amount applicable to temporary agricultural labor certifications covering 100 or more H-2A workers (determined by adjusting \$75,000 to account for wage growth, as discussed above) is used as a starting point and is increased for each additional set of 50 H-2A workers. The interval by which the bond amount increases is based on an approximation of wages earned by 50 workers over a 2-week period, also updated annually to reflect increases in the AEWR. The NPRM included examples demonstrating this calculation. 84 FR 36168, 36204–36205.<sup>97</sup>

The Department received only one comment addressing its proposal to move the substantive requirements governing the content of H-2ALC surety bonds to § 655.132(c). A coalition of workers' rights advocacy organizations supported this proposal characterizing it as "a helpful, clarifying change." Likewise, those who commented on the Department's proposal to permit the electronic execution and delivery of surety bonds supported this proposal.

<sup>97</sup> In addition, the Department noted that under its proposal to expand the definition of agriculture in § 655.103 to include reforestation and pine straw activities, employers in these industries may have qualified as H-2ALCs and been required to comply with the surety bond requirements. Because the Department declines to adopt this proposal, as discussed *supra*, comments addressing the application of the bonding requirement to the reforestation and pine straw industries are not discussed herein.

The Department hereby adopts these two proposals without modification. As the Department is in the process of developing a functional capability for accepting electronic surety bonds, it reminds the regulated community that until such time as the OFLC Administrator directs the use of electronic surety bonds, employers may, pursuant to § 655.132(c)(3)(ii), submit an electronic (*i.e.*, scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the temporary agricultural labor certification is issued. Failure to timely submit a compliant, original surety bond has been added to § 655.182(d) and will constitute a violation that may provide grounds for debarment or revocation of the temporary agricultural labor certification. Further, the Department clarifies that it will generally consider such a failure as demonstrating a lack of good faith under § 655.182(e)(4), making such a violation, by itself, a substantial violation meriting debarment or revocation.

With respect to the Department's proposal to require the use of a bond form with standardized language, namely the proposed Form ETA-9142A—Appendix B, a coalition of workers' rights advocacy organizations supported the proposal, explaining that it would "promote efficiency during the review process and greater compliance with surety bond requirements." An employers' agent similarly supported this proposal. This agent, as well as a trade association representing the surety industry, noted that insurers and sureties should have the opportunity to review the Department's proposed standardized bond language. However, another employers' agent opposed the "one size fits all approach" of using standardized bond language, arguing that "parties to the instrument, as private parties engaging in an arm's length transaction, should have the contractual freedom to include additional protections, in amount or subject matter than called for under the regulations within one instrument." This commenter did not express specific concerns relating to the provisions of proposed Form ETA-9142A—Appendix B.

After considering these comments, the Department adopts its proposal to require the use of a standardized bond form. The Department notes that the language in the Department's proposed bond form, Form ETA-9142A—Appendix B, was included in the PRA package of the NPRM. Further, to the extent that this proposed language differs in substance from the current

bond requirements at 29 CFR 501.9, these differences were detailed in the NPRM. *See* 84 FR 36168, 36203–36205. An H-2ALC surety bond is a contract governed by Federal regulation between three parties: the H-2ALC, the surety, and the Department. As such, private parties to such a contract should not expect unfettered contractual freedom. The use of standardized bond language is necessary for the Department to ensure that the bonds submitted by H-2ALCs comply with the regulatory requirements and will facilitate processing efficiency as the Department will not be required to review bonds that vary considerably in wording and form. This is no different from the Department's use of other standardized forms that make up the *Application for Temporary Employment Certification* and which become binding on the H-2A employer. Further, the use of a standard bond form does not prevent the H-2ALC and surety from entering into a separate contract, provided, of course, that such contract does not alter the parties' obligations vis-à-vis the Department, limit in any way the Department's ability to collect on a bond, or undermine the purposes of the bonding requirement and/or H-2A requirements generally.

The Department also received comments addressing the specific language and/or requirements proposed in the NPRM and incorporated into the proposed Form ETA-9142A—Appendix B. For example, the Department's proposed bond language retained the requirement that a surety pay sums for wages and benefits owed to H-2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced based on a final decision finding a violation or violations of 20 CFR part 655, subpart B, or 29 CFR part 501, but clarified that the wages and benefits owed may include the assessment of interest. In response, an employers' agent stated that it "disagreed with interest being attached to the scope of coverage without quantification." The Department notes that an assessment of interest may be required to make an employee whole, and both WHD and the Department's administrative tribunals permit, and in some cases require, the assessment of interest on back wages. The required rate of interest is determined by law and is specified in WHD's determination letters and final orders, as well as administrative case law.<sup>98</sup> Further, a surety's liability on any

particular bond is capped at the face value of that bond; thus, any assessment of interest included for wages and benefits will not increase the potential liability of the surety. Accordingly, the Department adopts this proposed language as written.

The Department received several comments addressing its proposals to clarify the time period during which liability on the bond accrues ("liability period"), as distinguished from the time in which the Department may bring a claim ("claims period"); to automatically include in the liability period any extensions of the applicable temporary agricultural labor certification; to extend the claims period for filing a claim; and to omit the provision permitting a surety to cancel a bond with 45 days' written notice. A coalition of workers' rights advocacy organizations supported the proposals noting that these would promote efficiency. Two trade associations and one employer opposed the proposal to extend and simplify the time period in which a claim can be filed against a surety from the current claims period of "no less than 2 years" to 3 years, based on the mistaken understanding that this will increase a surety's total liability to three times the face value of the bond.

This confusion articulated in the comments is precisely why the Department sought to clarify and further distinguish the time period in which liability on the bond accrues from the time period in which the Department may bring a claim. As explained in the NPRM, extending the claims period to 3 years (tolled by the commencement of any enforcement action) does not extend the accrual of liability. 84 FR 36168, 36204. Instead, it merely allows the Department more time to complete its investigations while retaining the ability to seek recovery from the surety. The surety's liability for a particular bond is still limited to the face value of that bond.

A trade association representing the surety industry opposed the proposal to eliminate language permitting sureties to cancel a bond with 45 days' written notice, stating that this will increase the surety's risk in writing the bond and make it more difficult for employers to qualify for such a bond. It explained that "[i]t is critically important for a surety to maintain the ability to cancel bond coverage if the bonded employer is found to be in violation of the terms of its agreement with the surety or if the

<sup>98</sup> Interest assessed by WHD is governed by 31 U.S.C. 3717. Interest assessed by the Department's

administrative tribunals is governed by *Doyle v. Hydro Nuclear Servs.*, Nos. 99-041, 99-042, and 00-012, 2000 WL 694384, at \*16-17 (ARB May 17, 2000).

bonded employer's ability to perform the bonded obligations has materially changed and the surety is no longer able to offer security."

The Department appreciates this concern; however, as explained in the NPRM, this provision was never intended to permit a surety to cancel the bond during the liability period while the temporary agricultural labor certification is still in effect. Instead, it was intended as a means of ending the open-ended period in which claims could be filed by the Department. 84 FR 36168, 36204. Because the Department now extends and simplifies the claims period from "no less than 2 years" to 3 years (tolled by any enforcement action), there is no longer a need for this provision. Consistent with § 501.9(d), currently, WHD does not permit the cancellation of bonds prior to 2 years from the expiration of the temporary agricultural labor certification (tolled by any enforcement action). Moreover, during the tenure of this requirement, the Department has received few, if any, requests from sureties seeking to cancel a bond while the temporary agricultural labor certification was still in effect. The surety bond is an essential component of an H-2ALC's *Application for Temporary Employment Certification*, necessary to demonstrate an applicant's ability to discharge its financial obligations under the H-2A program. Accordingly, the Department believes that it is appropriate for the bond submitted with the *Application for Temporary Employment Certification* to cover liability accrued during the entirety of the temporary agricultural labor certification and declines to add a mechanism by which sureties can terminate the accrual of liability during this period.

After carefully considering these comments, the Department adopts its proposals to clarify and distinguish the liability and claims periods, to automatically include in the liability period any extensions of the applicable temporary agricultural labor certification, to extend the claims limitations period to 3 years, and to omit as unnecessary the provision permitting a surety to cancel a bond with 45 days' written notice, as proposed in the NPRM.

Numerous comments from workers' rights advocacy organizations noted that improvements are needed to help victimized workers access surety bond funds. Specifically, a joint comment of 42 workers' rights advocacy organizations suggested that the Department revise the language of proposed § 655.132(c) to make bonds payable either to the WHD

Administrator or to workers who have received a judgment against the H-2ALC for violations of the temporary agricultural labor certification and job order, either through private litigation or State agency action, on the grounds that WHD does not have adequate resources to enforce all actions against H-2A employers. The Department declines to adopt this suggestion in this final rule. Permitting individual claimants to make demands on the bonds could lead to circumstances in which bond funds are depleted before the WHD Administrator completes an investigation and are not distributed proportionally among affected workers.

The vast majority of bond-related comments focused on the Department's proposed adjustments to the required bond amounts to account for wage growth, as measured by increases in the AEW, and to reflect dramatic increases in the crew sizes being certified. In general, workers' rights advocacy organizations supported the proposed adjustments, characterizing the proposal as a "modest improvement[.] . . . important because H-2ALCs are often undercapitalized and unable to pay back workers for labor violations." Numerous workers' rights advocacy organizations supported the proposal but described the increases as insufficient. A coalition of 42 workers' rights advocacy organizations submitted a joint comment explaining that surety bond amounts are often insufficient to cover even unreimbursed inbound transportation expenses, let alone unpaid wages and other costs impermissibly borne by workers, and cited as support several prominent investigations in which WHD found that workers were entitled to wages and benefits exceeding the required surety bond amounts. This coalition supported increases to account for wage growth and increasingly large temporary agricultural labor certifications, but stated that, at a minimum, bond amounts should be sufficient to cover the costs of inbound and outbound transportation. Similarly, a commenter from academia supported these increases.

In contrast, employers, employers' agents, and trade associations typically opposed these increases to the required bond amounts. For instance, an employers' agent urged the Department to maintain the existing bond amounts stating that these amounts are sufficient to ensure that H-2ALCs are able to discharge their financial obligations. A trade association stated that the proposed increases are "unnecessary and punitive" and would have the effect of harming the larger and better-

capitalized labor contractors. These commenters also stated that the Department failed to demonstrate the insufficiency of current bond amounts through data. Rather than adjust required bond amounts based on increases in the average AEW and to account for temporary agricultural labor certifications covering 150 or more workers, this commenter suggested making across-the-board increases of 30 percent to the required bond amounts. Two trade associations and an employer stated that the surety bonds are more akin to bail bonds than insurance policies because bonding companies do not rely on the reinsurance market to mitigate losses and instead scrutinize an applicant's assets when evaluating the potential risk associated with a bond; they recommended proceeding with caution until a market emerges in which a surety can better mitigate its risk. Several commenters stated that increases in bond amounts may make it impossible for some H-2ALCs to obtain bonds. Others stated that the methodology for calculating the required bond amounts is "unnecessarily complex." A public policy organization recommended that the Department reduce the bond amounts required of H-2ALCs for which the Department has not submitted a surety bond claim in the previous 5 years.

Commenters with ties to the shearing industry, including a State agency, trade associations, several employers, and an agent, stated that the increased bond amounts would prove difficult for the industry as it tends to operate with very small crew sizes. For example, several commenters explained employers in this industry may employ fewer than 25 H-2A workers in a given year, but because these workers are employed under multiple temporary agricultural labor certifications, these employers are required to obtain significantly more in total bonds than those who employ the same number of workers under a single temporary agricultural labor certification. These commenters also stated that some sureties are hesitant to issue multiple bonds for the same employer and suggested allowing employers to maintain a single bond for multiple temporary agricultural labor certifications filed over the course of a year.

A trade association representing the surety industry concurred in the Department's proposal to increase bond amounts as needed to accurately reflect the risk associated with wage requirements but noted that this may make it difficult for certain employers to obtain these bonds. This commenter

explained that employers may need to provide more detailed financial disclosures, tax returns, and/or credit scores to qualify for higher bond amounts and, in some cases, collateral may be required.

Finally, an insurance provider and an employer both noted that the Department's proposed methodology does not account for differences in the length of time H-2A workers will be employed and proposed that required bond amounts be set at five percent of an employer's estimated gross payroll for its H-2A workers. As an alternative, the insurance provider suggested that back wages could be paid from an employer-funded trust administered by the Department.

After carefully considering comments pertaining to the appropriate amount of surety to be required of H-2ALCs, the Department adopts the methodology for determining required bond amounts detailed in the NPRM, with one modification. Under the proposal in the NPRM, to calculate the required bond amount for a temporary agricultural labor certification, the Department would start with a base bond amount (equal to the amount of the bond required under the 2010 H-2A Final Rule) and adjust proportionally on an annual basis to the degree that a nationwide average AEWR exceeds \$9.25, *i.e.*, by multiplying the base by the average AEWR and dividing that number by \$9.25. The Department stated that, until the Department published an average AEWR, it would use a simple average of the 2018 AEWRs, which it calculated to be \$12.20. However, given the increase in the AEWR since the publication of the NPRM, the Department has concluded that, until the Department publishes a different average AEWR, bond amounts will initially be calculated using an average AEWR of \$14.28, based on the simple average of the 2021 AEWRs. The average AEWR will be adjusted when the underlying AEWRs are adjusted. Thus, for a temporary agricultural labor certification covering 100 H-2A workers, the Department will calculate the required bond amount according to the following formula:

$$\begin{aligned} & \$75,000 \text{ (base amount)} \times \$14.28 \div \$9.25 \\ & = \$115,784 \text{ (updated bond amount).} \end{aligned}$$

The Department has determined that further modification of the NPRM's methodology for determining required bond amounts is unwarranted at this time. The Department declines to adopt a commenter's suggestion that it use an across-the-board increase, rather than requiring additional incremental surety amounts for temporary agricultural

labor certifications covering 150 or more H-2A workers, as an across-the-board increase would not fairly account for the proportionally greater back wage liability associated with larger crew sizes. As the Department noted in the NPRM, the current bond framework, which the commenter's suggestion would perpetuate, "disproportionately advantages larger H-2ALCs while providing diminishing levels of protection for employees of such contractors." See 84 FR 36168, 36205.

Likewise, the Department disagrees with commenters arguing that bond amounts should not be increased. Based on the Department's enforcement experience, bond amounts are often insufficient to cover the amount of wages and benefits owed by H-2ALCs, limiting the Department's ability to seek back wages for workers. *Id.* at 36204. Indeed, as bond amounts have remained the same since 2010, these amounts do not reflect subsequent wage growth or the dramatic increase in the number of workers covered by temporary agricultural labor certifications. *Id.* at 36204-36205. The Department believes that requiring additional surety for such temporary agricultural labor certifications is not punitive but rather necessary to ensure fairness among labor contractors and for workers. The Department recognizes that some H-2ALCs may not have sufficient financial resources and/or creditworthiness to obtain the higher required surety bond amounts and, as a result, will be unable to employ 150 or more H-2A workers under a single temporary agricultural labor certification. The Department notes that the purpose of the surety bond requirement is to ensure that labor contractors will be able to discharge their financial responsibilities, including meeting their payroll and other program obligations. To the extent that some labor contractors lack the financial resources and/or creditworthiness to obtain the requisite bonds, it may be appropriate for these contractors to hire fewer workers.<sup>99</sup> Accordingly, this final rule adopts the Department's proposal under which the bond amount applicable to temporary agricultural labor certifications covering 100 or more H-2A workers is used as a starting point and is increased for each additional set of 50 H-2A workers. The interval by which the bond amount increases will be based on the amount

of wages earned by 50 workers over a 2-week period and, in its initial implementation, will be calculated using an average AEWR of \$14.28 as demonstrated:

$$\begin{aligned} & \$14.28 \text{ (Average AEWR)} \times 80 \text{ hours} \times 50 \\ & \text{workers} = \$57,120 \text{ in additional} \\ & \text{bond for each additional 50 H-2A} \\ & \text{workers over 100.} \end{aligned}$$

Thus, under this final rule, a temporary agricultural labor certification covering a crew of 275 H-2A workers will require additional surety of \$171,360. This amount is calculated by determining the number of additional full sets of 50 workers beyond the first 100 workers covered by the temporary agricultural labor certification and then multiplying this number by the amount of additional surety required per each set of additional 50 workers ( $275 - 100 = 175$ ;  $175 \div 50 = 3.5$ ; this is three additional sets of 50 workers;  $3 \times \$57,120 = \$171,360$ ). This additional surety will be added to the bond amount required for temporary agricultural labor certifications of 100 or more H-2A workers resulting in a required bond amount of \$287,144 (\$115,784 required for temporary agricultural labor certifications of 100 or more H-2A workers + \$171,360 in additional surety).

The Department declines proposals to consider additional variables, such as the costs of inbound and outbound transportation or estimated gross payroll, or to replace the average AEWR with another measure of wages in its methodology for determining required bond amounts. While these proposals may in some instances permit the required bond amounts to more closely account for the potential back wage liability for particular temporary agricultural labor certifications, these would unduly complicate the calculation and review of the required bond amounts and slow the Department's processing of H-2A applications. The Department believes at this time that the methodology included in the final rule is sufficient to address most monetary violations, including those stemming from a failure to provide inbound and outbound transportation, and thus to limit program abuse and any resulting adverse effect on U.S. workers. The Department will continue to monitor the efficacy of the surety bond requirements and will propose revisions to these requirements as needed to assure that bond amounts are sufficient.

Likewise, the Department declines the proposal from commenters with ties to the shearing industry to allow such

<sup>99</sup> Several commenters, though not those from the surety or insurance industries, stated that bonding companies do not rely on the reinsurance market and thus have no way in which to mitigate losses. While some sureties may choose not to rely on reinsurance, the Department notes this is by no means uniform in the industry.

employers to maintain a single bond covering all temporary agricultural labor certifications in a given year, as doing so would require the Department, when reviewing applications from H-2ALCs, to check all prior applications filed during the year to ensure that the bond is sufficient to cover both the current application and prior applications, potentially slowing down the approval of such applications.<sup>100</sup>

The Department also declines to replace the surety bond requirement with an employer-funded trust. Unlike the bonding requirement, which helps to ensure that an H-2ALC is in compliance with its program obligations, *see* 2008 H-2A Final Rule, 73 FR 77110, 77163 (citing 8 U.S.C. 1188(g)(2)), the payment of back wages from an employer-funded trust would distribute responsibility for an H-2ALC's noncompliance among all contributing employers, including those who meet their program obligations, and may not provide as robust a deterrent against individual noncompliance as surety bonds. Further, the creation of such a trust would require considerable initial funding, as well as Department resources, which could undermine the recovery of back wages in the short-term.

Finally, the Department declines to offer discounted bond amounts for those H-2ALCs for which the Department has not submitted surety bond claims in the previous 5-year period. Because WHD investigates only a fraction of the H-2ALCs that operate in a given year, the fact that WHD has not pursued an H-2ALC's surety for the collection of unpaid back wages or found violations in the previous 5 years is not an indication of compliance or decreased potential liability. The length of the Department's administrative appeals process and any ensuing Federal court litigation means that a noncompliant employer could litigate a back wage award for years to avoid losing such a discount, potentially incentivizing appeals. Further, the surety may consider an H-2ALC's record of compliance when determining the premiums to be charged.

<sup>100</sup> While the January 2021 draft final rule would have responded to these concerns by creating a lower tier of bonds with a proportionally lower bond amount for temporary agricultural labor certifications covering fewer than 10 workers, after further review, the Department has decided against creating a separate bond tier for temporary agricultural labor certifications covering fewer than 10 H-2A workers because doing so would create a risk that workers employed under such temporary agricultural labor certifications will be left without sufficient recompense in the event that their H-2ALC employers fail to satisfy their financial obligations.

#### 4. Section 655.133, Requirements for Agents

The NPRM did not propose changes to the requirements for agents to provide, at the time of filing, a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer as well as a copy of the agent's MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, that identifies the specific farm labor contracting activities the agent is authorized to perform. Therefore, this final rule retains the current requirements without change.

#### 5. Section 655.134, Emergency Situations

The NPRM proposed minor amendments to this section to clarify procedures for accepting an emergency *Application for Temporary Employment Certification* filed by employers and to conform with other procedural changes proposed in the NPRM and adopted in this final rule. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM, except for technical corrections for clarity.

Paragraph (a) of § 655.134 addresses the function of the emergency situations provision, while paragraph (b) addresses what an employer must submit to the NPC when filing an *Application for Temporary Employment Certification* and requesting a waiver of the filing timeframe due to an emergency situation. To better focus paragraphs (a) and (b) by topic, the Department proposed to move a parenthetical example of "good and substantial cause" from paragraph (a) to paragraph (b), where the regulation provides a nonexclusive list of factors that may constitute good and substantial cause. In addition, the Department proposed to expand the nonexclusive list of factors to include additional examples, such as the substantial loss of U.S. workers due to Acts of God or a similar unforeseeable man-made catastrophic event (such as a hazardous materials emergency or government-controlled flooding).

One commenter noted the list of required documents in paragraph (b) was unclear and suggested the Department revise the wording or punctuation to avoid confusion about whether the Department meant to exclude only the first item in the list after the word "except" (*i.e.*, evidence of a job order submitted pursuant to § 655.121) or all of the items after the word "except." The Department

appreciates this suggestion and has revised the punctuation of this list of required documents to clarify that the only evidence excepted is a job order submitted pursuant to § 655.121. Under most circumstances, an employer using the emergency situations procedures would not need to submit a job order in advance of its *Application for Temporary Employment Certification*; therefore, there would not be evidence of a pre-filing job order. However, all other documentation required at the time of filing under § 655.130(a) is required at the time of filing under § 655.134. In addition, an employer's emergency waiver request submission must include a completed job order on the Form ETA-790/790A, including all required addenda, and a statement justifying the request for a waiver of the normal filing timeframe requirement.

In paragraph (c), the Department also proposed changes to simplify the emergency application filing process for employers, provide greater clarity with respect to the procedures for handling such applications, and conform to other changes proposed in this rulemaking. For example, the Department proposed to eliminate the language referring to concurrent submission of the emergency situations filing to the NPC and SWA, as under this final rule employers submit job orders to the NPC and the NPC electronically transmits them to the SWA; the same process applies to emergency situations job orders.

Further, the Department proposed language to clarify the transmittal and review procedures. The CO will promptly transmit a copy of the job order to the SWA serving the AIE for review. The SWA will review the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F,<sup>101</sup> and § 655.122, and, within 5 calendar days of receiving the job order from the CO, the SWA will inform the CO of any deficiencies found. Based on the information provided by the SWA and the CO's own concurrent review, the CO will make a decision to issue a NOD under § 655.141 or a NOA under § 655.143; and, then, the CO will make a final determination

<sup>101</sup> In the proposed regulatory text, the Department inadvertently referenced only the job order content review at § 653.501(c), rather than 20 CFR part 653, subpart F, in its entirety. To ensure SWA review of job orders submitted through the emergency situations provision is complete (*e.g.*, includes a nondiscrimination content check under § 653.501(d)(3)) and consistent with review of job orders under § 655.121, as intended, paragraph (c)(1) has been revised to conform with § 655.121(c)(3). *See* 84 FR 36168, 36205 (NPRM noting proposed change to paragraph (c) "makes the process for filing job orders in emergency situations consistent with the process for filing job orders under proposed § 655.121").

in accordance with §§ 655.160 through 655.167.

Finally, if the employer's submission did not justify waiver of the filing timeframe and/or the CO determined there is not sufficient time to undertake an expedited test of the labor market, the CO's NOD would include the reason(s) why the waiver request cannot be granted and provide the employer with an opportunity to submit a modified job order that brings the requested workers' start date into compliance with the non-emergency filing timeframe requirement at § 655.121(b) (*i.e.*, first date of need must be no less than 60 days from the submission date).

A workers' rights advocacy organization objected to the existence of the emergency situations waiver, on principle, and to the extent it is continued in this final rule, urged the Department to limit its use. The workers' rights advocacy organization expressed concern the emergency situations waiver request process undermines the SWA's ability to evaluate job orders and assess U.S. worker availability, thereby undermining the Department's statutory obligation. The Department appreciates the commenter's concern and recognizes that a correction to paragraph (c)(1) is necessary to ensure SWA review of job orders submitted through the emergency situations provision is complete (*e.g.*, includes a nondiscrimination content check under § 653.501(d)(3)) and consistent with review of job orders under § 655.121, as intended. Therefore, paragraph (c)(1) has been revised in this final rule to clarify that the SWA's review encompasses 20 CFR part 653, subpart F, in its entirety, rather than only the job order content requirements at § 653.501(c). The revisions adopted in this final rule make the SWA's involvement in reviewing the job order clear. *See* § 655.134(c)(1). Further, even where an employer justifies its request as a qualifying emergency situation, if the CO determines there is insufficient time to appropriately test the domestic labor market on an expedited basis and satisfy the Department's statutory obligation, the CO will not approve the employer's emergency situations waiver request.

Commenters, including trade associations and agents, generally supported the proposed revisions to § 655.134. A trade association expressed appreciation for the Department's simplification and clarification of emergency situations waiver request procedures, noting that time is critical in emergency situations. This commenter specifically expressed

support for the inclusion of an opportunity for the employer to modify its application or job order to bring it into compliance with non-emergency timeframe requirements in lieu of denial.

Among commenters who generally supported the proposed revisions to § 655.134, a couple objected to replacement of the term "unforeseen" with "unforeseeable," which they viewed as a possible change in the standard of review and a higher threshold for employers to meet. However, the Department did not intend to create any material change in the regulatory standard though the use of the term "unforeseeable." Rather, the revision is necessary to establish greater consistency—and avoid potential misunderstanding—between the H-2A standard for emergency situation waivers and a similar provision contained in the 2015 H-2B IFR at § 655.17; the Department does not have a different foreseeability standard in H-2A than H-2B and using different terms could suggest that possibility.<sup>102</sup>

A workers' rights advocacy organization expressed concern "unforeseeable changes in market conditions" and "similar conditions that are wholly outside of the employer's control" are terms that are "too broad and too vague and might encompass situations which would not warrant . . . a waiver" of the normal timeframe and the resulting abbreviated U.S. worker recruitment period. For example, this commenter worried that normal but unpredictable market fluctuations could qualify as an emergency situation. However, normal market fluctuations, despite being individually unpredictable, are a foreseeable aspect of conducting business. As demonstrated in the nonexclusive list of situations that might justify an emergency situations waiver, the Department envisions circumstances which are unforeseeable and wholly outside of the employer's control.

<sup>102</sup> Pursuant to § 655.17(b), the employer may request a waiver of the required time period(s) for filing an *H-2B Application for Temporary Employment Certification* based on good and substantial cause that "may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues." 2015 H-2B IFR, 80 FR 24042, 24116–24117.

6. Section 655.135, Assurances and Obligations of H-2A Employers

a. Paragraph (c), Recruitment Requirements

Although the Department proposed no changes to paragraph (c) in the NPRM, the Department is revising it in this final rule, as necessary, to reorganize the mandatory recruitment obligation provisions. As previously discussed in this preamble, commenters expressed concern about the placement of mandatory recruitment obligations in the proposed optional pre-filing recruitment provision at § 655.123. In addition, after considering comments, the Department decided not to adopt the proposed pre-filing recruitment provision, as explained above. To retain the mandatory recruitment obligation provisions and clarify their applicability to all employers engaged in recruitment under this subpart, the Department relocated the mandatory recruitment obligations paragraphs proposed at § 655.123(d) and (e) to § 655.135(c). In this final rule, proposed paragraph (c) of § 655.135 is now paragraph (c)(1), and proposed paragraphs § 655.123(d) and (e) are now paragraphs § 655.135(c)(2) and (3). This reorganization retains the requirement that an employer, in all cases, must accept and hire all qualified, available U.S. worker applicants through the end of the recruitment period set forth in § 655.135(d) and, if an employer requires interviews, the employer must conduct those interviews in a way that imposes little or no cost on U.S. worker applicants and ensures no less favorable treatment than that offered to H-2A workers.

b. Paragraph (d), 30-Day Rule

Under the 2010 H-2A Final Rule, employers of H-2A workers are required to hire any qualified, eligible U.S. worker who applies for the employer's job opportunities during the first 50 percent of the work contract period ("50 percent rule"), unless an exemption for certain small employers applies. In the NPRM, the Department proposed to replace the 50 percent rule with a 30-day rule. The proposed 30-day rule would have required employers to provide employment to any qualified, eligible U.S. worker who applied for the job opportunity until 30 calendar days from the employer's first date of need on the certified *Application for Temporary Employment Certification*, including any approved modifications. For those employers who would have chosen to stagger the entry of H-2A workers into the United States under proposed § 655.130(f), the Department proposed to extend the mandatory hiring period



through the last date on which the employer expected a foreign worker to enter the country, or apply the 30-day period, if longer. The proposed change to the mandatory hiring period was intended to strike an appropriate balance between the need to ensure U.S. workers' access to H-2A job opportunities and employer burdens and operational disruptions caused by hiring U.S. workers mid-season. As explained in the NPRM, the 30-day rule proposal was based on the Department's analysis of hiring practices indicating relatively few U.S. workers applied or were referred for job opportunities after the initial 30-day period. The Department determined that this finding, in conjunction with other proposed changes, such as the proposed staggered entry provision and related mandatory hiring period, justified a change from the 50 percent rule to reduce administrative and employer burdens. See 84 FR 36168, 36207. The Department invited stakeholders to comment with data illustrating the costs and benefits of the 50 percent rule, particularly by providing comprehensive studies of the frequency with which H-2A employers hire U.S. workers pursuant to the 50 percent rule. However, the comments received, both in support of and in opposition to the proposal, were largely anecdotal.

After consideration of all comments, the Department has decided, for the reasons explained below, not to adopt the proposed 30-day rule and, instead, will retain the 50 percent rule from the 2010 H-2A Final Rule, as discussed below.

The Department received several comments strongly opposing the proposed 30-day rule and elimination of the 50 percent rule, including comments from many workers' rights and immigration advocacy organizations, several State employment agencies, two U.S. Senators, a U.S. Representative, a public policy organization, a labor union, a trade association, an international recruiting company, and a commenter from academia. The commenters' primary concern was that the proposal would reduce employers' obligations to recruit and hire U.S. workers, thus reducing U.S. workers' access to these jobs. A U.S. Representative asserted the proposal would "undermine[] long-standing protections that help ensure employers are not incentivized to hire guest workers, who are vulnerable to exploitation and abuse due to their temporary immigration status, over domestic workers." Quoting a district court decision, a workers' rights advocacy organization opposed to the

proposal noted that the 50 percent rule is a vital "safety net to protect the jobs of citizens" that ensures protections for "small groups of available domestic employees who might not be known to [the Department] at the time of the initial certification . . . ."

Several commenters emphasized the importance of the 50 percent rule to U.S. agricultural workers who seek employment in a job opportunity more than 30 days after the start date for various reasons related to unexpected events, migratory labor patterns, differing dates of seasonal need, and interest in improved pay and benefits. A workers' rights advocacy organization noted that "uncertainty of agriculture caused by unexpected severe weather conditions" causes hardships for agricultural workers and asserted that under the proposed shortened recruitment period, workers displaced by crop loss would "have fewer alternative options," and workers displaced after a natural disaster would have greater difficulty finding substitute employment. Another workers' rights advocacy organization stated that the 50 percent rule would protect U.S. worker job opportunities in the event an employer's worker(s) leaves the job early, but after 30 days have elapsed, "due to being injured, getting ill, having a family emergency, or any other eventuality." A third workers' rights advocacy organization stated that elimination of the 50 percent rule "would make it difficult for [workers] . . . to change places of employment in cases of employer abuse." A workers' rights advocacy organization stated that the presence of U.S. workers at a worksite forces an H-2A employer to compete with other employers and makes it more likely that abusive H-2A employers will be exposed. Another advocacy organization expressed concern that the shortened recruitment period would reduce the period of time during which a U.S. worker may leave current employment to accept an H-2A job that pays a "higher wage and provides free transportation and housing if applicable . . . instead of settling for a non-H-2A job that may have lower pay and no legal requirement to provide transportation, housing, or other protections such as workers compensation." One commenter asserted the proposal would make it easier for agricultural employers to avoid their obligations to U.S. farmworkers, including unionized farmworkers, by engaging in intentionally "ineffective recruitment" and "refus[ing] to hire qualified U.S. workers." Other commenters stated that

the proposal would increase recruitment efforts within a reduced window for Migrant Services Outreach Workers and asserted the longer recruitment period allows workers to overcome employer attempts to discourage domestic farmworkers from applying or shut them out entirely.

Several workers' rights and immigration advocacy organizations and a labor union noted that "[o]n many farms, hiring continues beyond the first day of work before the peak of the harvest season." One of these commenters stated that "[s]ome U.S. workers work in agricultural jobs for part of the year, work in other industries such as construction and retail for a certain period of the year, and then return to agricultural jobs." The commenter added that "[s]ome local areas of employment and migrant streams involve contiguous states" and agricultural workers "alter their migration patterns depending on the terms and conditions of employment." A State employment agency asserted that "limiting the availability of the job order to 30 days after the Date of Need (DON) will effectively limit the ability of U.S. workers to follow the crops as in the past." A workers' rights advocacy organization noted that "[i]n areas where migration is typical, crews are called to work in stages," with the number of crews "increas[ing] at peak season," and reduction in the post-certification recruitment period would displace "[w]orkers who have reported for and worked in these jobs for years" by permitting employers "to reject U.S. workers who report to work on the exact date they had begun work the year before, which could be after the 30-day deadline."

Some commenters who opposed the proposal took issue with the hiring practices data the Department cited in the NPRM. A workers' rights advocacy organization also commented that the Department's data assume that the SWAs are properly implementing the 50 percent rule, but there are multiple instances where the SWAs miscalculate the 50 percent rule period and shorten the recruitment period. Other commenters generally emphasized the continuing importance of the SWA referral process. One of these commenters cited a 2018 monitor advocate report indicating SWAs referred more than 35,000 U.S. workers for H-2A job opportunities in 2015. A State employment agency asserted the data on which the Department relied were insufficient to justify elimination of the 50 percent rule because it examined "only 20 percent of the selected H-2A applications audited." A

workers' rights advocacy organization asserted the decision to eliminate the 50 percent rule was arbitrary and capricious because the Department failed "to present any evidence of disruption caused by the 50 [percent] rule" and failed to account for employers discouraging U.S. workers from applying for jobs. Two U.S. Senators expressed concern that the "lack of any data in the NPRM reflecting the lengths of work contracts" prevented the public from "sufficiently respond[ing] to the potential effects of the Department's proposal" and "exacerbates the concern . . . that eliminating the 50 percent rule will harm U.S. workers."

The Senators also asserted "the Department fail[ed] to provide any quantitative analysis and offer[ed] generalized assertions to support its claim that the employer costs of compliance with the 50 percent rule outweigh the benefit to U.S. workers." Similarly, a State agency that urged the Department to maintain the 50 percent rule noted the requirement is longstanding and "the data shows there have been minimal disruptions to agricultural employers." Some commenters said that the rationale for eliminating the 50 percent rule was faulty because if the number of workers applying during the 50 percent rule period are low, then the cost to employers is negligible. Many workers' rights advocacy organizations agreed and cited to the early congressional study indicating the 50 percent rule not only provides an important protection for U.S. workers but does so with minimal burden to employers. Several of these commenters noted the report's conclusion that "[i]n comparing the tangible benefits and costs alone, the benefits of the 50 Percent Rule outweigh the costs" and that "the costs of the 50 Percent Rule have been minimal and that the Rule has not had any particular negative impacts on either growers or U.S. workers." Other commenters pointed to the Department's 2010 H-2A Final Rule, which concluded that the 50 percent rule's benefits to workers outweighed the costs to employers, and that there was a lack of definitive data cutting in either direction.

In contrast, many commenters, including trade associations, employers, agents, individual commenters, a State agency, and a public policy organization, expressed support for the proposal. Some stated that few workers apply beyond the first 30 days, so the impact on U.S. workers would be minimal. Others stated that the proposal also would provide employers with more certainty and reduced costs.

Another stated that it was difficult to train workers who are hired months after the season starts, and others said the proposal would reduce workplace disruptions caused by hiring new workers later in the contract period. Some stated that it was very difficult for agricultural employers to find domestic workers for these jobs. A State agency commented that the proposal would allow States to conduct concentrated recruitment of domestic workers at the beginning of the period of need. Some commenters added that the proposal provides a clear, bright-line rule as to employers' hiring obligations. An employer commented that once harvest begins, workers change location every 30 to 45 days, and most U.S. workers hired under the rule refuse to travel, so their employment is short term. Another commenter said that the proposal would be beneficial to H-2A workers who may be displaced by domestic workers well into the contract.

Some commenters who expressed support for the proposal to replace the 50 percent rule also suggested that the Department should further reduce the period during which employers must hire U.S. workers. Commenters suggested that the Department require employers to hire U.S. workers during a set period, pre-season, ending no later than when the H-2A workers depart from their home country to travel to the United States (*i.e.*, coinciding with the end of the employer's positive recruitment period under § 655.143(b)(3)). Other commenters suggested that the Department adopt the H-2B rule that requires recruitment until 21 days before the first date of the need (§ 655.40(c)). Alternatively, one commenter suggested that, given the shorter time period involved in the H-2A filing process, the Department could adopt a modified version of the H-2B rule's recruitment period by reducing the recruitment period to as little as 7 to 10 days before the first date of need. An agent commented that the job order should stay open for the entire recruitment period unless the employer notifies the Department that all jobs have been filled, at which time, the job order should be closed. The commenter also suggested that the job order should be reopened if workers are needed at any time during the contract period.

An agent also objected to the proposal insofar as it eliminated the "small employer exemption" to the rule, which excused certain small businesses from any hiring obligation after the end of the positive recruitment period and encouraged the Department to retain the existing small employer exemption framework with the proposed 30-day

rule. The commenter stated that it was unreasonable to require a small employer to continue recruiting U.S. workers even 30 days into the season, because smaller operations do not enjoy the same margins for error and cannot easily absorb workforce disruptions during the season. Additionally, the commenter stated that the Department failed to explain why the exemption should be removed from the regulations. Another commenter stated that the small employer exemption was important to maintain.

The Department takes seriously its obligation to protect workers in the United States from potential adverse impact resulting from the employment of H-2A workers and appreciates the many comments it received on the proposed change to the post-certification mandatory hiring period. After careful consideration of all comments, and in light of the substantial concerns expressed by immigration and workers' rights advocacy organizations, U.S. Senators and Representatives, State employment agencies, and others, the Department has decided not to adopt the proposed 30-day rule. Instead, the Department will retain the 50 percent rule it has applied nearly continuously for decades.

The Department notes, first, that in reaching its decision to retain the longstanding 50 percent rule, it was not persuaded by the congressionally required study to which several commenters referred, as that study was commissioned by the Secretary of Labor in 1990 and focused on the impact of the 50 percent rule in only two States—Virginia and Idaho. *See* 2008 H-2A NPRM, 73 FR 8538, 8553. The research firm that produced the study interviewed only 66 growers, constituting only 0.1 percent of Virginia and Idaho's 64,346 farms at the time of the study. The study's age and small size render it an unreliable measure of the current impact of the 50 percent rule. The reasoning in the 2010 H-2A Final Rule also was similarly not determinative here—in that rule, the Department reinstated the 50 percent rule because of a lack of definitive data. 2010 H-2A Final Rule, 75 FR 6884, 6922.

Since then, the Department has conducted its own analysis of hiring practices, as noted in the NPRM. Based on a small set of recruitment reports obtained through the audit examination process, the hiring practices data cited in the NPRM demonstrate that most U.S. workers who apply for agricultural jobs do so before the start of the work contract. Based on these data, the

Department considered adopting the reduced recruitment period in the January 2021 draft final rule but acknowledged that some U.S. workers apply for these jobs after the employer's first date of need. Specifically, the Department's analysis of certified H-2A applications covering more than 33,510 jobs indicated that 3,392 U.S. workers applied for the available job opportunities at some point from the beginning of the employer's H-2A recruitment efforts through 50 percent of the work contract period and 16 percent of these U.S. workers applied and/or were hired more than 30 days after the start date of work.

Although the vast majority of workers who apply after the start date of work apply during the first 30 days of a work contract, the Department acknowledges that the analysis is based on a limited set of data available from employer recruitment reports selected for audit examination. After further consideration of comments and the available data, the Department agrees with commenters who note the burden the 50 percent rule imposes on employers in those limited cases where U.S. workers apply beyond the proposed 30-day period is minimal and outweighed by the interests of the hundreds or potentially thousands of domestic migrant and seasonal farmworkers who may want to apply for the job opportunity more than 30 days after the first date of need. The 50 percent rule was initially a creation of the INA and designed to enhance domestic worker access to job opportunities for which H-2A workers were recruited. The Department believes any burden on employers as a result of the 50 percent rule is outweighed by the interests of the Department in ensuring U.S. workers are provided fair notice of H-2A job opportunities and are not denied employment if they are qualified and available within an adequate period of time after the employer's start date.

Additionally, the Department shares the concerns of commenters that changing the hiring period through this final rule could reduce U.S. workers' ability to access temporary and seasonal job opportunities and would raise the prospect of adverse impact resulting from the employment of H-2A workers. Furthermore, as several commenters pointed out, due to the nature of agricultural work, U.S. workers may need to seek new employment because of crop loss, or may need flexibility to follow crops as one work contract ends and another begins. These comments are consistent with comments from employers and associations that noted agricultural employers rarely need their entire workforce at the beginning of the

season, but instead need a steadily increasing number of workers as the harvest intensifies. Both the proposed 30-day rule and the longstanding 50 percent rule weigh the same factors: on the one hand, ensuring U.S. worker applicants have a fair opportunity to apply for job opportunities so that they are not displaced by foreign workers; and on the other, recognizing the practical realities of agricultural work and the need to administer the INA in a way that is fair and reasonable for all affected parties, including employers. After considering the merits of the proposal and the significant number of comments expressing substantial concerns with a shorter hiring period, the Department has concluded that retaining the 50 percent rule best balances the objectives of ensuring the H-2A program operates in a way that is fair to all parties and provides adequate protections for U.S. workers, consistent with the Department's statutory mandate.

The Department is sensitive to the concerns regarding the impact on small businesses and appreciates the agent's comment regarding the small employer exemption. In light of the Department's decision to retain the 50 percent rule, and further consideration of the regulatory history, the Department has decided to retain the small employer exemption in this final rule.<sup>103</sup> In 1986, the IRCA added the 50 percent rule to the INA as a temporary 3-year statutory requirement, which included an exemption for employers who, among other requirements, "did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in section 203(u) of title 29." 8 U.S.C. 1188(c)(3)(B)(iii). That exemption was included in the Department's 1987 H-2A IFR. 52 FR 20496, 20520. Although the statutory 50 percent rule and exemption were temporary, the corresponding requirements in the 1987 regulations had no expiration date. *See* 55 FR 29356, 29357 (July 19, 1990). In 1990, ETA published an IFR to continue the 50 percent rule, and included the small employer exemption. *Id.* at 29358. In 2008, the Department eliminated the 50 percent rule and created a 5-year transitional period during which employers were required to hire U.S. workers for 30 days after the employer's first date of need. 2008 H-2A Final Rule, 73 FR 77110, 77128. The 30-day

<sup>103</sup> The January 2021 draft final rule would have eliminated the small employer exemption because the mandatory hiring period under the 30-day rule would have been shorter than under the 50 percent rule.

requirement did not include an exemption for small businesses, and the final rule offered no explanation for the omission. In 2010, the Department reinstated the 50 percent rule, including the small employer exemption, stating that the exemption "minimize[s] the adverse effect on those operations least able to absorb additional workers." 2009 H-2A NPRM, 74 FR 45906, 45917. In light of the Department's decision to retain the longstanding 50 percent rule, the Department also is retaining the small employer exemption in this final rule.

In addition to the comments addressed above, the Department also received a few comments addressing issues beyond the scope of the proposal to replace the 50 percent rule with the 30-day rule. One commenter said that worker referrals preceding the date of need should not automatically reduce the number of H-2A workers certified in the application, and the employer should have the discretion to either reduce the number of H-2A positions or hire both domestic referrals and H-2A workers. Another commenter suggested that to mitigate the inconvenience of hiring U.S. workers after the start of the contract, the Department should facilitate the placement of displaced H-2A workers in immediate, subsequent H-2A employment elsewhere. Another suggested treating H-2A workers in the country the same as U.S. workers for purposes of recruitment, which would require employers to prove that no H-2A workers already in the country are available to fill the positions. However, these suggestions are beyond the scope of this rulemaking.

The Department also invited comments on the proposed recruitment period for employers who chose to stagger the entry of H-2A workers. However, as the Department has decided not to adopt the proposed staggered entry provision, the issue of the related recruitment period is moot.

Accordingly, under this final rule, unless the small employer exemption applies, an employer granted temporary agricultural labor certification must continue to provide employment to any qualified, eligible U.S. worker who applies until 50 percent of the period of the work contract has elapsed, and an employer must update the recruitment report for each U.S. worker who applies through the entire recruitment period.

#### c. Paragraph (k), Contracts With Third Parties Comply With Prohibitions

The Department received a few comments regarding this provision of the NPRM, which the Department considered. The Department now adopts

the language proposed without change. The current regulation requires employers to contractually forbid any engaged foreign labor contractor or recruiter (or their agents) from seeking or receiving payments or other compensation from prospective workers; the employer must provide documentation of the prohibition upon request. In the NPRM, the Department proposed to amend § 655.135(k) to clarify that employers engaging any foreign labor contractor or recruiter “must contractually prohibit in writing” the foreign labor contractor or recruiter, or any agent of such contractor or recruiter, from seeking or receiving payments from prospective employees. As explained in the NPRM, the Department has specified the contractual language that employers must use to satisfy this requirement for employers’ convenience and to facilitate consistent and uniform compliance. 84 FR 36168, 36208.

The revision makes it clear that foreign labor contractors or recruiters and their agents are not to receive remuneration from prospective employees recruited in exchange for access to a job opportunity or any activity related to obtaining H–2A labor certification. To help monitor compliance with this prohibition, the Department has retained the requirement that employers make these written contracts or agreements available upon request by the CO or another Federal party.

A farmer and agent opposed the proposal because they believed the existing regulation was sufficient and that employers should be able to draft their own language prohibiting fees. The agent argued further that requiring specific contractual language could expose employers to a nonsubstantive violation, and furthermore that the Department had not provided a reason that the existing regulation was problematic. The Department understands employers’ interest in drafting their own contractual language. However, the Department nonetheless has determined that it is necessary to require the specific language set forth in this provision to facilitate uniform application and compliance with the regulatory requirement. The previous regulatory requirement left room for employers to write language that may not have been clear or may not have conveyed the prohibition correctly. The language adopted in § 655.135(k) should serve to remove any doubt concerning contractual parties’ obligations under § 655.135(k), and it makes it easier for employers to comply with the regulation.

An international recruitment company, trade associations, and advocacy organizations explained that the Department has failed to prevent recruitment fees from being charged to foreign workers in the past, and that this has caused such foreign workers to be vulnerable to unlawful conduct and debts. One of the advocacy organizations opposed any changes that would lower wages or reduce worker protections or reduce Department oversight. The Department, in requiring the addition of this specific language under § 655.135(k) clarifies the existing legal requirements. The Department acknowledges that, while organizations or people have nonetheless collected recruitment fees in violation of existing law, the change adopted in this final rule relates only to the addition of specific language in order to facilitate consistent and uniform compliance. Furthermore, the Department’s processes and procedures meant to enforce this requirement are still in place.

While noting that it approved of the additional contractual language proposed, one of the workers’ rights advocacy organizations went on to explain that this prohibition for third parties causes employers to intentionally remain ignorant of the recruitment process. It argued that workers are discouraged from coming forward for fear they will be denied a visa and fear of retaliation or blacklisting from recruiters and employers. The organization explained that unlawful conduct surrounding recruitment leads to debt for workers and human trafficking, and then detailed numerous examples from case law to support the assertion that recruiters are not abiding by the current regulations and are abusing foreign workers. The organization put forth numerous suggestions relating to increased enforcement and transparency regarding the recruitment process and increased worker protections. The Department appreciates the concerns the workers’ rights advocacy organization has raised regarding the treatment of workers. Although several of the suggestions are beyond the scope of this rulemaking, the Department has addressed related concerns in other relevant sections of this final rule. For example, the Department has retained the current regulations’ anti-retaliation provision and has added debarment of agents and attorneys for their own misconduct in this final rule. See 20 CFR 655.135(h) and 655.182; 29 CFR 501.20. The Department also believes the addition of the required contractual

language is an important step toward ensuring that employers do not remain ignorant of the prohibitions and that any agreement with a third party clearly articulates the prohibitions.

An agent suggested the regulation be revised further and argued that the employer’s inclusion of this contractual language should be a “legal safe harbor” to any claim brought against it to recover recruitment fees unless there is clear and convincing evidence that the employer knew or participated in the prohibited fees being requested. Through the proposed language in § 655.135(k), the Department did not propose such a “legal safe harbor,” and was not attempting to affect the legal rights parties may have in any private civil claims. To the contrary, as the Department has previously made clear in both the 2008 and 2010 prior rulemakings, these contractual terms must be bona fide. 75 FR 6926. Creating a “legal safe harbor” could potentially undermine an employer’s incentive to assure the bona fides of the contractual provisions, thereby undermining these important worker protections. Accordingly, the Department declines to incorporate such a provision.

#### 7. Section 655.136, Withdrawal of an Application for Temporary Employment Certification and Job Order

As discussed earlier in this preamble under § 655.124, the Department proposed to reorganize all withdrawal provisions so that, for example, the procedure for withdrawing the *Application for Temporary Employment Certification* and job order is located in the section of the rule where an employer at that stage of the labor certification process would look for such a provision. Accordingly, the NPRM proposed revisions to move the withdrawal provisions at § 655.172(b) of the 2010 H–2A Final Rule to this new section, and to clarify the timeframe and procedures by which an employer may request withdrawal. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed to move the content of § 655.172(b) of the 2010 H–2A Final Rule to a new provision at § 655.136 located in the “*Application for Temporary Employment Certification* Filing Procedures” portion of the regulation, which begins at § 655.130. As a result of this relocation, the withdrawal provisions relating to an *Application for Temporary Employment Certification* that is in process at the

NPC and the associated job order would be located in a section of the rule where the regulated community would be more readily able to locate and understand the actions required for withdrawal at that stage of processing.

In addition, the Department proposed to remove language limiting withdrawal to the period after formal acceptance and expand this period to any time before the CO makes a final determination. This revision would allow employers to notify the NPC at any time after submitting an *Application for Temporary Employment Certification* of their desire to end processing of the application and job order. Finally, the Department proposed under § 655.136(b) to clarify that employers must submit withdrawal requests in writing to the NPC, identifying the *Application for Temporary Employment Certification* and job order to be withdrawn and stating the reason(s) for requesting withdrawal; however, the Department did not change the employer's obligations to workers recruited in connection with the *Application for Temporary Employment Certification* and associated job order, as these obligations attach at recruitment and continue after withdrawal.

The Department received no comments objecting to the proposed reorganization of the job order withdrawal provision from § 655.172(b) to § 655.136. One trade association supported a proposal to permit withdrawal any time after submission and up to the point of the CO's final determination. Two commenters objected to requiring employers to comply with their obligations under the *Application for Temporary Employment Certification* and related job order after withdrawal, apparently without regard to the timing of withdrawal. Consistent with discussion in the preamble for § 655.124, these comments objecting to an employer's continuing obligations after withdrawal are outside of the scope of the proposed change at § 655.136. The Department's proposal was limited only to reorganizing the existing withdrawal provision from § 655.172(b) to § 655.136 and minor clarifying edits, such as adding "and job order" to the statement of the employer's continuing obligation to comply with the terms and conditions of employment after withdrawal with respect to all workers recruited in connection with that *Application for Temporary Employment Certification*, which includes the related job order. Accordingly, the Department is adopting § 655.136, as proposed, without change.

#### *D. Processing of Applications for Temporary Employment Certification*

##### 1. Section 655.140, Review of Applications

The NPRM proposed minor amendments to this section to conform existing procedures to other proposed changes, such as changes involving electronic filing and expansion of the first actions available to the CO after initial review of the *Application for Temporary Employment Certification*, job order, and any supplementary documentation necessary to issuance of a Final Determination. The Department received a few comments on this provision. After reviewing these comments, the Department has decided to adopt this provision as proposed in the NPRM, although first actions available to the CO will not include certification, as a result of the Department's decision not to adopt the pre-filing positive recruitment proposal at § 655.123, as discussed below.

In paragraph (a), the Department proposed to expand the first actions available to the CO after initial review of the *Application for Temporary Employment Certification*, job order, and any necessary supplementary documentation for compliance with all requirements under the subpart. In addition to the two first action options available to the CO under the 2010 H-2A Final Rule (*i.e.*, issuance of a NOA under § 655.143, if the application meets acceptance requirements, or issuance of a NOD under § 655.141, if the application contained deficiencies), the Department proposed that the CO could issue a Final Determination under § 655.160 as the first action. As explained in the NPRM, in combination with the pre-filing positive recruitment proposal at § 655.123, the proposed revision to § 655.140(a) would permit the CO to either certify or deny an *Application for Temporary Employment Certification* as the first action. The CO could issue a temporary agricultural labor certification as the first action if the employer satisfied all criteria for certification at the time of the CO's initial review, which could be possible for an employer who engaged in the proposed pre-filing recruitment option at § 655.123. Or, the CO could issue a denial as the first action if an application was incurably deficient at the time of filing, such as an application filed by a debarred employer.

The Department received a comment from a trade association that expressed support for the proposal, stating the ability to issue a Final Determination would expedite the application process in certain situations. An employer made

a general comment expressing concern about the Department's requirement that employers cure deficiencies through the NOD process before the CO accepts an application for further processing, asserting that inconsistent identification of deficiencies could create processing delays for some applications. The Department appreciates the commenter's concern; however, the Department did not propose to change the criteria for the CO's decision to issue a NOD. The CO makes every effort to identify and address deficiencies consistently across applications and cannot accept an application for further processing and recruitment until all deficiencies related to effective recruitment of U.S. workers are resolved. The Department intended to expand the range of actions available to a CO by adding the option to issue a Final Determination under § 655.160 as the first action; the criteria for the CO's decision to issue a NOD remains unchanged.

This final rule adopts proposed paragraph (a) without change. Although the Department's decision not to adopt optional pre-filing recruitment removes certification as a possible first action, a Final Determination remains an available option for the CO's first action because the CO may deny an *Application for Temporary Employment Certification* as the first action if the application is incurably deficient. Alternatively, the CO may issue a NOD that provides the employer with an opportunity to cure deficiencies in the application or a NOA that accepts the application for further processing and recruitment.

The Department also proposed minor revisions to paragraph (b) explicitly addressing electronic communication, both to permit the CO to send electronic notices and requests to the employer and to permit the employer to send electronic responses to these notices and requests. The Department proposed to retain the option to use traditional methods that ensure next-day delivery because these methods will remain necessary in limited cases, such as when the employer is unable to file or communicate electronically. The same trade association expressed support for this proposed revision, stating that electronic submissions are more efficient. Therefore, this final rule adopts proposed paragraph (b) without change.

##### 2. Section 655.141, Notice of Deficiency

The NPRM proposed amendments to this section to remove the option for employers to request expedited administrative review or a de novo

hearing of a NOD, and to clarify that an employer may submit a modified job order in response to a NOD and may appeal a denial issued by the CO of a modified application. The Department received some comments on this provision. After carefully reviewing these comments, the Department has decided not to make any changes to the proposed regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed removing language from paragraph (b) to conform to the language of the INA, which requires expedited administrative review, or a de novo hearing at the employer's request, only for a denial of certification or a revocation of such certification. See 8 U.S.C. 1188(e)(1). Because a NOD is not a denial or revocation of certification and is, instead, an opportunity for employers to provide information or cure deficiencies before the CO makes a final determination, the Department's proposal better aligns with the statutory requirements under the INA. 84 FR 36168, 36209.

Some commenters expressed general opposition to the proposed changes to paragraph (b) without further explanation. A commenter stated the proposal would complicate the program and make it more costly but did not explain why this would be the case. The Department disagrees with these assertions. As noted below, the Department believes that this change will simplify and streamline the temporary agricultural labor certification process. One commenter mistakenly believed the Department had justified this proposal on the basis of consistency with the H-2B program, but this was not a stated reason for the proposal. Other commenters believed they would not be able to fix errors in their filings or alert the CO to an addendum mistakenly not included in their original filing without the ability to appeal a NOD. However, the ability to appeal a NOD to BALCA is not required to address these issues. The employer can instead respond to the NOD with the necessary modification(s), correction(s), or omitted document(s). Specifically, under § 655.141, the employer retains the opportunity to respond to the NOD with additional information or documentation, including an amended job order, to address the identified deficiency or deficiencies in its application.

Another set of commenters claimed removing the option to appeal a NOD to BALCA could delay the temporary agricultural labor certification process. Many commenters did not explain why

they believed that delays would occur as a result of the Department's proposed change. Two employers, however, provided more specific information. One employer stated the failure to include a document listing their proposed worksites as an attachment to a prior application delayed the arrival of their workers under the Department's subsequent certification. The other employer noted that their agent quickly resolved previous NODs and asserted that losing the ability to request NOD review would slow the process because they would have to produce a "new and amended" job order. Neither commenter explained how the ability to appeal a NOD to BALCA would prevent delay, especially when the opportunity to correct deficient applications continues to be available pursuant to § 655.141 and employers still must produce documentation, such as job orders, that meet all regulatory requirements.

Some commenters stated they would be unable to expeditiously defend their application when a NOD is issued and would have to comply with the NOD or wait to appeal after a denial, risking extra expenses or a potential delay in worker arrivals. One of these commenters suggested the ability to appeal both NODs and denials is a more efficient use of the employer's and the Department's time. However, employers do not need to appeal a NOD in order to submit additional documents or otherwise address the identified deficiencies. As explained above, employers can provide these documents in their response to the NOD. In fact, the Department anticipates that the changes in this final rule will expedite resolution of the majority of applications and decrease expenses by providing one clear, singular route for resolving information and documentation issues that prevent acceptance and certification of *Applications for Temporary Employment Certification* or job orders. Based on OFLC's experience administering the H-2A program, the appeal of a NOD to BALCA tends to add more time to case processing than a CO's efforts to resolve remaining issues in a NOD response through mechanisms such as subsequent NODs or other communication that this final rule explicitly authorizes in § 655.142(a). Under this final rule, the Department preserves the enhanced need for timeliness in agriculture by simplifying the steps in the adjudication of H-2A applications. Rather than allowing an appeal of a NOD to BALCA, which, even if successful, could lead to subsequent NODs, appeal of those NODs, and then

a CO's denial and an appeal of that denial (*i.e.*, separate appeals of multiple issues), this final rule consolidates consideration of remaining issues or deficiencies into one appeal of the CO's determination. Notably, as explained in the NPRM, this approach provides the CO and employer more opportunities to resolve deficiencies that prevent acceptance or certification of *Applications for Temporary Employment Certification* or job orders and better ensures that only those issues that the CO and employer cannot resolve are subject to appeal before BALCA. See 84 FR 36168, 36209. The appeal process continues to include an expedited administrative review procedure, or an expedited de novo hearing at the employer's request, of the denial in recognition of the INA's concern for prompt processing of H-2A applications.

An agent stated no data were provided on the rate of certifications following appeals of NODs that underwent BALCA review and suggested these data be used to determine whether to adopt the proposal. OFLC does not produce data on this rate. Moreover, the Department does not believe these data would be instructive of whether to adopt its proposal. Regardless of whether an application receives a NOA after an appeal of a NOD or after resolution with the CO, the post-NOA requirements that must be met for certification, such as recruitment requirements, are the same. These post-NOA requirements for certification do not typically relate to the deficiencies that would be raised in a NOD, thus the rate at which an application is certified following the appeal of a NOD is irrelevant. Another commenter claimed that, based on the small number of BALCA decisions out of the total number of H-2A applications filed each year, the current process should be preserved. This comment is unclear because the figures provided by the commenter do not distinguish between appeals from a NOD versus appeals from a denial of an application. To the extent the commenter is asserting an appeal of a NOD should be preserved because of the limited number of BALCA rulings related to these appeals, there could be several reasons for this number that are unrelated to the ability to appeal a NOD, including that many employers receive a NOA in the first instance or choose to respond to the NOD instead of appealing.

Some commenters suggested the change may eliminate an opportunity for dialogue between the Department and the employer prior to a final

determination. However, as explained above, the appeal of a NOD is not the only opportunity for the employer to engage in dialogue with the Department prior to a final determination. Employers have the option of responding to the NOD and working with the CO to resolve the deficiencies identified in the NOD. Several commenters believed the proposal would limit employers' due process or result in undesired outcomes due to errors by the agency. The Department believes the proposed change continues to guard against the latter because employers can still request review before an administrative tribunal of a CO's denial of an application. Employers also continue to decide whether they wish to seek review in the form of administrative review or a de novo hearing. In this way, the proposed change retains the due process protections afforded employers under sec. 218(e)(1) of the INA and better conforms with these statutory requirements. See 8 U.S.C. 1188(e)(1) (noting the regulations must provide for expedited administrative review, or, at the employer's request, a de novo hearing, of a denial of certification or a revocation of such certification). And, as is the case now, employers may appeal this administrative decision or seek other appropriate relief in Federal court.

An agent suggested that, in cases where the CO believes the employer will likely agree to the modification requirements, the NOD should provide the employer the option to accept the proposed changes by checking a box in iCERT or its successor (FLAG) instead of filing a formal NOD response. While there are circumstances when OFLC may address certain minor issues without the issuance of a formal NOD and response, the Department declines to adopt the agent's suggestion to create this separate procedure for two reasons. First, it would necessitate judgment calls on whether the employer is likely to consent to the required modifications. Second, the Department's electronic filing system is designed to prevent submission of obviously deficient, incomplete applications, which should reduce the need for the CO to issue nonsubstantive NODs.<sup>104</sup>

The NPRM also proposed adding language to § 655.141(b)(3) to clarify that the employer may submit a modified job order in response to a NOD. This proposal conforms paragraph (b)(3) with other paragraphs in

§ 655.141, which allow the CO to issue a NOD for job order deficiencies and provide the employer an opportunity to submit a modified job order to cure these deficiencies. A commenter suggested that where the CO is unable to make a determination at least 30 days before an employer's date of need, paragraph (b)(3) should include language requiring the Department to notify the employer or agent of the reason. However, this comment is beyond the scope of the Department's proposal and cannot be implemented through this rulemaking. Because no commenter raised issues with the proposed language in paragraph (b)(3), the Department adopts this paragraph without change.

Lastly, the NPRM proposed to remove language in § 655.141(b)(5) that purports to prohibit the employer from appealing the denial of a modified application.<sup>105</sup> This clarification aligns § 655.141 with § 655.142(c), which permits the appeal from a denial of a modified application. The Department received two comments, both supporting the proposal. This final rule therefore adopts paragraph (b)(5) as proposed.

### 3. Section 655.142, Submission of Modified Applications

The NPRM proposed to amend this section to clarify the standards and procedures that govern the employer's submission of a modified *Application for Temporary Employment Certification* or job order. The Department received one comment on this provision; after reviewing this comment, the Department has decided not to make any changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The provisions in this section govern the employer's response to a NOD issued pursuant to § 655.141. The Department proposed revisions to paragraph (a) to clarify that an employer may submit a modified job order in response to a NOD, not only a modified *Application for Temporary Employment Certification*. This change conforms this section to the provisions at § 655.141 that permit the CO to issue a NOD for *Application for Temporary Employment Certification* and/or job order deficiencies. In addition, the

Department proposed to revise paragraph (a) to explicitly authorize the CO to issue multiple NODs, if necessary, to provide the CO with additional flexibility to resolve deficiencies that would otherwise prevent acceptance of an *Application for Temporary Employment Certification* and job order.<sup>106</sup> For example, this may be necessary if the CO discovers a deficiency while reviewing submissions by the employer, such as an employer's response to a NOD that raises other issues that require the CO to request additional modifications.

In paragraph (b), the Department proposed clarifying revisions to explain the circumstances under which the CO will deny an *Application for Temporary Employment Certification* after reviewing an employer's NOD response(s). If the modified *Application for Temporary Employment Certification* or job order does not cure the deficiencies the CO identified or otherwise fails to satisfy the criteria required for certification, the CO will issue a denial following the procedure outlined in § 655.164.

Otherwise, the Department retained without change the provisions in paragraph (a) that allowed the CO to postpone issuing a final determination for 1 calendar day (up to a maximum of 5 calendar days) for each day an employer fails to submit a timely response to a NOD and, if the employer fails to submit a response within 12 calendar days after the NOD was issued, to deem the *Application for Temporary Employment Certification* abandoned. The Department also retained without change the provisions in paragraph (c) describing the opportunity to appeal the CO's denial of a modified *Application for Temporary Employment Certification*.

The Department did not receive comments opposed to the proposed changes in this section. One trade association expressed support for the changes, stating that they would reduce the burden on employers to resolve problems with the job order and would expedite application processing once problems are resolved. Therefore, the Department has adopted § 655.142 as proposed, without change.

### 4. Section 655.143, Notice of Acceptance

The NPRM proposed to amend this section to clarify current policy and ensure the NOA content requirements and timeline for issuance conforms to

<sup>104</sup> See 84 FR 36168, 36198 (noting OFLC's technology system will not permit electronic submissions where required fields and documentation have not been completed or uploaded and saved).

<sup>105</sup> The purpose of § 655.141(b)(5) in the current regulations is to address situations where the employer fails to respond to the NOD or appeal and, accordingly, "abandons" the application. The Department has retained the relevant language in what will now be § 655.141(b)(4): "if the employer does not comply with the requirements of § 655.142, the CO will deny the *Application for Temporary Employment Certification*." 84 FR 36168, 36276.

<sup>106</sup> The Department also explained that this revision mirrors language included at § 655.32(a) of the 2015 H-2B IFR. See 80 FR 24042, 24122.



other changed proposed in the NPRM, such as labor supply State determinations and requiring the CO to transmit the job order to the SWAs for interstate circulation. The Department received some comments on the changes proposed to this provision. As discussed below, in this final rule, the Department has made additional revisions to further clarify the NOA content requirements and conform this section both to regulatory changes adopted in the 2019 H-2A Recruitment Final Rule and the Department's decision not to adopt the pre-filing positive recruitment options proposed at § 655.123.

The Department proposed no substantive changes to the notification timeline in paragraph (a). The proposed regulatory language included a technical revision to remove "are complete and" for clarity and to conform the language with the Department's proposal in paragraph (b) to codify the current practice under which the CO issues a NOA when an *Application for Temporary Employment Certification* and job order is complete and compliant for recruitment purposes, even though requirements for certification that are unrelated to recruitment (e.g., final housing approval) may not have been completed yet. In addition, the Department proposed to revise the list of NOA content requirements to conform to other proposed changes in the NPRM. After considering comments on the Department's proposals, and to conform this section to changes made through the 2019 H-2A Recruitment Final Rule, the Department has retained paragraph (a) without change but further revised paragraph (b) of this section, as discussed below.

To avoid making unnecessary changes from the 2010 H-2A Final Rule, the Department has further reorganized the content of paragraph (b). Paragraphs (b)(1) through (3) now correspond to topics addressed in those paragraphs in the 2010 H-2A Final Rule: paragraph (b)(1) addresses interstate clearance of the job order, with revisions to conform with the NPC's electronic transmission of the job order to the SWAs; paragraph (b)(2) addresses the employer's positive recruitment and recruitment report obligations, with revisions to conform with the Department's decisions discussed in §§ 655.123 and 655.154 of this preamble (i.e., not to adopt the proposed optional positive pre-filing recruitment provision and to require the NOA to provide instructions to the employer regarding additional positive recruitment requirements, if any, and related documentation retention requirements) and changes implemented through the 2019 H-2A

Recruitment Final Rule; and paragraph (b)(3) addresses the positive recruitment period, with a proposed technical revision to cite to § 655.158 rather than repeat its content. In addition, the Department has redesignated the remaining paragraphs listed under paragraph (b). Paragraph (b)(4), which appeared as paragraph (b)(3) in the NPRM, requires the NOA to list outstanding documents and assurances required for certification. Paragraph (b)(5), which appeared as proposed paragraph (b)(4) in the NPRM, requires the NOA to notify the employer of the timeline for the CO's final determination and adopts the proposed allowance for the CO to hold final determination inside the 30 days before the employer's start date if the application is not certifiable by the 30-day mark but is expected to be certified before the employer's first date of need.

Finally, this final rule adds a new paragraph (b)(6) to accommodate a new provision added by the 2019 H-2A Recruitment Final Rule at paragraph (b)(5), effective October 21, 2019. Under paragraph (b)(6), the NOA will direct the SWA to provide written notice of the job opportunity to organizations that provide employment and training services to workers likely to apply for the job and/or to place written notice of the job opportunity in other physical locations where such workers are likely to gather, when appropriate to the job opportunity and AIE.

A workers' rights advocacy organization expressed concern about the CO issuing a NOA where the employer's application is complete and compliant for recruitment purposes but the employer has not submitted all documentation required for certification. The Department believes the commenter may have misunderstood the provision and thought the CO's issuance of a NOA in such circumstances would result in a temporary agricultural labor certification despite the employer's failure to submit all required documentation. In fact, what was proposed is effectively how the current process works. The CO's issuance of a NOA does not guarantee the employer will receive labor certification and does not absolve the employer of any recruitment requirements or documentation requirements in these cases. However, issuance of a NOA allows positive recruitment of U.S. workers to begin as early as possible—as soon as the application is complete and compliant for recruitment purposes. For example, positive recruitment may begin while the employer is making a housing repair the SWA identified

during inspection. The employer can only receive certification after it has submitted all documentation and assurances necessary for certification, including the SWA's housing certification. Therefore, in this final rule, paragraph (b)(4) allows the CO to issue a NOA listing any documentation or assurances that the CO has not yet received and without which certification will not be issued.

An employer and a trade association generally supported the Department's proposal to include an allowance for the CO not to issue a final determination 30 days before the employer's first date of need under one additional circumstance—when an *Application for Temporary Employment Certification* does not meet the requirements for certification on the 30th day before the first date of need but is expected to meet such requirements before the first date of need. The commenters asked the Department to clearly indicate this exception is limited to circumstances where CO must place a hold on an application that otherwise would be denied in order to afford the employer additional time to satisfy certification requirements. The Department appreciates the comment, which reflects the Department's intent as discussed in the NPRM, but does not believe it is necessary to revise this section further. The proposed language, which is adopted in this final rule at paragraph (b)(5), clearly limits the CO's authority to issue a Final Determination within 30 days of an employer's first date of need to the two scenarios specified: an employer's untimely modification under § 655.142 and when the CO holds an application that cannot be certified at the 30-day mark but is expected to be certifiable before the employer's first date of need.

##### 5. Section 655.144, Electronic Job Registry

The NPRM proposed minor amendments to this section to ensure the standards and procedures for posting the approved job order on the electronic job registry conforms with other changes proposed in the NPRM and is consistent with the Department's current practices. The Department received a few comments on this provision; after reviewing these comments, the Department has decided not to make any substantive changes to the regulatory text proposed in the NPRM. Therefore, as discussed below, the Department is adopting this provision as proposed in the NPRM.

In paragraph (a), the Department is deleting an obsolete sentence that stated job orders would be posted on the

electronic job registry after the Department initiated operation of the electronic job registry; as the electronic job registry is now fully operational, this sentence is no longer necessary. The Department is making two minor revisions to paragraph (b). First, rather than retaining both a detailed description of the period during which a job order will be posted on the electronic job registry and a reference to the regulatory provision where the primary description of that recruitment period is found (§ 655.135(d)), the Department is retaining only the reference to § 655.135(d). This approach is consistent with other similar revisions to simplify the regulation as a whole. Second, the Department proposed to add the phrase “in active status” to clarify job orders must remain in active status on the electronic job registry until the end of the recruitment period set forth in § 655.135(d). As discussed in the preamble to the NPRM as well as in the preamble to the 2019 H–2A Recruitment Final Rule, after the job order has served as an electronic recruitment tool on the electronic job registry during the recruitment period at § 655.135(d), the job order’s status on the electronic job registry will change to “inactive” so that the information on the job order will still be available for public research and access. See 84 FR 36168, 36210; 2019 H–2A Recruitment Final Rule, 84 FR 49439, 49444.

The Department received two comments on this section regarding the collection and public availability of information related to H–2A job opportunities. A State government agency suggested the Department leverage the electronic job registry to collect additional demographic information, including the work location of foreign workers and the concentration of certified applications and workers. A workers’ rights advocacy organization urged the Department to expand and enhance publicly available information for a variety of purposes, including increasing transparency and effective monitoring and enforcement. The commenter asked the Department to make all job and employer information, across all forms and in supporting documentation, publicly available and accessible, in particular, to potential workers and their advocates. The commenter expressed concern about the speed with which the Department would post job orders to the electronic job registry and potential difficulties with public access to older job orders, in particular, as the result of the Department’s transition between electronic systems.

The Department agrees it is important to collect H–2A program information and make it available to the public, which it currently accomplishes through the Disclosure Data section of the OFLC website. The Department will continue to collect detailed program information, including information about work locations and certification statistics sortable by occupation, and publish this information on the OFLC website. In early 2020, the Department significantly expanded the scope of labor certification decision data available to the public through the Disclosure Data section of the OFLC website. However, the Department declines to collect additional demographic information beyond that already required for program purposes because the labor certification stage of the immigration process involves the prospective recruitment of unnamed U.S. or foreign workers by an employer for often large numbers of job vacancies. Further, the intended use of the information published on the Department’s electronic job registry differs from the intended use of OFLC’s Disclosure Data. The electronic job registry is a recruitment tool designed for broad dissemination of available temporary or seasonal job opportunities to U.S. workers. As such, the electronic job registry provides information for job seekers, including work locations, duties to be performed, qualifications required, and dates of employment.

As of December 27, 2019, the Department has transitioned the electronic job registry to a new web-based platform, *SeasonalJobs.dol.gov*. *SeasonalJobs.dol.gov* is a mobile-friendly online portal that leverages the latest technologies to automate the electronic advertising of H–2A job opportunities and ensures copies of H–2A job orders are promptly available for public examination. The portal is designed to help U.S. workers identify and apply for open seasonal and temporary job opportunities using robust and personalized search capabilities. In addition, the portal makes it easier to integrate employment postings with third-party job search websites to make the posted job order information more accessible to job seekers. As a publicly available resource, any interested party may search and review posted job opportunities.

#### 6. Section 655.145, Amendments to Applications for Temporary Labor Certification

The NPRM proposed minor amendments to this section that contains the standards and procedures

by which an employer may submit a written request to the CO to amend its *Application for Temporary Employment Certification* in order to increase the number of workers or make minor changes to the period of employment. Specifically, paragraph (b) contained technical corrections to replace references to the terms “job site” or “place of work” with the proposed term “place of employment” as defined under proposed revisions to § 655.103. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department received a few comments that presented situations in which an employer might want to correct typographical errors or make other changes to its application to respond to changes in market conditions after submission. As discussed in the preamble to § 655.121(e)(2), allowing applicants to request corrections to applications without restrictions would run counter to the Department’s efforts to modernize the temporary agricultural labor certification process. The 2010 H–2A Final Rule at § 655.145, to which changes have not been proposed, allows an applicant to request amendments to increase the number of workers or to make minor changes to the period of employment, which could be due to changes in market conditions or for other reasons. In addition, an employer may request modifications to its job order under § 655.121(e)(2) before submitting its *Application for Temporary Employment Certification*. Should an employer want to make changes to its application other than those permitted under these amendment provisions, the employer will need to file a new *Application for Temporary Employment Certification* to accommodate the changes needed. Depending on the circumstances, the new application may qualify as an emergency situation filing under § 655.134, which allows for waiver of the normal filing timeframe requirements for reasons including “good and substantial cause (which may include unforeseen changes in market conditions).”

As for typographical errors, the Department reminds applicants to thoroughly review each application prior to submission, as they alone are responsible for ensuring an application is complete and accurate at the time of submission; the CO is not responsible for correcting an employer’s typographical errors. While some typographical errors may not impact the

CO's final determination, if a typographical error creates a substantive issue that is apparent to the CO (*e.g.*, an offered wage that is lower than required), the CO will issue a NOD requiring the employer to modify the application to address the deficiency. In situations where a typographical error mischaracterizes or misrepresents the job opportunity available in a way that does not create a regulatory deficiency that would trigger a NOD and the deficiency cannot be corrected during processing, the employer would be required to file a new *Application for Temporary Employment Certification* to accurately reflect the job opportunity for which it requests temporary labor certification to employ H-2A workers.

#### E. Post-Acceptance Requirements

##### 1. Section 655.150, Interstate Clearance of Job Order

The Department proposed to retain this section authorizing the interstate clearance of an employer's approved job order with three minor amendments to conform with changes proposed to other provisions in the NPRM. After considering the comments it received in connection with this provision, the Department has adopted as final the proposed revised § 655.150 with one technical amendment, which is discussed below. Related comments, such as those regarding the NPC's role in transmitting job orders to SWAs and electronic transmission of those job orders, are addressed in the preamble discussion of § 655.121. Similarly, comments regarding the Department's proposal to revise the recruitment period at § 655.135(d) are addressed in the preamble discussion of § 655.135(d), and comments regarding the Department's proposed process through which the OFLC Administrator will designate labor supply States or suggested additional changes to positive recruitment obligations are discussed in the preamble to § 655.154.

As established under the 2010 H-2A Final Rule, after receiving the CO's NOA under § 655.143, the SWA transmits the job order beyond the AIE and intrastate clearance, as directed in the NOA, at minimum, to all other States listed in the job order as anticipated worksites. Each SWA that receives the job order must keep the job order on its active file until the end of the recruitment period at § 655.135(d) and refer each qualified U.S. worker who applied during that period to the employer.

In the NPRM, the Department first proposed that the NPC, rather than the SWA, would transmit the employer's job order to each additional SWA under

§ 655.150, consistent with the Department's proposed revisions to § 655.121. Second, the Department proposed to add language specifying that the NPC will transmit the approved job order to each State that the OFLC Administrator designates as labor supply State(s), if applicable, consistent with the Department's proposal at § 655.154(d). Finally, consistent with proposed revisions to other sections of the regulatory text, the Department proposed to simplify the language in paragraph § 655.150(b) by including a citation to the recruitment period at § 655.135(d), rather than restating the language in the regulatory text under this paragraph.

Two State government commenters suggested that the Department require employers to input job order information into SWAs' online labor exchanges and/or other online recruitment tools, which they viewed as consistent with the Department's adoption of electronic filing and sensitive to State resources and system investments. One of these commenters further asked the Department to clarify that employer identity information is not suppressed (*i.e.*, withheld) in H-2A job orders, unlike non-H-2A job orders subject to § 653.501; the commenter thought such clarification would relieve SWAs of the task of manually entering that information in job order postings in the State labor exchange system.

The Department is sensitive to SWA resource concerns, but the Department declines to impose a duplicative job order data entry requirement on employers. Such a requirement is inconsistent with the Department's goals stated in the NPRM to eliminate redundancies, reduce or avoid duplication of burden on employers, and ensure a single point of entry for employers to access the H-2A program. Under this final rule, the employer will enter the job order information into the Department's centralized electronic system, to which the SWAs have access and from which the SWAs can retrieve the entirety of the job order data—including employer identity information—for use in processing the job order and posting on their State labor exchange systems for intrastate clearance. To the extent these comments suggest the Department should require employers to conduct additional positive recruitment or post jobs electronically in SWA recruitment tools beyond the State labor exchange system, the Department respectfully declines to make any changes in response. The topic of employers' electronic advertising obligations was addressed in the Department's 2019 H-2A

Recruitment Final Rule and is outside the scope of this rulemaking. As explained in the 2019 H-2A Recruitment Final Rule, the Department intended for the NPC's posting of the job order in the Department's enhanced electronic job registry system, as required under § 655.144, to facilitate broad electronic dissemination of the approved job opportunity. The electronic job registry system makes a standard set of job data available to third-party job search websites, which could include SWA online resources, allowing those job listing websites "to execute web-scraping protocols that extract new H-2A job opportunities from *SeasonalJobs.dol.gov* and index them for advertising to U.S. workers." 2019 H-2A Recruitment Final Rule, 84 FR 49439, 49445.

After consideration of these comments, the Department is adopting the proposed revisions to § 655.150, with one correction. The Department decided to revise paragraph (a) in this final rule to retain the phrase "at minimum" from the 2010 H-2A Final Rule's paragraph (a). This phrase was inadvertently removed in the proposed paragraph. Reinserting this phrase is necessary to avoid an unintended and inappropriate gap in job order circulation. For example, a job opportunity may be located in an AIE that crosses State lines; however, all places of employment the employer listed are located in only one of the States in the AIE. To appropriately test the domestic labor market, the job order must be circulated to all SWAs with jurisdiction over the AIE, not only the one SWA with jurisdiction over the places of employment listed. Retaining "at minimum" provides clarity and the necessary flexibility for the NPC and SWAs to ensure appropriate recruitment through the labor exchange system and does so without added burden to the employer. As a result, under this final rule, "at minimum," the CO will transmit the job order for interstate clearance to the SWA in each State listed in the job order as an anticipated place of employment and the SWA in each State designated by the OFLC Administrator as a State of traditional or expected labor supply for job opportunity under § 655.154(d).

##### 2. Section 655.153, Contact With Former U.S. Workers

The NPRM proposed minor amendments to this section containing the standards and procedures by which employers contact U.S. workers they employed in the occupation at the place of employment during the previous year to solicit their return to the job. *See*

2010 H-2A Final Rule, 75 FR 6884, 6929. This obligation aims to ensure that these U.S. workers, who likely have an interest in these job opportunities, receive notice of the job opportunities. The obligation also aims to prevent the employer from effectively displacing qualified and available U.S. workers by seeking H-2A workers. An employer, however, need not contact those U.S. workers it dismissed for cause or those who abandoned the worksite. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text from the NPRM.

Therefore, this final rule retains this section from the NPRM without change. Section 655.153 requires an employer to contact, by mail or other effective means (e.g., phone or email), U.S. workers it employed in the occupation at the place of employment during the previous year to solicit their return to the job. See 2010 H-2A Final Rule, 75 FR 6884, 6929. This obligation aims to ensure that these U.S. workers, who likely have an interest in these job opportunities, receive notice of the job opportunities. It additionally aims to prevent the employer from effectively displacing qualified and available U.S. workers by seeking H-2A workers. An employer, however, need not contact those U.S. workers it dismissed for cause or those who abandoned the worksite.

The Department proposed in the NPRM to add language to § 655.153 requiring an employer to provide the notice described in § 655.122(n)<sup>107</sup> to the NPC with respect to a U.S. worker who abandoned employment or was terminated for cause in the previous year. The proposal also required an employer to provide the notice in a manner consistent with the NPC **Federal Register** notice issued under § 655.122(n).<sup>108</sup> The Department intended the proposal to ensure that there would be virtually contemporaneous documentation to support an employer asserting that a U.S. worker abandoned employment or that it terminated the U.S. worker for

cause. Under the proposal, the employer would have to contact former U.S. workers who abandoned employment or were terminated for cause if, while subject to H-2A program requirements, it failed to provide notice in the required manner.

The Department may not certify an application unless the prospective employer has engaged in positive recruitment efforts of able, willing, and qualified U.S. workers available to perform the work. See 8 U.S.C. 1188(b)(4). The prospective employer's positive recruitment obligation is distinct from, and in addition to, its obligation to circulate the job through the SWA system. *Id.* E.O. 13788 requires the Department, consistent with applicable law, to protect the economic interests of U.S. workers. See 82 FR 18837 (Apr. 21, 2017), secs. 2(b) and 5. The requirement to notify the Department of abandonment and termination for cause protects the interests of able, willing, and qualified U.S. workers who might be available to perform the agricultural work, consistent with the INA. In addition, the notice could assist growers in the event U.S. workers who have abandoned employment or been terminated for cause later assert the employer failed to contact them as required by § 655.153.

As the Department provided in the NPRM, the notice obligation should not increase the existing regulatory burden. Section 655.122(n) currently permits an employer to avoid the responsibility to satisfy the three-fourths guarantee as well as its return transportation and subsistence payment obligations when a U.S. worker voluntarily abandons employment or the employer terminates the worker for cause if the employer notifies the NPC not later than 2 working days after the abandonment or termination. Employers already have a strong financial incentive to submit this notice to avoid responsibility for the three-fourths guarantee and return transportation and subsistence costs. The requirement to submit the notice to avoid § 655.153's contact obligation is thus unlikely to change the current regulatory burden on employers.

As noted above, § 655.153 currently permits employers to contact U.S. workers by mail or other effective means. In the NPRM, the Department reaffirmed that phone and email contact continue to be effective means to contact U.S. workers. The Department received no comments that suggested that permitting employers to contact U.S. workers by phone or email would be inconsistent with program requirements or undermine the interests of U.S. workers. Thus, the Department

again reaffirms that contact by phone or email is permissible.

In the NPRM, the Department observed that employers that are new to the program have employed U.S. workers in the occupation at the place of employment during the previous year. Further, there may be instances in which a regular user of the H-2A program might employ U.S. workers in the pertinent occupation at the place of employment to provide agricultural services and use the H-2A program again in the succeeding year.

The NPRM clarified that in each of these instances, § 655.153 requires these employers to contact the U.S. workers employed in the previous year. This obligation applies to entities that employed U.S. workers in the previous year under the common law definition of employer incorporated in § 655.103(b). The NPRM included the following example to demonstrate an instance in which a grower that employed U.S. workers under the common law in the previous year would assume an obligation to contact those U.S. workers under § 655.153 in the current year. Assume a grower used FLCs to provide U.S. workers during the previous year and then applied to employ H-2A workers in the following year. If the grower employed the U.S. workers under the common law of agency as a joint employer with a FLC in the previous year, then § 655.153 would require the employer to contact those U.S. workers in the following year.

The Department received numerous comments concerning this clarification, particularly related to a possible employer's obligation to contact workers that an H-2ALC or FLC employed in the previous year. Multiple institutional commenters, as well as individual commenters, opposed the application of § 655.153's contact obligation to U.S. workers an H-2ALC or FLC employed in the previous year. It appears, however, that these commenters misunderstood the scope of the Department's clarification. These commenters thought the clarification included an obligation to contact the U.S. workers who an H-2ALC or FLC employed at a grower's worksite in the previous year even when the grower did not (jointly) employ such U.S. workers under the common law definition of employer. The Department hereby reaffirms, consistent with the language of the existing regulation and the preamble in the NPRM, that its proposal in the NPRM did not require U.S. worker contact when the grower had no employment relationship under the common law definition of employer

<sup>107</sup> Under § 655.122(n), a worker's abandonment of employment or termination for cause relieves an employer of responsibility for subsequent transportation and subsistence costs and the obligation to meet the three-fourths guarantee for that worker, and, in the case of a U.S. worker, to contact that worker under § 655.153, if the employer provides notice to the ETA NPC of the abandonment or termination. In the case of an H-2A worker, notification to DHS is also required pursuant to 8 CFR 214.2(h)(5)(vi)(B)(1).

<sup>108</sup> See Notice, *Information about the DOL Notification Process for Worker Abandonment, or Termination for Cause for H-2A Temporary Agricultural Labor Certifications*, 76 FR 21041 (Apr. 14, 2011).

with the U.S. worker in the previous year. Thus, if the H-2ALC or FLC with whom the grower contracted in the previous year was the only employer of the U.S. workers that worked at the grower's farm, the grower has no contact obligation under § 655.153 in the subsequent year. The Department's proposal merely clarified that when the grower jointly employed the U.S. workers in the previous year, it must contact those U.S. workers it jointly employed.

These commenters also contended that the contracts between growers and H-2ALCs/FLCs regularly contain provisions prohibiting growers from "poaching" the labor contractors' workers. They accordingly submitted that the clarification will disrupt the parties' contractual relations. One commenter submitted that farmers "will increasingly be unable to find FLCs willing to work for them because the [FLC] will want to avoid having his workers poached by his clients," and that growers will not use labor contractors because "they will be concerned about breach of contract liability resulting from their required attempts to poach the [FLCs'] employees." Another commenter remarked that the proposed requirement should be clarified such that contact with former workers must only occur in situations when a written agreement exists between a farmer and a contractor that specifies joint employment status, to avoid the perception of "poaching."

A few commenters that opposed the clarification appear to evince a clearer understanding that its scope only includes growers that employed U.S. workers in the previous year. A joint comment contended that the clarification "appears to be the first instance" in which the Department is applying § 655.153 to workers employed by labor contractors. The commenters interpreted the provision to apply only to "former [workers]" and not to "joint [workers employed by] the H-2A applicant and [FLCs]. If the Agency intended for joint employees to be contacted, it would have included specific language identifying joint [workers] within the regulation" (emphasis in original). Another comment provided that § 655.153 does not reference workers employed jointly by a grower and FLC, adding that the clarification would "require applicants to do more than is required by statute and regulations."

Similar to the other commenters, the joint comment also explained that the proposal would seriously disrupt the relationship between growers and FLCs, particularly the requirement that

growers seek, in the joint comment's words, to "steal" labor contractors' workers.

Finally, one commenter reiterated the concerns of the commenters described above, adding that application of the proposal is likely to result in labor contractors relying more frequently on H-2A workers rather than U.S. workers. The commenter also proposed "at a minimum" that the regulatory language be "revis[e]d . . . to state explicitly that the obligation to contact former employees only extends to the employer's own employees, not the employees of an FLC utilized by the employer, unless the FLC operates as a joint employer with the employer."

This commenter's description captures precisely what the Department proposed in the NPRM. An employer's obligation to contact U.S. workers employed in the previous year extends solely to U.S. workers the employer itself employed in the previous year. Thus, if the employer jointly employed the U.S. workers on its farm in the same occupation with an FLC in the previous year, then § 655.153, as currently written, requires the employer to contact the U.S. workers. However, the contact obligation does not apply to U.S. workers an FLC alone employed in the previous year, using the common law definition of employer, even if the FLC employed the U.S. workers to perform services on the grower's farm. The Department does not believe, as a commenter has suggested, that it is necessary to add language to § 655.153 specifying that an employer must contact U.S. workers it jointly employed in the previous year. An entity that jointly employs workers is the "employer" of such workers. The current language of § 655.153 accordingly compels an H-2A employer that jointly employed U.S. workers in the occupation at the place of employment in the previous year to contact such workers.

The Department is therefore not adopting the broader request of some commenters to exempt entirely an employer from § 655.153's contact obligation when the employer jointly employed the pertinent U.S. workers with an FLC/H-2ALC in the previous year. Adoption of the commenters' request would be inconsistent with the current language of § 655.153, which ensures that a prospective H-2A employer must contact *all* U.S. workers it employed in the job in the previous year before hiring H-2A workers to perform such work in the current year. Requiring employers to contact their own U.S. workers effectuates the statutory obligation of prospective H-2A

employers to engage in "positive recruitment efforts" for qualified U.S. workers (8 U.S.C. 1188(b)(4)), provides job opportunities to specific U.S. workers who have recently performed the job at the pertinent location for the employer, and helps fulfill the Department's obligation to certify an application only when there are not sufficient qualified workers to perform the agricultural work. *See* 8 U.S.C. 1188(a)(1)(A).

As mentioned above, multiple commenters objected to the proposal based on the potential for interference with the contractual obligation growers have historically assumed to refrain from hiring workers employed by their FLCs/H-2ALCs. However, as noted below, this is not a new requirement and the Department's prior enforcement has not resulted in the kinds of problems envisioned by the commenters. This is likely because, as previously stated, the Department's clarification does not require prospective H-2A employers to contact workers the employers did *not* employ in the previous year. Moreover, Congress clearly intended to ensure prospective employers recruit qualified, available U.S. workers to perform the work prior to the employment of H-2A workers. This clarification helps to fulfill that intent.

The commenters that suggested that this is the first time the Department is seeking to hold a grower responsible to contact U.S. workers it jointly employed in the previous year with a labor contractor are incorrect. The Department has pursued this approach successfully in Federal litigation.<sup>109</sup>

As the Department noted in the NPRM, in the event that the grower has not kept payroll records for such U.S. workers, the regulations implementing MSPA require FLCs to furnish the grower with a copy of all payroll records, including the workers' names and permanent addresses. Growers must maintain these records for 3 years. *See* 29 CFR 500.80(a) and (c). These records should provide the employer with contact information for the pertinent U.S. workers.

The Department noted in the NPRM that it would not require employers that did not participate in the H-2A program in the previous year to provide the NPC the notice described in § 655.122(m) (in order to avoid the obligation to contact U.S. workers the employer terminated

<sup>109</sup> *See Scalia v. Munger Bros.*, Case No. 2:19-cv-02320 (E.D.C.A. Nov. 19, 2019) (Consent Judgment and Order in which Defendants agreed to "contact and offer employment to all U.S. workers that worked for Defendants the previous year, including those hired through FLCs").

for cause in the previous year or who abandoned the employment in the previous year). The Department received no comments warranting the reversal of this position. The Department accordingly adopts it.

Another commenter suggested that the threshold for determining abandonment based on failure to report should be a “more reasonable” 3 days, not the “excessive” 5 days proposed, because 3 days is “a standard in the agricultural industry” and a longer period without a replacement worker could put perishable commodities at risk. The Department, however, did not propose and thus declines to make any change to its longstanding standard for determining whether a worker has abandoned employment.

Finally, the proposed rule clarified that the employer’s contact with former U.S. workers must occur during the positive recruitment period (*i.e.*, while the employer’s job order is circulating with the SWAs in the interstate clearance system and terminating on the date workers depart for the place of employment, as determined under § 655.158) by including a reference to § 655.158. The Department received no comments warranting the reversal of this proposal. The Department accordingly adopts it.

### 3. Section 655.154, Additional Positive Recruitment

In the NPRM, the Department proposed amendments to this section to clarify the standards and procedures by which the Department identifies States of traditional or expected labor supply for recruiting U.S. workers. The Department received some comments on this section, a few of which necessitated additional revisions in this final rule to clearly describe the traditional or expected labor supply State determination process and the recruitment required, both on the employer’s behalf and through employer action, as well as a minor change to paragraph (a), consistent with changes to recruitment methods in the 2019 H–2A Recruitment Final Rule that impacted this section. These revisions are discussed below.

The INA requires employers to engage in positive recruitment of U.S. workers within a multi-State region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. *See* 8 U.S.C. 1188(b)(4). The Department satisfies this statutory requirement and the broader statutory obligation

regarding U.S. worker availability through a combination of recruitment activities, including posting the job opportunity on an electronic job registry (§ 655.144), interstate clearance of the job order through the SWAs (§ 655.150), employer contact with former U.S. workers (§ 655.153), and additional positive recruitment (§ 655.154). The additional positive recruitment required of the employer under § 655.154 is discrete from, but occurs concurrently with, the multi-State recruitment the Department and SWAs conduct on behalf of the employer (*i.e.*, electronic recruitment under § 655.144 and interstate employment service system recruitment under § 655.150).

At the NPRM stage of this rulemaking, the Department was separately engaged in rulemaking that sought to modernize positive recruitment requirements, which culminated in the 2019 H–2A Recruitment Final Rule that became effective after the NPRM was published. That rulemaking addressed an employer’s statutory requirement to engage in positive recruitment of U.S. workers, generally, and resulted in the rescission of §§ 655.151 and 655.152, which involved print newspaper advertisements, and the enhancement of the Department’s electronic job registry and related electronic recruitment on the employer’s behalf. As explained in the 2019 H–2A Recruitment Final Rule, the Department determined that advertisement of the employer’s job opportunity through the Department’s electronic job registry under § 655.144 will be sufficient, in most cases, to satisfy the employer’s multi-State recruitment obligations under § 655.154. However, in that rulemaking, the Department did not revise the additional positive recruitment obligations provision at § 655.154 or propose to codify the underlying process for designating labor supply States where the job order must be circulated and, within designated labor supply States, areas in which additional employer-conducted positive recruitment would be appropriate for the CO to order, as a means of reaching qualified U.S. workers who would make themselves available for job opportunities like the employer’s.

The NPRM proposed amendments to this section to clarify the standards and procedures by which the Department identifies States of traditional or expected labor supply for recruiting U.S. workers. By proposing to add a new paragraph (d), the Department sought to provide more public transparency in the process for designating traditional or expected labor supply States and for determining

whether and what additional positive recruitment should be required in those States as a condition of granting temporary agricultural labor certification. Specifically, the Department proposed to shift the responsibility for designating traditional or expected labor supply States and determining the particular methods of positive recruitment required within those States, if any, from the CO to the OFLC Administrator. Further, the OFLC Administrator would base traditional or expected labor supply State determinations primarily on information received from SWAs within the preceding 120 days and provide public notice by posting the determinations annually on OFLC’s public website. In addition to providing more public transparency, advance notice of labor supply State designations provides greater predictability for employers in advance of receiving instructions from the CO in the NOA.

Given both the 2019 H–2A Recruitment Final Rule’s changes to positive recruitment requirements and the Department’s consideration of comments submitted in response to the NPRM, the Department has further revised § 655.154 in this final rule to clearly describe the traditional or expected labor supply State determination process and the recruitment required—both on the employer’s behalf and through employer action—to ensure an adequate test of the domestic labor market for the job opportunity. For example, the Department removed redundant language in paragraph (a) that described the nature of traditional or expected labor supply States and added a reference in that paragraph to the labor supply State determination process provision at paragraph (d). The resulting language clarifies that an employer’s positive recruitment obligations under § 655.154 will be satisfied, in most cases, through the Department’s broad dissemination of job information through the Department’s electronic job registry. In addition, the Department revised paragraphs (c) and (d) to clarify the information included in the labor supply State determination that the OFLC Administrator will post on OFLC’s website and its use. The Department has considered whether OFLC Administrator’s annual determination should provide advance, public notice of additional positive recruitment requirements on OFLC’s website, including instructions on the precise nature of the additional recruitment, in order to accommodate employers that chose to begin

recruitment prior to receiving the NOA under proposed § 655.123. After careful consideration, this final rule provides that the OFLC Administrator's annual determination under revised paragraph (d) identifies both designated labor supply State(s) where the job order must be transmitted under § 655.150(a) for interstate clearance and area(s) of labor supply within a designated State, if any, where an employer may be required to conduct additional positive recruitment to reach qualified U.S. workers who would make themselves available for the job opportunity. Consistent with the Department's decision not to adopt the proposed optional pre-filing recruitment provision, this final rule does not require the Administrator's annual determination to specify the precise nature of additional positive recruitment and the documentation or other supporting evidence that must be maintained by the employer. Instead, revised paragraph (c) of this final rule clarifies that the employer will receive instructions in the CO's NOA regarding any additional positive recruitment requirements applicable to its job opportunity, which conforms with revisions at § 655.143(b)(2) and is consistent with the process in the 2010 H-2A Final Rule.

Several commenters supported the proposal as a means of enhancing the transparency and consistency of traditional or expected labor supply State determinations. Other commenters expressed concern regarding particular aspects of the proposal, as discussed below. One commenter urged the Department to eliminate the traditional or expected labor supply State designation process and related recruitment requirements entirely or use the State determination approach in the 2008 H-2A Final Rule. The Department appreciates the comments but is unable to eliminate a requirement that is mandated by statute. Regarding the comment to adopt the determination approach in the 2008 H-2A Final Rule, the commenter did not fully explain their understanding of that labor supply State designation process and the reasoning for re-instituting those recruitment requirements; however, in the preamble to the 2008 H-2A Final Rule, the Department discussed requiring affirmative employer action in labor supply States only where the Department had made a factual determination that information it received justified a particular type of additional recruitment in a particular area. *See* 2008 H-2A Final Rule, 73 FR 77110, 77132. The Department believes the commenter's suggestion is addressed

in this final rule, which requires affirmative action by the employer only where the OFLC Administrator identifies a particular area within a State based on specific, credible information about the availability of qualified U.S. workers and appropriate means of recruiting those workers. In addition, as discussed in the 2019 H-2A Recruitment Final Rule, "[§] 655.154 does not afford the CO unlimited discretion; rather, it authorizes the CO to order the recruitment necessary to ensure an adequate test of the domestic labor market for the employer's job opportunity, after taking into account the location and characteristics of the position." 84 FR 49439, 49450.

Two workers' rights advocacy organizations noted that the Department's proposal placing the labor supply State determination process at paragraph (d) effectively replaced the Proof of Recruitment provision at § 655.154(d) in the 2010 H-2A Final Rule and expressed concern the Department had not retained the Proof of Recruitment provision in a different location. The commenters believed removing this provision would hinder the Department's ability to enforce the H-2A regulations because it would eliminate the CO's authority to specify the documentation or supporting evidence an employer must retain to prove compliance with the additional positive recruitment requirements. Although the document retention provision at § 655.167 already requires employers to retain evidence of compliance with § 655.154, the Department agrees with the commenters that the rule should address the type of evidence an employer is required to retain to show compliance with particular recruitment efforts required in designated traditional or expected labor supply States. The Department has determined that including such a provision provides greater clarity and predictability to employers, who want to properly document compliance, and facilitates its effective and consistent enforcement of this regulatory requirement. Therefore, the Department has revised paragraph § 655.143(b)(2) in this final rule to provide that the CO's NOA will specify the documentation or other supporting evidence to be maintained by the employer to demonstrate compliance with positive recruitment requirements.

One workers' rights advocacy organization expressed concern and opposed the proposed traditional or expected labor supply State designation process because it would diminish the role of the SWAs because assigning the responsibility of making these State

determinations to the OFLC Administrator would allow the OFLC Administrator to consider information from sources other than the SWA. The commenter was also concerned the proposed regulatory language would reduce the period of labor market information considered from 6 months to 120 days, and also expressed the language was vague and did not specify the sources of information the OFLC Administrator may consider or the weight given to the information from sources other than the SWA.

The Department believes the commenter's concerns are unwarranted. As is the case under the 2010 H-2A Final Rule, the Department anticipates the SWAs will continue to be the primary source of information regarding traditional or expected labor supply States based on their knowledge and expertise in local labor markets. The proposed determination process was not intended to diminish the role of the SWAs or substantively change the nature of information upon which traditional or expected labor supply designations will be based. Under the 2010 H-2A Final Rule, the CO's determination is based primarily on information about labor supply trends and information regarding interstate referral activities observed by the SWAs. The Department intended to formalize the existing communication between SWAs and OFLC, while making the process more transparent and predictable to employers seeking to employ H-2A workers.

In the 2010 H-2A Final Rule, the Department also explained that it continues to welcome information on labor supply from SWAs, employers, and workers' rights advocacy organizations to assist in its decisions on the best sources of labor and related recruitment activities to be required of employers. *See* 75 FR 6884, 6930; *see also* 2019 H-2A Recruitment Final Rule, 84 FR 49439, 49450 (explaining the Department most often obtains information from the SWAs, but "continues . . . to invite stakeholders to submit information on areas of traditional or expected labor supply and effective means of recruiting U.S. workers in those areas"). The NPRM and this final rule merely reiterate the Department's longstanding policy to consider reliable information from appropriate sources that may be helpful in determining States of traditional or expected labor supply. Appropriate sources may include, for example, information from other State or Federal agencies or information the Department receives from other relevant stakeholders, such as organizations that



provide employment and training services to workers who are likely to apply for agricultural job opportunities. Similarly, the proposal in the NPRM stated the OFLC Administrator's determination would be based primarily upon information provided within 120 calendar days preceding the determination.

The Department's decision to base traditional or expected labor supply State determinations primarily on information provided within 120 calendar days preceding the determination reflects that although, based on the Department's experience, these designations have not changed significantly from year to year because the information the Department receives does not change significantly from year to year, the designations should be informed by the most current information available. Notably, this provision does not limit the collection of information to the 120-day period preceding the OFLC Administrator's determination. For example, information gathered over a 6- or 9-month period and submitted to the OFLC Administrator within the 120-day period before the OFLC Administrator's determination can reflect current labor market activities across a wide range of seasonal agricultural production cycles and appropriately inform the annual determination process. This process prioritizes current information, without excluding older information that is relevant to the determination.

The Department anticipates the majority of the information published in the OFLC Administrator's annual determination will inform the CO's transmission of the job order for interstate clearance under § 655.150, rather than impose additional employer-conducted recruitment requirements under § 655.154. For example, if the Georgia SWA informs the OFLC Administrator that it receives interstate referrals, generally, from the Florida SWA, the OFLC Administrator would designate Florida as a labor supply State for Georgia in the labor supply State determination posted on OFLC's website; however, this information, alone, would not support additional employer-conducted recruitment requirements in Florida without greater specificity from either SWA regarding the appropriate and effective means of recruiting qualified U.S. workers. Accordingly, when applying the posted labor supply State determination during application processing, the CO would transmit all job orders involving places of employment in Georgia to the Florida SWA for posting on its intrastate public job listing system; the CO would not

instruct the employer to conduct additional positive recruitment activities in Florida. However, if the OFLC Administrator received more specific, credible information about effective recruitment methods, such as information specific as to the type of qualified workers available (e.g., tomato harvest workers), the area within the State where the workers may be found (e.g., Immokalee, Florida), and the methods for apprising the workers of a job opportunity (e.g., posting with a particular community organization engaged with those workers), the OFLC Administrator's annual determination of labor supply States would identify this area and type of worker for additional recruitment and the CO's NOA would include specific recruitment instructions and document retention information applicable to employers in Georgia that are seeking tomato harvest workers.

The additional positive recruitment requirement will be effective on the date of publication for any employer that has not yet commenced positive recruitment. As the Department decided not to adopt the proposed optional pre-filing positive recruitment provision, discussed in the preamble to § 655.123, this means that, once published, the additional positive recruitment requirements posted are in effect for any employer to whom the NPC has not yet issued a NOA in accordance with § 655.143. One commenter remarked on the provision retained from the 2010 H-2A Final Rule at paragraph (b) that requires an employer's additional positive recruitment efforts be no less than the kind and degree of recruitment efforts the employer "made" to obtain foreign workers. The commenter recommended the Department change the word "made" to the future tense "makes" to avoid suggesting that foreign labor recruitment precedes U.S. worker recruitment. The Department has revised this provision to "may make" to clarify that the nature of the employer's foreign worker recruitment efforts, not the timing of those efforts, is the subject of this provision.

One workers' rights advocacy organization reiterated its comment, submitted in connection with an H-2B program rulemaking, in which it urged the Department to require employers to conduct positive recruitment in labor surplus areas designated by the Department. As with comments discussed in §§ 655.151 and 655.152, this comment relates to a topic addressed in the 2019 H-2A Recruitment Final Rule and, therefore, it is outside the scope of the current rulemaking. However, as discussed in

the 2019 H-2A Recruitment Final Rule, by requiring the CO to post H-2A job orders on the Department's electronic job registry at *SeasonalJobs.dol.gov*, each H-2A job opportunity will be advertised broadly and disseminated to U.S. workers, including those in labor surplus areas. Further, to the extent a labor surplus in a particular State results in a trend of labor referrals to other States or submission of specific information provided to the OFLC Administrator regarding workers in a particular area who, if apprised, would make themselves available for work elsewhere, the labor supply State designation process will provide for additional recruitment in that State.

The Department also received comments from a State governor and an individual commenter suggesting the Department expand H-2A program recruitment requirements to include an H-2ALC's clients (i.e., the growers who contract with the H-2ALC to provide labor or services for their agricultural operations). One of these commenters explained that local workers would respond to recruitment for employment with a local grower but not for employment with an unfamiliar H-2ALC. The other commenter expressed concern with growers contracting with out-of-State H-2ALCs, who will bring H-2A workers into the State, rather than in-State FLCs, who employ local workers. These commenters urged the Department to expand an H-2ALC's recruitment obligations to include recruitment requirements for its client growers. One suggested the Department require an H-2ALC to demonstrate that its client grower unsuccessfully solicited bids from contractors that do not use H-2A workers before contracting with an H-2ALC seeking a temporary labor certification, while the other suggested the Department require both the client grower and the H-2ALC to satisfy H-2A recruitment requirements.

The Department declines to expand H-2A recruitment requirements to parties other than an employer filing an *Application for Temporary Employment Certification* or impose additional positive recruitment requirements on out-of-State H-2ALCs generally. The Department believes that an employer's satisfaction of the several methods of recruitment required in the H-2A regulations will ensure an effective test of the labor market. The Department requires all employers to conduct recruitment through SWA circulation of job orders, a process that encompasses various SWA recruitment activities, and through advertisements posted on the Department's electronic job registry,

which broadly disseminates job opportunity information on the internet. In addition, the H-2A regulations permit the CO to order specific additional positive recruitment activities, on a case-by-case basis, if the Department receives information that indicates these activities are necessary to effectively disseminate information about the job opportunity to U.S. workers.

#### 4. Section 655.155, Referrals of U.S. Workers

The NPRM did not propose amendments to this section containing the standards by which SWAs refer qualified, able, willing, and available U.S. workers for employment in the H-2A program. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text from the NPRM. Therefore, this final rule retains this section from the NPRM without change.

The comments received on this section generally urged the Department to require additional SWA screening of the workers referred to employers through the employment services system. They suggested, for example, SWAs “vet” self-referring applicants and refer only U.S. workers who specifically request agricultural work. One stated that few referred workers are actually interested in the jobs to which they have been referred and considering uninterested workers is time consuming and costly for employers. In addition, these commenters suggested that SWAs verify the employment eligibility of each worker and confirm the worker is available for the entire period of employment before referring the worker to the employer.

The Department respectfully declines to revise this section. Not only are these suggestions outside the scope of this rulemaking, but the Department discussed suggestions like these at length in the preamble to the 2010 H-2A Final Rule when declining to adopt them in that rulemaking. See 75 FR 6884, 6905–6906. The Department’s position in this rulemaking remains the same as in 2010. Accordingly, the Department has decided to maintain § 655.155 in this final rule without change.

#### 5. Section 655.156, Recruitment Report

The NPRM proposed amendments to this section to simplify the regulatory text related to an employer’s obligation to report on its efforts to recruit U.S. workers, conform the regulatory text to other changes proposed in the NPRM, and clarify the content requirements for

the recruitment report. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text from the NPRM. However, in response to a comment related to paragraph (b) of this section, the Department has made revisions to clarify that an employer must produce its updated recruitment report to the Department and not to any other Federal agency that might request it without independent investigative or other authority to do so. The Department also made clarifying edits to paragraph (a), as discussed below. Finally, the Department also revised this section to conform to the Department’s decision not to adopt the proposed staggered entry and optional pre-filing recruitment provisions in this final rule, and made minor technical edits to conform to the terminology used in § 655.153. Otherwise, this final rule adopts the proposed changes from the NPRM.

In the NPRM, the Department proposed to remove language in paragraph (a) related to the timing of the employer’s initial recruitment report submission, as this timing requirement was addressed at proposed § 655.123(d) for those employers who engage in optional pre-filing positive recruitment and at § 655.143(b)(2) for those employers who receive a NOA, which will contain instructions regarding pre-certification recruitment report submission. Consistent with the Department’s decision not to adopt proposed § 655.123, as discussed above, paragraph (a) in this final rule retains the 2010 H-2A Final Rule language requiring employers to submit the recruitment report on a date specified by the CO in the NOA. In addition, the Department has made a technical correction to paragraph (a) so that this paragraph refers to the NOA provisions at § 655.143, rather than the NOD provisions at § 655.141.

In addition, the Department proposed to add language in paragraphs (a)(1) and (3) to make explicit the required content of a recruitment report. A recruitment report describes a particular recruitment activity clearly when it identifies the specific, proper name of the recruitment source—rather than only the general type of recruitment source (e.g., “web page” or “online job board”)—and provides the date(s) of advertisement for that recruitment source. In addition, a recruitment report clearly describes the employer’s satisfaction of its obligation under § 655.153 to contact former U.S. workers when it either (1) affirmatively states the employer has no former U.S. workers to contact; or (2) states that,

before submitting the recruitment report, the employer contacted former U.S. workers and describes the means the employer used to make that contact. In this final rule, the Department has made clarifying revisions to paragraphs (a)(1) and (3). In paragraph (a)(1), the Department revised “date” to “date(s),” to clarify that the recruitment report must identify the date—or range of dates—of each recruitment activity, which may be different for each recruitment activity. In addition, the Department revised paragraph (a)(3) to clarify that an employer’s statement in its recruitment report about contacting former U.S. workers must identify the date(s) of contact, as well as the means of contact, when describing the employer’s contact with such workers.

Two workers’ rights advocacy organizations suggested the Department add to the recruitment report content requirements in paragraph (a). One suggested the Department align the H-2A and H-2B regulations by requiring H-2A recruitment reports to confirm (1) community-based organization(s) designated by the CO were contacted, if applicable; (2) additional recruitment was conducted, as directed by the CO; and (3) 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 in the job classification and area in which the work will be performed by the foreign workers. The other commenter thought the recruitment report should include a description of the employer’s recruitment of H-2A workers, including the resources expended in such efforts; a description of the recruitment activities of non-H-2A employers in the AIE for the occupation; and information about how the employer checks worker qualifications, if applicable. Paragraph (a)(1) already requires the employer to identify in the recruitment report each recruitment source used and the date(s) of recruitment using that source. This recruitment report content requirement encompasses all recruitment activities the CO identifies in the NOA. The Department appreciates the opportunity to clarify that paragraph (a)(1) requires an employer’s recruitment report to confirm contact with a community-based organization or any other additional recruitment activity directed in the NOA, if applicable. However, the Department declines to revise paragraph (a)(1) further at this time.

The Department declines to add in this rulemaking the suggested H-2B recruitment and recruitment report content requirements, or the additional content related to recruitment efforts

outside of the employer's own efforts to recruit and hire U.S. workers. Neither adopting the H-2B program's general requirement to contact a bargaining representative or post notice at the place of employment, nor including content in the recruitment report beyond the employer's own efforts to recruit and hire U.S. workers during the H-2A recruitment period were proposed for public comment. As such, expanding the recruitment report content requirements in the manner suggested is outside the scope of this rulemaking.

One of these commenters also urged the Department to make significant additional changes to the recruitment requirements and recruitment report procedures, beyond those the Department proposed for public comment. For example, the commenter suggested the Department require employers to submit a recruitment report before certification is granted and, again, on the first date of need. In addition, the commenter suggested that the Department transmit the recruitment report to the SWA to solicit the case-by-case analysis of the employer's recruitment efforts, as compared with those of non-H-2A employers in the area, and the location of historical and/or current labor supply patterns to inform additional positive recruitment activities under § 655.154(b). This commenter also suggested the Department ask the SWA to provide a list of all U.S. worker referrals to each job so the Department can review both the SWA's list and the employer's list and contact all listed workers to verify the accuracy of the employer's report. The commenter further suggested a website portal be created to allow workers to report unlawful rejections. These suggestions also are beyond the scope of this rulemaking and would require public notice and solicitation of comments. However, the Department reminds concerned parties that workers may call WHD's hotline at (466) 487-9243 (this is not a toll-free number) or 1 (866) 4US-WAGE (toll-free number) and/or contact their local district WHD office to file a complaint if they believe they have been unlawfully rejected. In addition, workers may call other federal agencies that enforce anti-discrimination laws if they believe an H-2A employer has unlawfully rejected them. For example, workers can call the Immigrant and Employee Rights Section of DOJ's Civil Rights Division at 1 (800) 255-7688 if they believe an H-2A employer rejected them or fired them because of their citizenship, immigration status, or national origin.

The Department also proposed revisions to paragraph (b), the provision

addressing the employer's obligation to update its recruitment report throughout the positive recruitment period at § 655.135(d) and submit it for review, if requested. An agent remarked on the revised language that would expand an employer's obligation to produce its recruitment report, beyond the Department, to "any other Federal agency." The commenter expressed concern such information sharing could have a "significant chilling effect on workers" and is beyond the Department's statutory authority. The Department has determined that further revision to paragraph (b) is necessary to more clearly reflect the Department's intent. The Department intended to retain the requirement for an employer to produce its recruitment report to the Department, upon the Department's request, not to any Federal agency that might request it without independent authority to do so. In addition, the Department's intention was to clarify that the information sharing provision at § 655.130(f) in this final rule applies to recruitment reports the Department may share with other Federal agencies with authority to enforce compliance with program requirements as appropriate for investigative and enforcement purposes.

The Department agrees the proposed language in paragraph (b) was overbroad and could be misunderstood or misused, resulting in the sharing of an employer's recruitment report with a Federal agency not involved in H-2A program enforcement and integrity activities or for purposes other than program-related investigative or enforcement purposes. The Department's rationale for revising both §§ 655.130(f) and 655.156(b) to more clearly address intergovernmental information sharing, and the parameters for such sharing, along with this commenter's related concerns, are discussed in the preamble to § 655.130(f). Accordingly, the Department has revised paragraph (b) to require employers to produce recruitment reports only to the Department (e.g., OFLC or WHD) and only upon the Department's request, and to clarify that the same scope of information sharing applies to recruitment reports as applies to information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity measures such as audits. Otherwise, the Department has adopted this section as proposed in the NPRM, without change.

6. Sections 655.157, Withholding of U.S. Workers Prohibited, and 655.158, Duration of Positive Recruitment

The NPRM proposed minor amendments to these sections in the form of technical corrections for conformity within the subpart. The Department received no comments related to the prohibition of withholding U.S. workers at § 655.157 and only one comment expressing general support regarding the duration of positive recruitment at § 655.158, which the Department had retained from the 2010 H-2A Final Rule. Therefore, this final rule adopts the proposed changes to these sections from the NPRM without change.

#### *F. Labor Certification Determinations*

##### 1. Section 655.161, Criteria for Certification

The NPRM proposed minor amendments to this section to clarify existing rules and procedures. In paragraph (a), the Department proposed to use a clear statement that the employer must comply with all applicable requirements of 20 CFR parts 653 and 654 and all requirements of 20 CFR part 655, subpart B, that are necessary for certification, without the nonexclusive list of those requirements that appeared in the 2010 H-2A Final Rule. Similarly, the Department's proposed revisions to paragraph (b) simplified regulatory language to more clearly state that the CO will count as available any U.S. worker whom the employer must consider and whom the employer has not rejected for a lawful, job-related reason. The Department received no comments on the proposed amendments to the regulatory text. Therefore, this final rule adopts the proposed changes from the NPRM without change.

##### 2. Section 655.162, Approved Certification

The NPRM proposed minor amendments to this section to modernize and simplify the Department's issuance of temporary agricultural labor certifications to employers and the delivery of those certifications to USCIS, while maintaining program integrity. The Department received a few supportive comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

Under this final rule, the Department will issue temporary agricultural labor certifications electronically using a Final Determination notice that

confirms certification and contains succinct, essential information about the certified application. The CO will send the Final Determination notice, as well as a copy of the certified *Application for Temporary Employment Certification* and job order, both to the employer and USCIS using an electronic method designated by the OFLC

Administrator.<sup>110</sup> In cases where an employer is permitted to file by mail as set forth in § 655.130(c), the Department will deliver certification documentation to the employer using a method that normally assures next-day delivery. The Department will send the same information to USCIS, using the same electronic method used to transmit the temporary agricultural labor certification to the employer, regardless of the employer's method of filing. Finally, consistent with current practice, the Department will send a copy of the certification documentation to the employer and, if applicable, to the employer's agent or attorney.

### 3. Section 655.164, Denied Certification

The NPRM proposed minor amendments to this section to modernize the Department's issuance of Final Determination notices that deny temporary agricultural labor certifications and to simplify the regulatory text by replacing details about the procedure for appealing a Final Determination with references to § 655.171, the section of the regulation containing the standards and procedures for appeals. The Department received a few supportive comments on this provision, none of which necessitated changes to the regulatory text. Therefore, this provision remains unchanged from the NPRM.

### 4. Section 655.165, Partial Certification

The NPRM proposed minor amendments to this section to modernize the Department's issuance of partial temporary agricultural labor certifications to employers and the delivery of those certifications to USCIS, in addition to other amendments conforming to proposed changes in other sections of the regulation. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department received no comments expressing opposition to the

proposed changes, but it did receive comments from two employers and an agent expressing opposition to the general practice of issuing partial temporary agricultural labor certifications. Two of these commenters stated that the Department should not reduce a temporary agricultural labor certification by the number of U.S. workers hired if the employer attests that it still has a need for the full number of requested H-2A workers, notwithstanding the hiring of any U.S. workers. The commenters believed this approach would be helpful to employers where conditions change and would not adversely affect the wages or working conditions of U.S. workers, as the employer's obligation to hire qualified and available U.S. workers and displace an H-2A worker to accommodate the hiring of a U.S. worker, if necessary, would continue throughout the recruitment period. One of these commenters acknowledged that § 655.166 permits a redetermination based on unavailability of U.S. workers but asserted that process is time consuming and costs the employer additional filing fees to submit amended petitions with USCIS. This commenter suggested that it would be more effective and efficient to discontinue issuing partial temporary agricultural labor certifications and rely on the employer's attestation to continue hiring any qualified and available U.S. workers.

The Department appreciates the commenter's suggestion, but the Department did not propose such a change, nor suggest it was open to considering comments on this issue in the NPRM. Therefore, this comment is beyond the scope of this rulemaking and the Department has adopted the proposed changes to § 655.165 without amendment.

### 5. Section 655.166, Requests for Determinations Based on Nonavailability of U.S. Workers

The NPRM proposed minor amendments to this section to modernize the Department's receipt and issuance of redetermination decisions, consistent with the electronic filing and certification procedures proposed in §§ 655.130 and 655.162, in addition to other technical amendments to simplify the provision generally. The Department received no comments on the proposed amendments to the regulatory text. Therefore, this final rule adopts the proposed changes from the NPRM without change.

### 6. Section 655.167, Document Retention Requirements of H-2A Employers

The NPRM proposed minor amendments to this section to clarify under paragraph (c)(1) that employers must document compliance with each recruitment step applicable to the *Application for Temporary Employment Certification*. The Department also proposed to add a new paragraph at (c)(7) clarifying that if a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, as set forth in § 655.122(n), employers must retain records demonstrating they notified the NPC and DHS. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. However, as discussed below, the Department believes it is necessary to make minor conforming amendments due to prior revisions currently in effect based on the Department's 2019 H-2A Recruitment Final Rule and one technical revision.

The Department received two comments objecting to the requirement that employers retain records associated with notifying the NPC and DHS of workers who abandon employment or are terminated for cause. These commenters asserted such a requirement created an unnecessary burden because the three-fourths guarantee and return transportation obligations already provide an adequate incentive for employers to provide timely notice to the Department. One of the commenters also asserted the Department lacked authority to impose the requirement, as proposed, and that USCIS must engage in its own rulemaking if it wishes to require employers to retain this documentation.

The Department appreciates the comments received, but respectfully disagrees. As explained below and in the preamble for §§ 655.122(n), 655.141, and 655.153, the requirement to retain documentation demonstrating the employer provided notice of abandonment or termination is necessary for the Department's administration and enforcement of the temporary agricultural labor certification program; thus, the imposition of such recordkeeping obligations is within the Department's authority under the INA. As stated in the NPRM, the Department encounters H-2A employers that claim to have properly notified the NPC regarding workers who have abandoned employment or have been terminated for cause, but the employers frequently cannot produce records of such notification when requested. Requiring

<sup>110</sup> When an employer submits the petition to USCIS, it must comply with DHS regulations and USCIS petition form instructions, which may include printing and submitting a copy of the temporary agricultural labor certification.

each employer to maintain records of the notification to the NPC, and to DHS in the case of a worker in H-2A nonimmigrant status, supports the Department's enforcement policy of investigating claims of abandonment or termination. Further, retention of these records also may benefit the employer. For example, in the event a U.S. worker who abandoned employment or whom the employer terminated for cause later claims the employer failed to make contact to solicit their return to work, the employer's retained record of its contemporaneous notice to the NPC could demonstrate that the employer was not required to contact that particular U.S. worker under § 655.153. In addition, the Department is not imposing a record retention requirement on behalf of DHS; DHS already has a record retention obligation in this context. *See*, 8 CFR 214.2(h)(5)(vi)(B)(2).

In addition, the Department does not believe the requirement will impose a significant burden on employers. As the commenters noted, many employers already provide the Department notice of abandonment or termination to take advantage of incentives provided in §§ 655.122(n) and 655.153; for these employers, the only change is a requirement to add a copy of the notice to the employer's document retention file. In the NPRM, the Department assessed the proposed burden of this recordkeeping requirement and determined the total annual cost, among just over 4,900 employers, would range from \$10,890 in 2020 to \$15,988 in 2029. The Department believes the minimal burden imposed on employers by this recordkeeping requirement is outweighed by the Department's interest in ensuring program integrity.

Therefore, the Department has adopted the proposed changes to § 655.167, with additional revisions necessary to conform to a change adopted in § 655.175 of this final rule and the current provisions in effect, which were revised as a result of the 2019 H-2A Recruitment Final Rule, and to remove an unnecessary parenthesis. Accordingly, this final rule reflects the elimination of paragraph (c)(1)(ii) of the 2010 H-2A Final Rule—the document retention requirements associated with print newspaper advertisements—and the redesignation of paragraphs (c)(1)(iii) and (iv) as paragraphs (c)(1)(ii) and (iii), which the 2019 H-2A Recruitment Final Rule made effective October 21, 2019.

### G. Post-Certification

#### 1. Section 655.170, Extensions

The NPRM did not propose changes to the standards and procedures by which an employer may apply to the CO for a short- or long-term extension to its certified *Application for Temporary Employment Certification*. However, the Department is making one minor technical amendment under paragraph (b) to replace the term “12 months” with “1 year” as the maximum period for a long-term extension, except in extraordinary circumstances, to ensure greater consistency with the use of that same term adopted under § 655.103(d) of this final rule.

#### 2. Section 655.171, Appeals

The NPRM proposed substantive amendments to this section containing the standards and procedures by which an employer may request an administrative review or a de novo hearing before an ALJ regarding a decision issued by the CO, where authorized under this subpart. As discussed in detail below, the Department received numerous comments opposing all or some of the proposed changes to § 655.171. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several minor revisions, as discussed below. Such revisions include the addition of regulatory language the Department adopted in a different final rule, *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608), and other modifications that either respond to concerns raised by commenters or provide further clarity. Some comments simply opposed all changes regarding the appeals section without explanation, and do not necessitate changes to the regulatory text. Other comments referenced § 655.171 but appear to address changes related to § 655.141; the Department has already addressed those comments in the section of the preamble addressing § 655.141.

##### a. Discretionary Review by the Secretary

Between the publication of the proposed rule at 84 FR 36168 (July 26, 2019) and this final rule, the Department published *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608), which affected the language of this section. The current iteration of § 655.171, with the changes effectuated by the *Rules Concerning Discretionary Review by the Secretary*, is different from the iteration of § 655.171 that was in effect when the proposed rule was published. Specifically, the

*Rules Concerning Discretionary Review by the Secretary* removed the language in paragraphs (a) and (b)(2) that stated the decision of the ALJ was the final decision of the Secretary, and it added language, pursuant to 29 CFR 18.95 stating that the Secretary could assume jurisdiction over a “case for which a de novo hearing is sought or handled under 20 CFR 655.171(b),” after the BALCA had issued a decision. 29 CFR 18.95(b)(2).

In the NPRM, the Department had already proposed removing language from the prior regulations that stated the ALJ's decision is the final decision of the Secretary. This language was thought to be unnecessary in light of the Office of Administrative Law Judge's (OALJ) Rules of Practice and Procedure for Administrative Hearings, which state that the ALJ's decision is the final agency action for purposes of judicial review when the applicable statute or regulation does not provide for a review procedure, as here. *See* 29 CFR 18.95; 20 CFR 655.171. The removal of the “final decision” language was consistent with the H-2B regulations, which lack similar language, and does not affect the issue of whether the parties may appeal to the ARB, which is governed by other authorities issued by the Department. *See* 20 CFR 655.61; Secretary's Order 02-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 FR 69378 (Nov. 16, 2012). However, because the aforementioned *Rules Concerning Discretionary Review by the Secretary* removed this language from the regulations, the issue of the removal of the language is now moot.

The Department has merged the language added to this subsection by the issuance of *Rules Concerning Discretionary Review by the Secretary* with the originally proposed text.

##### b. Request for Review

The prior text of § 655.171 outlined the procedure by which an employer may request administrative review, the timeline for doing so, and how the ALJ must make a decision. General information on the request for review was previously located in sections of the H-2A regulations that discussed the CO's authority and procedure for issuing a specific decision (*e.g.*, denied certification). *See, e.g.*, § 655.164. As proposed in the NPRM, the Department has amended the regulations so that the language regarding the requests for review are located in one location. The language conforms with the corresponding appeals section in the H-2B regulations to the extent possible to

provide consistency across the programs.

To clarify an employer's existing administrative exhaustion obligations, the NPRM specified in paragraph (a) that when a hearing or administrative review of a CO's decision is authorized in this subpart, an employer must request such review in accordance with § 655.171 in order to exhaust its administrative remedies. No comments were received on the text regarding the administrative remedies, and the Department has adopted this language unchanged from the NPRM.

The newly added paragraph (a) describes the content of the request for review and the procedures for its submission. This language was drawn from the H-2B procedures at § 655.61 as well as the already existing text in the H-2A regulations. In paragraph (a)(1), the Department proposed to extend the time in which an employer may file a request for review from 7 calendar days to within 10 business days of the date of the CO's decision to more closely align with the timeframe to request review under the H-2B regulations. It also proposed that the request for review must be received by—rather than sent to—the Chief ALJ and the CO within 10 business days of the CO's decision. The Department believes that specifying a time for receipt of the request for review is reasonable because it enables the Department to more easily determine if a request was filed in a timely manner. The longer period of time provided to file a request for review allows the employer more time to develop a robust request, which, in the case of a request for administrative review, will also serve as the employer's brief to the OALJ. To this end, the Department has included in the regulations that the request must include the specific factual issues the employer seeks to have examined as part of its appeal. Having this information allows for the prompt and fair processing of appeals by providing the ALJ and the CO adequate notice regarding the nature of the appeal. One commenter supported the proposal to determine timeliness based on the receipt of the request for review. The Department received no comments that opposed the changes in paragraph (a)(1), and therefore the Department has adopted the proposed language unchanged from the NPRM.

In paragraph (a)(1), the Department has also added the phrase “[e]xcept as provided in § 655.181(b)(3).” Upon review of the proposed §§ 655.171 and 655.181, it became apparent that the regulatory text, as drafted, contained confusing information regarding the

timelines for submitting appeal requests. This added phrase makes clear that § 655.181(b)(3), while referencing § 655.171, does not change the existing timelines to file appeal requests under § 655.181.

In paragraph (a)(4), the Department proposed including language that the request for review clearly state whether the employer is requesting administrative review or a de novo hearing. The Department has found that in the past, some requests did not identify the type of review sought by the employer, which would result in delays (as the ALJ asked for clarification) or a type of review not desired by the employer (as the ALJ presumed the employer requested a hearing). The Department also proposed that the case will proceed as a request for administrative review if the request does not clearly state the employer is seeking a hearing. *See* 8 U.S.C. 1188(e)(1) (noting the regulations must provide for expedited administrative review or, at the employer's request, for a de novo hearing).

The Department received a few comments regarding this proposal. One commenter supported the change and stated that this will expedite the appeals process by avoiding ambiguity. Another commenter opposed the proposal and characterized it as placing a burden on the employer to identify the type of review requested. Another commenter asked for clarification on whether an employer had to go through administrative review before it could ask for a de novo hearing. The Department disagrees with the characterization that articulating which type of appeal an employer desires is a burden. The INA requires the regulations provide for an expedited procedure for review, “or, at the applicant's request,” a de novo hearing. 8 U.S.C. 1188(e)(1). The employer may request whichever it prefers. The Department agrees with the comment that the proposed change will improve judicial efficiency and provide for more orderly and consistent administration of appeal proceedings, and therefore has adopted the proposed language. Finally, in response to the commenter seeking clarification, an employer does not need to go through administrative review before asking for a hearing. Therefore, the Department has adopted the proposed language unchanged from the NPRM.

In paragraph (a)(7), the Department proposed to clarify that where the request is for administrative review, the request may only contain evidence that was before the CO at the time of their decision. This language has been

adopted unchanged from the NPRM. The Department included this language in paragraph (a), which tracks language in the administrative review section (paragraph (d)), so that employers or their representative(s) can prepare their requests accordingly. The Department has also included language that an employer may submit new evidence with its request for a de novo hearing, which will be considered by the ALJ if the new evidence is introduced during the hearing. The Department included this language in paragraph (a), which tracks language in the de novo hearing section (paragraph (e)), so that employers or their representative(s) can assemble their requests and prepare their cases accordingly. Comments regarding evidence submission are discussed in the administrative review and de novo hearing sections below.

#### c. Administrative File

Proposed paragraphs (b) and (c) drew on existing language in the H-2A regulations and language from the H-2B appeals procedures to reorganize information on the administrative file and the assignment of the case into separate sections. Though not proposed in the NPRM, the Department has decided to change how it refers to the “administrative file” or “appeal file.” Both terms have been used. To be consistent, the Department will simply refer to the document that OFLC compiles and transmits as the “administrative file.” This is a nonsubstantive change that is made only to provide clarity in the regulation.

The Department proposed paragraph (b) to specify that the CO would send a copy of the OFLC administrative file to the Chief ALJ as soon as practicable. One commenter approved of this additional language but suggested that the regulations go further and require that the administrative file be transmitted within a specific timeframe. This commenter also suggested that because applications are filed electronically, a 48- or 72-hour deadline for transmittal should be feasible. Another commenter suggested that compiling the administrative file was simply a matter of printing it. The Department understands the concern for expediency and the sensitive timing of these cases, but compiling the administrative file is not as simple as suggested. As with any type of government or court record, the administrative file must be assembled and reviewed for accuracy and completeness. Because the length of this process is dependent on a variety of factors, including the length of the record, the Department has determined

that a specific timeframe is not practicable. The Department believes adding the language that the CO will send the administrative file as soon as practicable balances expediency with the realities of agency resources and therefore has adopted the proposed language that the file must be sent as soon as practicable.

A number of commenters believed that the administrative file would not be transmitted to the employer. This is not the case. The current regulations do not explicitly state that the administrative file will be sent to the employer and the NPRM mirrored that same language. However, in response to these concerns, the text of paragraph (b) has been amended to state that the CO will transmit the administrative file to the Chief ALJ as well as to the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. DOL (counsel).

#### d. Assignment

In paragraph (c), the Department proposed language to clarify that the ALJ assigned to the case may be a single member or a three-member panel of the BALCA. The proposed amendments to paragraphs (b) and (c) mirror the wording and organization of the appeals section in the H-2B regulations. *See* § 655.61(b) and (d). The Department did not receive any comments regarding paragraph (c) and has adopted the paragraph as proposed.

#### e. Administrative Review

The prior regulations regarding administrative review give only a brief overview of the process. In the NPRM, the Department proposed adding a specific briefing schedule, explaining the standard and scope of review, and providing a revised timeline for decisions in cases of administrative review. The Department received numerous comments on these changes. After carefully considering these comments, the Department has decided to substantially adopt the proposed language. The changes made, and the reasons for making those changes, are discussed below.

In paragraph (d)(1), the Department outlined a briefing schedule; numerous commenters opposed the proposed change. Some argued that the counsel for the CO would have an advantage in the appeal process. One commenter suggested that this was because counsel would be able to respond item-by-item to the arguments made by the employers. One commenter was concerned that because the counsel for

the CO has 7 days after receiving the administrative file to submit a brief, and because there is no set deadline for when the administrative file must be transmitted to the counsel for the CO, the counsel for the CO would have significantly more time to write a brief than the employer. Some commenters expressed opposition on the grounds that employers would not have the administrative file with them when writing their briefs, as the brief must be submitted with the request for review. While many of those commenters who expressed opposition on this ground believed they would never receive the administrative file, which is not the case, the concern that they would have to write a brief without the administrative file is noted. Some suggested that not having concurrent briefing would slow down the process of review.

The Department understands the commenters' concerns about timing and fairness. As noted in the NPRM, because there was no regulatory briefing schedule, concurrent or otherwise, there was often inconsistency among cases, and neither party knew when briefs would be due until an ALJ issued an order. Also, it was not uncommon that, due to the practice of simultaneous briefing, issues raised by the employer were not addressed by the counsel for the CO. A set briefing schedule will ensure consistency of deadlines between cases and thus efficiency in the appeals process. The CO filing a brief in response to the employer's brief allows for a complete set of arguments, as appropriate, which, in turn, more effectively assists the ALJ's decision-making process. Through this updated rule, the employer has been given 10 business days, instead of 7 calendar days, to file its request for review. This provides the employer with ample time to write a brief in support of its case and provides the employer as much, if not more, time than the CO to draft and file its brief.

The Department does not agree that the counsel for the CO will have an advantage over the employer with respect to the briefing schedule. The administrative file contains documents the employer has submitted to OFLC with its applications, and it contains communication back and forth between OFLC and the employer. The employer should therefore have the vast majority, if not all, of the documents contained in the administrative file at the time it files its request for review. Furthermore, the administrative file must be assembled and transmitted to the parties "as soon as practicable." A nonconcurrent briefing structure may extend the

timeline for adjudication of an appeal, but the Department nonetheless believes that the benefit of a set time schedule for briefing, and the benefits of having a complete set of arguments, ultimately provide a more efficient and reliable process.

The Department invited the public to comment on other ways it could address a briefing procedure while still ensuring expedited review. The public submitted no such proposals, except to argue that no change should be made and that the Department should keep concurrent briefing. However, as stated, the regulations did not establish a briefing schedule. To the extent that the argument to "keep" concurrent briefing is a proposal, the Department explained in the proposal and above why it has decided to adopt the proposed approach.

In paragraph (d)(2), the Department has set out clearly the standard of review for administrative review cases. The Department did not receive comments on the proposed paragraph (d)(2) and the Department has adopted this section as proposed. The Department has incorporated the arbitrary and capricious standard of review into requests for administrative review, codifying a well-established and longstanding interpretation of the standard of review for such requests. *See, e.g., J and V Farms, LLC*, 2016–TLC–00022, at 3 & n.2 (Mar. 7, 2016).

In paragraph (d)(3), the Department has included language providing that the scope of administrative review is limited to evidence in the OFLC administrative file that was before the CO when the CO made their decision. The Department included this language because the administrative file may contain new evidence submitted by the employer to the CO after the CO has issued their decision, such as when the employer submits a request for review with new evidence, or a corrected recruitment report with new information, after the CO has denied certification. Although such evidence is in the administrative file, this change was proposed to clarify that the ALJ may not consider this new evidence because it was not before the CO at the time of the CO's decision. Despite some commenters' assertion that the Department is removing the ability to submit new evidence on administrative review, this amendment incorporates legal principles already in existence for H-2A cases, namely, that administrative review is limited to the written record and written submissions, "which may not include new evidence." § 655.171(a). A de novo hearing is the



only avenue by which an employer may introduce new evidence.

The Department has adopted the substance of paragraph (d)(3) but has reorganized the wording of this paragraph for clarity. The language now mirrors more closely the similar language in paragraph (e)(2). The Department has also added for clarity the fact that the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action, "except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95." This concluding phrase was not in the NPRM, nor was it in the amended language of § 655.171 in the *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608). However, the principle that the Secretary may assume jurisdiction over cases in which administrative review was requested is contained within the *Rules Concerning Discretionary Review by the Secretary* and is now a part of the current regulations. 29 CFR 18.95(b)(1) states that a decision by the BALCA constitutes the final administrative decision except in cases over which the Secretary has assumed jurisdiction, which include "any case for which administrative review is sought or handled in accordance with 20 CFR 655.171(a)." The addition of the language in paragraph (d)(3) codifies the principle of 29 CFR 18.95(b)(1) in this section of the regulations. This also makes the language more consistent with similar language located in paragraph (e)(2).

In proposed paragraph (d)(4), the Department has modified the timeline in which the ALJ should issue a decision from 5 business days to 10 business days after receipt of the OFLC administrative file, or within 7 business days of the submission of the CO's brief, whichever is later. This schedule conforms to the timeline in the H-2B appeals procedures while continuing to provide for an expedited review procedure. See § 655.61(f). No comments were received on paragraph (d)(4). The Department has made one change to proposed paragraph (d)(4) for clarity. The paragraph had modified the individuals and entities that receive the ALJ's decision to align with the recipients of ALJ decisions under the H-2B regulations, namely, the employer, the CO, and counsel for the CO. See § 655.61(f). In this final rule, the Department has added text to clarify that the employer's attorney or agent (if applicable) will also receive the decision.

#### f. De Novo Hearing

The Department proposed changes related to the de novo hearing process. After carefully considering the comments it received on this proposal, the Department has decided to adopt the proposed language, with minimal changes, as discussed below.

In paragraph (e)(1)(ii), the Department proposed changing the time in which an expedited hearing must occur from 5 to 14 business days after the ALJ's receipt of the OFLC administrative file. This proposed change was based on the Department's administrative experience, and it was intended to allow the parties reasonable time to adequately prepare for a hearing while effectuating the INA's concern for prompt processing of H-2A applications.

Some commenters opposed the proposal that the hearing must occur within 14 business days of the ALJ's receipt of the administrative file rather than within 5 business days. One explained that because there was no time certain for the CO to send the administrative file to the Chief ALJ and related parties, extending the time for a hearing could cause "irreparable harm" to employers while they wait. The commenter further argued that this time extension combined with the 10 calendar days in which the ALJ may issue an opinion, along with alleged delays by DHS and DOS, means that it is unlikely an employer will have its workers by its start date of need.

The Department understands the concerns regarding timing and expediency but has adopted the language as proposed. As stated in the NPRM, the experience of the Department is that scheduling a hearing within 5 business days is very difficult for not only the parties, but also the ALJ. The extension of time is meant to provide more preparation time, flexibility, and time for the parties to potentially settle the case. The Department believes that holding a hearing within 14 business days is still working within an expedited timeline. To the extent commenters suggested late arrival of workers is caused by alleged delays from DHS or DOS, those comments cannot be resolved by this regulatory process and are not within the Department's purview.

In paragraph (e)(1)(iii), the Department had proposed to provide the ALJ broad discretion to limit discovery and the filing of pre-hearing motions in a way that contributes to a fair hearing while not unduly burdening the parties. As is the case with the 2010 H-2A Final Rule, 29 CFR part 18 governs rules of procedure during the hearing process,

subject to certain exceptions discussed in this section and part 18. Although 29 CFR 18.50 through 18.65, permits an ALJ to exercise discretion in matters of discovery, the Department's language makes explicit the ALJ's broad discretion to limit discovery and the filing of pre-hearing motions in the circumstances of a hearing under the H-2A program. The Department has included this language because in the H-2A program, the time to hold a hearing and to issue a decision following that hearing are expedited. This expedited timeline makes the need for limits on requests for discovery and the filing of pre-hearing motions is particularly pronounced. The administrative procedures in 29 CFR part 18, and particularly the sections on discovery and motions, were not specifically designed for the H-2A program, nor for situations that require an accelerated adjudication process, as is required by the H-2A program. As such, the Department has provided the ALJ with broad discretion to restrict discovery and the filing of pre-hearing motions to situations where they are needed to ensure fundamental fairness and expeditious proceedings. One commenter sought clarification regarding the ALJ's discretion and asked if this text was a change to current practice. The proposed regulation was not a change to current practice, but rather a codification of the same. No other comments were received in relation to this subsection and the Department has adopted it as proposed.

In paragraph (e)(1)(iv), the Department proposed a 10-calendar-day timeframe in which an ALJ must issue a decision after a hearing. The Department invited the public to comment on whether this time period should be modified, but no proposals were received. The Department has adopted the language as proposed.

In paragraph (e)(1)(v), the Department clarified that for cases in which the employer waives its right to a hearing, the proper standard and scope of review is the standard and scope used for administrative review. Under the INA, the regulations must provide for expedited administrative review or, at the employer's request, a de novo hearing. See 8 U.S.C. 1188(e)(1). If the employer requests a de novo hearing but then waives its right to such a hearing, the case reverts to administrative review. In that circumstance, the standard and scope of review for administrative review applies. Similarly, should an ALJ determine that a case does not contain disputed material facts to warrant a hearing, review must proceed under the standard

and scope used in cases of administrative review. As no comments were received on this clarification, the Department has adopted the language as proposed.

In paragraph (e)(2), the Department has articulated the standard and scope of review for de novo hearings. The Department has clarified that the ALJ will review the evidence presented during the hearing and the CO's decision de novo. This standard of review recognizes that new evidence may be introduced during the hearing and allows the ALJ, as permitted under sec. 218(e)(1) of the INA, to review such evidence and other evidence introduced during the hearing de novo. See 8 U.S.C. 1188(e)(1) (noting regulations shall provide for a de novo administrative hearing at the applicant's request). Similarly, the INA permits the ALJ to review the CO's decision de novo when the employer requests a de novo administrative hearing. See *id.* This is the standard of review under the INA, and the Department has codified it in the regulations so that the standard is clearly and consistently applied. As no comments were received regarding the standard of review, the Department has adopted the language as proposed.

The Department has recognized that there may be instances when the issues to be resolved are purely legal, or when only limited factual matters are necessary to resolve the issues in the case. Paragraph (e)(2) has been revised to address this possibility and provide that the ALJ may resolve the issues following a hearing based only on the disputed factual issues, if any. Two commenters suggested that the proposed language would limit the issues an ALJ could review and adjudicate. This was not the intention, and the language in this rule simply codifies an already existing practice. Currently, the OALJ already relies on mechanisms, including, but not limited to, status conferences and pre-hearing exchanges, to determine which issues raised in the request for review can be resolved as a matter of law and which issues involve disputed material facts requiring the introduction of new evidence during a hearing. Should an ALJ determine that an issue is purely legal and does not contain disputed material facts to warrant a hearing, review must proceed under the standard and scope used in cases of administrative review. The wording of this language has been slightly revised in this final rule for clarity, but the substance remains the same as it was in the NPRM.

The Department proposed and subsequently adopted language that states that if new evidence is submitted

with a request for de novo hearing, and the ALJ determines that a hearing is warranted, the new evidence submitted with the request for review must be introduced during the hearing to be considered by the ALJ. This allows for the introduction of new evidence, and for the de novo review of that evidence by the ALJ, while ensuring new evidence submitted with a request for review is subject to the same procedures that apply to new evidence introduced during a hearing, such as the opportunity for cross-examination and rebuttal.

Finally, as part of its efforts to conform this section with the appeals section in the H-2B regulations, the Department has moved the language that the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95, from proposed paragraph (e)(3) to proposed paragraph (e)(2), which addresses the standard and scope of review.

In paragraph (e)(3), the Department has adopted changes regarding the issuance of the decision for a de novo hearing as proposed with only the one minor change. Paragraph (e)(3) had modified the individuals and entities that receive the ALJ's decision to align with the recipients of ALJ decisions under the H-2B regulations, namely, the employer, the CO, and counsel for the CO. See 20 CFR 655.61(f). In this final rule, the Department, in paragraph (e)(3), has added that employer's attorney or agent (if applicable) will also receive the decision.

#### g. Other Comments

Finally, there were some general comments, which the Department addresses here. As discussed below, the Department has not made any changes in response to these comments. One commenter proposed that the CO be prohibited from denying applications that are similar to previously approved applications unless the CO provides notice to employers that, as the commenter characterized it, those previously approved temporary agricultural labor certifications could no longer be "relied upon" for future applications. The Department declines to adopt this suggestion. The Department rejects the suggestion that previously approved applications mandate approval in the future. Each application for a temporary agricultural labor certification must be processed on its own merits, and each must be processed according to the time and place for which the job opportunity will

take place. See 8 U.S.C. 1188(a) and (b) (noting that a temporary agricultural labor certification certifies, among other things, that there are "not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition"). The regulatory appeals process provides an adequate opportunity for employers to seek review of the CO's decisions, as is required by statute. 8 U.S.C. 1188(e)(1). To the extent that this commenter alleged that previous applications may have been processed or adjudicated outside a regulatory timeline, such an allegation falls outside the scope of this rule to address specific prior applications or appeals.

One commenter expressed concern that the Department would eliminate the opportunity to appeal from an ALJ's temporary agricultural labor certification decision to the Department's ARB. However, employers did not previously have the ability to appeal a temporary agricultural labor certification decision to the ARB, nor was such an option proposed in the NPRM.

One commenter suggested that the Department establish a system by which employers could seek out advisory opinions, which could be adjudicated through the appellate system, and which would clarify the Department's interpretation of the regulations. This submitted comment is beyond the scope of the proposed rule and cannot be implemented through this regulatory rulemaking.

#### 3. Section 655.172, Post-Certification Withdrawals

The NPRM proposed technical amendments to this section to relocate the job order withdrawal provision from § 655.172(a) to § 655.124, in addition to amendments to relocate the *Application for Temporary Employment Certification* withdrawal provision from § 655.172(b) to § 655.136, as discussed above in the preamble for those sections. The Department proposed to reorganize these withdrawal provisions so that, for example, the procedure for withdrawing the *Application for Temporary Employment Certification* is located in the section of the rule where an employer at that stage of the temporary agricultural labor certification process would look for such a provision. The Department also proposed language in this section reiterating current requirements that withdrawal does not nullify an employer's obligation to comply with all the terms and conditions of employment

under the certified *Application for Temporary Employment Certification*.

The Department received no comments on the proposed amendments to reorganize the withdrawal provisions in the regulatory text. Therefore, this final rule adopts the proposed changes from the NPRM without change. Accordingly, an employer seeking withdrawal of a certified *Application for Temporary Employment Certification* must submit a withdrawal request, in writing, to the NPC. In the withdrawal request, the employer must identify the temporary agricultural labor certification to be withdrawn and state the reason(s) for the employer's request. Similar to the withdrawal provisions at §§ 655.124 and 655.136, this section adopts the proposed language to reiterate that the withdrawal of a temporary agricultural labor certification does not nullify an employer's obligations to comply with the terms and conditions of employment under the certification with respect to all workers recruited in connection with the application and job order.

The Department received two comments stating that employers should not be bound to comply with obligations under the *Application for Temporary Employment Certification* and related job order after withdrawal, apparently without regard to the timing of withdrawal. These comments have already been addressed above in the section of the preamble related to § 655.124.

#### 4. Section 655.173, Setting Meal Charges; Petition for Higher Meal Charges

The NPRM proposed minor amendments to this section that contains the methodology for setting the annual rates at which an employer may charge workers for meals and the procedures by which an employer may request approval from the CO for a higher meal charge amount. The Department received a few comments related only to the proposal to establish a ceiling on the meal charge amount the CO may approve. As discussed in detail below and after carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with revisions to remove language related to establishing a maximum higher meal charge amount.

As provided in § 655.122(g), employers must provide each worker three meals a day or furnish free and convenient cooking and kitchen facilities so that the worker can prepare meals. If an employer provides workers with three meals per day, rather than

providing them with free and convenient cooking and kitchen facilities, the employer may not charge workers more than the allowable meal charge set by the Department's regulations at § 655.173(a) for providing those meals, unless and until the CO authorizes the employer to charge a higher amount pursuant to § 655.173(b).

The Department proposed no changes to the existing methodology used to annually adjust the standard amount an employer may charge workers for providing them with three meals per day. The Department proposed to update the amount stated in paragraph (a) to reflect the current standard meal charge amount in effect (*i.e.*, \$14.00 per day) and to more clearly characterize it as the starting point for future annual updates. 85 FR 16133 (Mar. 20, 2020). In addition, the Department proposed to make the annual adjustments effective on a date no more than 14 calendar days after publication in the **Federal Register**, to provide employers a brief period for adjustment to the updated rate, consistent with the Department's proposed approach to wage rate updates. *See, e.g.*, § 655.120(b)(3). The Department did not receive comments on these revisions to paragraph (a). However, consistent with the Department's reasoning and decision not to adopt an adjustment period of up to 14 calendar days for both AEWR updates and prevailing wage updates, the Department has not adopted the proposed adjustment period for meal charge updates. Therefore, apart from a grammatical edit and removal of the proposed 14-day adjustment period, the Department has adopted paragraph (a) without change in this final rule.

In paragraph (b), the Department proposed to retain the basic process an employer may follow to petition the CO for authorization to charge workers more than the standard meal charge set under paragraph (a), with revisions for clarity and to address situations in which an employer's higher meal charge petition is based on its use of a third party to provide meals to workers (*e.g.*, hiring a food truck to prepare and deliver meals or engaging restaurants near the housing or place of employment to provide meals). In paragraph (b)(1), the Department clarified that the CO will deny the employer's petition, in whole or in part, if the documentation the employer submits to the CO does not justify the higher meal charge requested, with paragraph (c) retaining the employer's option to appeal.

In paragraph (b)(1)(i), the Department retained the 2010 H-2A Final Rule's documentation requirements for

employers that directly provide meals to workers (*i.e.*, through its own kitchen facilities and cooks), with clarification that the employer's documentation must include only permitted costs. The Department proposed a new paragraph (b)(1)(ii) to address documentation requirements applicable to employers that provide meals to workers through a third party. Specifically, the employer's documentation must identify each third party engaged to prepare meals, describe how the employer's agreement with each third party will fulfill the employer's obligation to provide three meals a day to workers, and document each third party's charges to the employer for the meals to be provided. The employer must retain records of payments to the third party and deductions from a worker's pay, as provided in § 655.167(b). Finally, the employer, or anyone affiliated with the employer, is prohibited from receiving a direct or indirect benefit from a higher meal charge to a worker. The Department did not receive comments on these proposals and is adopting them without change in this final rule.

In paragraph (b)(2), the Department clarified the effective date and scope of validity of an approved higher meal charge petition. In addition to waiting for the CO's approval, which may specify a later effective date, an employer must disclose to workers any change in the meal charge or deduction before it may begin charging the higher rate. Further, the Department clarified that the CO's approval of a higher meal charge is valid only for the meal provision arrangement presented in the higher meal charge petition and only for the meal charge amount the CO approved. If the approved meal provision arrangement changes, the employer would not be permitted to charge workers more than the standard meal charge set under paragraph (a) until the employer repeated the higher meal charge petition process for the new meal provision arrangement and received the CO's authorization to charge a higher amount. The Department did not receive comments on these revisions and is adopting them without change in this final rule.

Finally, the Department also proposed to reintroduce an objective ceiling on meal charges through a maximum higher meal charge amount. In part, the Department thought an upper limit on meal charges could help to ensure that an employer's choice to engage a third party to provide three meals a day to workers would not unreasonably reduce workers' wages. The maximum higher meal charge amount the Department proposed was derived from the last

maximum allowable higher meal charge amount published in the **Federal Register** and effective in 2008, updated using the same methodology as in paragraph (a). The Department invited comments on methods for processing and evaluating higher meal charge requests involving third party prepared meals, including alternative methods for determining and updating a higher meal charge ceiling that would not inhibit the provision of sufficient, adequate meals and will not reduce workers' wages without justification.

The Department received several comments from trade associations, agents, and an employer that expressed strong opposition to the proposal to impose a ceiling for higher meal charge petitions. The commenters generally viewed the ceiling as "artificial." Some expressed concern that the maximum rate proposed would often be below actual meal costs, with one asserting that such a limitation would result in some employers providing smaller and lower quality meals to their workers to stay within budget. Another agent saw no added benefit from a maximum amount because higher meal charge requests are subject to the CO's approval, so there is no need to place an arbitrary limit on the CO's discretion. The Department did not receive comments suggesting alternative methods to determine an appropriate higher meal charge limitation.

After consideration of the comments received, the Department has decided not to adopt the proposed ceiling on the meal charge amount the CO may approve and, therefore, has revised paragraphs (b) introductory text and (b)(1) to remove language related to a maximum higher meal charge amount. The Department appreciates and shares commenters' concerns that the proposal would not adequately account for various factors that could influence the costs of employer-provided meals, such as the variance of food costs across localities or the need to accommodate a worker's dietary restrictions, and could result in employers providing smaller and lower quality meals to their workers to stay within budget in certain circumstances. The Department also agrees the proposal would have placed an unnecessarily rigid limitation on the CO's discretion and might have prevented the CO from approving higher meal charge requests even in cases where the employer provides ample documentation of actual costs, compelling justification for the higher meal charge, and solid evidence the employer could not have provided adequate meals at a lower cost.

The Department has therefore determined that the reasonable approach, at this time, is to allow the CO to determine whether to approve higher meal charge petitions, on a case-by-case basis, based on the CO's evaluation of the employer's documentation. Particularly in meal arrangements involving third-party preparers, the CO will consider whether the employer has demonstrated it cannot provide the required meals for the standard costs permitted by paragraph (a) and the higher meal charge requested, based on the meal provision arrangements presented in the petition, is necessary, not merely convenient or a means of reducing an employer's housing costs (e.g., when motel rooms with kitchenettes are available at a higher rate). In administering this final rule, the Department will continue to consider ways to best protect workers from improper deductions, while also providing sufficient discretion to the CO and adequately accounting for the various factors that may influence the cost of employer-provided meals.

One State government commenter reiterated a comment submitted in connection with the meal provision obligation at § 655.122, stating that even where an employer provides three meals per day that satisfy minimum Federal standards, a worker may need to supplement those meals through individually purchased and stored food to satisfy nutritional and caloric needs and urging the Department to allow this practice. A pattern of workers finding it necessary to supplement employer-provided meals might suggest that the employer's meals are insufficient and its meal provision arrangement should be reevaluated. However, where an employer is providing sufficient meals and workers wish to supplement those meals with additional food (e.g., snacks), the Department notes that nothing in the regulations prohibits or prevents workers from purchasing, storing, and eating food not provided by the employer.

#### 5. Section 655.174, Public Disclosure

The NPRM did not propose changes to the longstanding practice of providing publicly accessible information about users of the H-2A program on the OFLC website. Therefore, this final rule retains the current requirements.

#### 6. Section 655.175, Post-Certification Amendments

The 2010 H-2A Final Rule does not permit amendments to an application after the CO issues a Final

Determination. Thus an employer that experiences changed circumstances after certification is required to submit a new and substantially similar *Application for Temporary Employment Certification* and job order. The NPRM proposed to add a new provision permitting an employer to request minor amendments to the places of employment listed in the certified *Application for Temporary Employment Certification* and job order under limited circumstances and subject to certain conditions. The proposal was intended to recognize that an employer may experience changed circumstances, wholly outside of their control, after certification, necessitating adjustments to certain aspects of the anticipated work plan. The Department's proposed provision would have allowed for narrowly tailored post-certification amendments to alleviate the burdens with filing and processing a new *Application for Temporary Employment Certification* and provide employers with a certain degree of flexibility to more quickly respond to changing needs, without compromising the H-2A program's integrity or changing the terms and conditions of employment to which the employer already attested. The Department received a significant number of comments on this provision. After careful consideration of comments, the Department has decided not to adopt the proposed post-certification amendments provision at § 655.175, as discussed in detail below.

The majority of comments from employers, associations, and agents that addressed the proposed post-certification amendment provision expressed general support and viewed this provision as a practical, reasonable administrative improvement that would simplify the H-2A program, reduce burdens on employers by providing flexibility to accommodate changed circumstances after certification within limits appropriate to protect program integrity, and improve the accuracy of information available to the Department regarding worker location, especially in the case of workers that travel from site to site when employed by FLCs or itinerant employers. An agent explained that requiring an employer to file a new application to add a place of employment within the certified AIE is burdensome and restrictive because the employer has already completed a labor market test for that area and the period of need. Several of the comments provided examples of the types of circumstances in which a post-certification amendment would help producers stay in compliance with the

rule while adapting to on-the-ground conditions. For example, situations like late snow, drought, or excessive rain may prevent access to rangeland, or wildfire or drought may alter or eliminate vegetation on the rangeland, such that ranchers must relocate herds, on short notice, to other rangeland with vegetation of sufficient quality and quantity available for grazing. Other examples commenters cited included severe adverse weather, changes in vegetative growing conditions, sudden presence of predators, disaster situations, and unanticipated planting to replace lost crops. An agent requested the Department include examples, unrelated to weather, constituting good and substantial cause. Commenters provided non-weather examples including wildfires, predators, and inability to access certain locations due to route conditions, which are discussed above.

The Department also received a significant number of comments from workers' rights advocacy organizations, labor unions, State agencies, and elected officials expressing concerns about the proposed post-certification amendments provision. Commenters expressed concern that this provision would provide employers with unilateral ability to make mid-season changes to the terms and conditions of employment, which they asserted is unfair to workers who are not able to negotiate or appeal changes made after the job begins. These commenters also expressed concerns that the proposal might jeopardize the labor market test, create occupational instability, complicate wage determinations, hinder the work of workers' rights advocacy organizations, lead to worker exploitation, disadvantage employers that do not employ H-2A workers, and result in employer abuse of the attestation-based process.

In response to the Department's request for comments on ways to balance employers' need to adapt quickly to changed circumstances with the Department's need to protect program integrity, a workers' rights advocacy organization asserted that the timeline for processing an *Application for Temporary Employment Certification* is already short enough to accommodate an employer's need to adapt to changing circumstances. The commenter asserted the proposal would violate the Department's statutory obligation by relying on employer assurances that they met all program requirements, including those vital to workers' rights (e.g., workers' compensation and wage rate for a new State). Two U.S. Senators requested the

Department abandon the proposal, asserting the Department can balance its goals within the current regulatory framework, specifically the pre-certification amendment provision at § 655.145 and the emergency situations waiver provision at § 655.134. In contrast, a few trade associations thought the proposal was sufficiently limited to allow employers to react quickly to unforeseen circumstances without compromising the integrity of the temporary agricultural labor certification.

A workers' rights advocacy organization asserted that the Department had not provided sufficient data or rationale to explain how this proposal furthers regulatory or statutory goals. This commenter also stated that even if the employer provides a copy of the amended temporary agricultural labor certification to workers, H-2A workers who are told to work at different worksites, possibly in different States, may not be certain that the work is permitted under their H-2A visa. This commenter also believed the proposed post-certification amendment process would be abused by H-2ALCs and would permit employers to use the process as a "tool to further their illegal preference for H-2A workers."

Some commenters asserted the proposal conflicted with workers' need to know the job terms before accepting an H-2A job opportunity, which could negatively affect U.S. workers' access to jobs and deter them from applying. Two U.S. Senators and one of the workers' rights advocacy organizations asserted the employment of foreign workers at worksites not disclosed to U.S. workers would not only disadvantage U.S. workers, but may increase the risk of exploitation, trafficking, and labor abuses. The senators further asserted that, in conjunction with the Department's proposal to determine the AEW for specific occupations, post-certification amendments to worksites would unnecessarily complicate wages for employers and workers, greatly increasing the risk of workers being paid an incorrect wage. The senators also believed the proposal unnecessarily increased the administrative burden on employers and defeated the Department's objective of simplifying the H-2A program.

Some commenters viewed post-certification changes to worksites as compounding their general concerns about the labor market test, the proposed option for staggered start dates, and the proposed 30-day period replacing the 50 percent rule. Two workers' rights advocacy organizations expressed concern the proposal did not

require additional recruitment. One of the commenters asserted workers must know where they will be required to work in order to assess housing, transportation, terrain, facilities, quality of crops, and other factors that affect workers' interest in potential employment. This commenter expressed particular concern about situations in which the certified AIE crosses State lines because the proposal would not require the employer to conduct additional positive recruitment in the new State or allow the SWA in the new State to evaluate the job order and availability of workers, which it feared would result in lost job opportunities for U.S. workers.

A State governor expressed concern the proposal could create hardships for U.S. workers who have to find their way to the new worksite or risk being fired, which they believed would be a particular concern in a situation where the employer has a "no rehire policy" and might invoke the policy to refuse to hire those workers who had to quit or were fired for refusing to report to an additional work location. One of the workers' rights advocacy organization commenters expressed concern about U.S. workers who might lose jobs at the added place of employment, such as former workers with seniority at that worksite who might not be contacted to determine whether they are available for the job. The commenter expressed particular concern about situations in which an H-2ALC adds a place of employment where workers were directly hired by the farmer in prior years.

A State governor and one of the workers' rights advocacy organizations feared that the proposal would permit misuse of the program by employers, such as reforestation contractors, employing workers in many locations, because these employers might test the labor market in one AIE, but actually employ workers in another area. The governor further expressed concern the proposal would not provide the SWA sufficient time to test the labor market for domestic workers in the new locations because amendments to worksites after certification would require changes to the job order in the SWA system, as well as changes to recruitment posters and advertising that the SWA creates to notify the community of the jobs available. The governor also noted domestic workers at the new locations will need to be made aware of the change in order to know if they are in corresponding employment under the H-2A certification.

In addition to comments expressing support or opposition to the proposed

post-certification amendments, the Department received several comments requesting specific changes to the proposal or suggesting alternatives to one or more aspects of the proposal. Comments from employers, associations, and agents generally urged the Department to expand the scope of post-certification amendments, ease the proposed restrictions on the amendments, and clarify requirements for approval of amendment requests. Some commenters mistakenly believed the provision would permit employers to increase the number of workers and add work locations after certification as they acquire additional work (e.g., new contracts or fields) in the normal course of business. Several commenters also urged the Department to provide additional guidance and clarity regarding various aspects of the proposed provision. An international recruitment company asked the Department to define more clearly the terms “minor changes,” “good and substantial cause,” “circumstance(s) underlying the request,” “reasonably foreseen,” “wholly outside the employer’s control,” and “material terms and conditions.” An agent and two farm owners urged the Department to be flexible in evaluating “good and substantial cause,” expressing concern that if an employer’s burden of proof is too high it could render post-certification amendments unworkable. One of these commenters believed the Department should apply a more flexible definition of “good and substantial cause” than it applies to emergency situation requests under § 655.134.

Regarding the time provided for the CO to review these requests, several commenters simply stated post-certification amendment requests should be processed as quickly as possible or otherwise without delay. An international recruiting company suggested employers submit real-time updates regarding the workers’ location to the NPC, rather than submitting individual requests and waiting up to 3 days for CO approval. In contrast, a workers’ rights advocacy organization opposed the proposed 3-business-day review period, asserting this would not provide sufficient time to review the request and assess the effect on the labor market test.

The Department also received comments addressing time limitations on post-certification amendment requests. A workers’ rights advocacy organization argued if the Department adopts a post-certification amendment provision, the amendments must be limited to a post-certification time

period shorter than 30 days after certification, the shortest period the Department mentioned as an option in the NPRM. An individual commenter suggested the Department either permit post-certification amendments until 50 percent of the work contract period has elapsed or extend the employer’s hiring obligation to 30 days after any amendment to the temporary agricultural labor certification. In contrast, a few trade associations urged the Department to permit employers “ample” time to submit post-certification amendments requests because the circumstances necessitating these amendments are not bound by any regulatory limit and can happen at any time.

After careful consideration of all comments, as stated above, the Department has decided not to adopt the post-certification amendment provision in this final rule. Although the Department did not intend for the proposed provision to have permitted post-certification amendments that changed the terms and conditions of employment (e.g., adding places of employment in a different AIE than certified), the Department recognizes commenters’ concerns. The Department is sensitive to the concerns about the potential for changed terms and conditions of employment and ensuring U.S. workers’ access to job opportunities. The Department agrees that permitting employers to add places of employment beyond the AIE and the States certified would change the terms and conditions of employment without CO review, could permit employers to use the post-certification amendment process in a way that undermines the Department’s underlying finding regarding U.S. worker availability, and could require the employer to secure additional documentation of the type that would have been subject to the CO’s review during application processing (e.g., evidence of workers’ compensation compliance in the new State and, potentially, housing). These types of changes are beyond the scope of what the Department believes is appropriate to permit under a post-certification, expedited review process. The Department appreciates the concerns of a workers’ rights advocacy organization and State governor regarding potential job losses for workers with seniority at that worksite who might not be contacted to determine whether they are available for the job and workers who may be unable or unwilling to report to a new worksite. The Department agrees an effective post-certification amendment provision

should require the employer to contact former U.S. workers for each added place of employment and solicit their return to the job opportunity and that the post-certification amendment process may require a carefully tailored expedited process to guarantee employers engage in such contact. The Department also appreciates and agrees with commenters’ concern about the necessity of providing sufficient time to assess the effect of the amendment on the labor market test. Finally, the Department appreciates the State governor’s comment expressing concern regarding the process for apprising corresponding workers at new worksites of their rights and protections and the Department agrees that an effective post-certification amendment provision must more clearly address employers’ obligation to reevaluate whether its workers are engaged in corresponding employment and timely disclose to workers approved amendments to the work contract, in compliance with § 655.122(q).

While the Department understands the importance of providing flexibilities that permit employers and associations to quickly respond to exigent circumstances requiring minor amendments to places of employment after their applications are certified, the Department has determined that the proposal would require significant revisions to provide greater clarity to employers and ensure post-certification amendments do not adversely affect workers similarly employed in the AIE and those U.S. workers seeking employment. In light of the substantial and numerous commenter concerns, the Department does not believe the proposal, even with significant revisions, will satisfy the policy considerations underlying this final rule. Notwithstanding, as noted by the U.S. Senators and workers’ rights advocacy organization commenters, the Department agrees that the existing regulations already provide a limited degree of flexibility to employers to react to exigencies and changing circumstances. Accordingly, the Department declines to adopt the proposal in the NPRM at this time. Under this final rule, as under the 2010 H-2A Final Rule, the employer may request certain amendments under the provisions set forth at § 655.145, in situations where the employer could foresee the need for amendment after filing, but prior to the CO issuing a Final Determination, and, if necessary, may file a new *Application for Temporary Employment Certification*, using the emergency situations procedures at

§ 655.134 to address changes not permitted under § 655.145. For example, if unusually heavy storms and rains occur after the employer submits its *Application for Temporary Employment Certification*, the employer can assess impacts on crop conditions and its temporary need and may determine it is appropriate to reduce staffing levels for the job opportunity described on the pending *Application for Temporary Employment Certification* and file an emergency situation *Application for Temporary Employment Certification* to address its need for labor or services under the new circumstances at other place(s) of employment or with adjusted duties.

The Department will continue to consider how best to accommodate the needs of employers to make minor post-certification amendments to places of employment due to unforeseen circumstances over which the employer has no control, while also sufficiently limiting the scope of these amendments to ensure employers provide effective notice of job opportunities to non-H-2A workers—both former U.S. workers and workers in corresponding employment at each place of employment added to the temporary agricultural labor certification—and guarantee changes to specific work locations are minimal for workers, terms and conditions of employment remain unchanged, and the underlying labor market test for the AIE remains valid for the certification.

#### H. Integrity Measures

##### 1. Section 655.180, Audit

The NPRM proposed minor amendments to this section to clarify the procedures by which OFLC conducts audits of applications for which temporary agricultural labor certifications have been granted. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed five revisions to this section in the NPRM. First, the Department proposed revisions to paragraphs (b)(1) and (2) to clarify that audit letters will specify the documentation that employers must submit to the NPC, and that such documentation must be sent to the NPC not later than the due date specified in the audit letter, which will be no more than 30 calendar days from the date the audit letter is issued. Second, in paragraph (b)(2), the Department proposed to revise the timeliness measure from the date the NPC receives

the employer's audit response to the date the employer submits its audit response. This change is more consistent with other filing requirements contained in this final rule and better ensures employers' ability to timely submit their responses. Third, the Department proposed to revise paragraph (b)(3) to clarify that partial audit compliance does not prevent revocation or debarment. Rather, employers must fully comply with the audit process in order to avoid revocation under § 655.181(a)(3) or debarment under § 655.182(d)(1)(vi) based on a finding that the employer impeded the audit. Fourth, the Department proposed to add language to paragraph (c) to codify the current practice of a CO issuing more than one request, and sometimes multiple requests, for supplemental information if the circumstances warrant. This practice ensures that employers have every opportunity to comply fully with audit requests and that the CO's audit findings are based on the best record possible. Finally, the Department proposed revisions in paragraph (d) to clarify the referrals a CO may make as a result of audit, including updating the name of the office within the DOJ, Civil Rights Division, Immigrant and Employee Rights Section, that will receive referrals related to discrimination against eligible U.S. workers.

The Department received two comments expressing general support for the proposed changes and one comment suggesting that only WHD conduct audit examinations of certified *Applications for Temporary Employment Certification*. Although the Department appreciates the suggestion, the NPRM did not propose changes related to which agency would conduct audit examinations. Therefore, this suggestion is outside the scope of this rulemaking.

##### 2. Section 655.181, Revocation

The NPRM proposed minor amendments to paragraph (b)(2) of this section to clarify that if an employer does not appeal a Final Determination to revoke a temporary agricultural labor certification according to the procedures in proposed § 655.171, that determination will become the final agency action. The Department proposed to remove language referring to the timeline for filing an appeal, as that information was provided in proposed § 655.171. The Department received some comments generally supporting these proposals, and no comments in opposition. However, as explained below, the Department has

decided not to adopt the proposed revisions in this final rule.

The proposed deletion of paragraph (b)(2)'s current 10-calendar-day timeline for appealing, combined with the proposed retention of paragraph (b)(2)'s reference to the appeal procedures of § 655.171, would have resulted in an unintended change in paragraph (b)(2)'s appeal timeline. The Department did not intend to change any of the current timelines in paragraph (b). This final rule therefore retains the timelines stated in current paragraphs (b)(1) and (2), both of which now reference paragraph (b)(3). Paragraph (b)(3), in turn, retains a reference to the appeal procedures of § 655.171, but now clarifies that while the appeal *procedures* of § 655.171 apply to any appeals filed under paragraph (b)(1) or (2), the *timelines* to file an appeal, as stated in paragraphs (b)(1) and (2), continue to apply.

Additionally, the Department has removed language from the proposed paragraph (b)(3), stating that the ALJ's decision is the final agency action, in light of an intervening change to the current paragraph (b)(3). As discussed elsewhere, between the publication of the 2019 proposed rule at 84 FR 36168 and this final rule, the Department published *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608), which affected the language of this section. The current iteration of § 655.181(b)(3), with the changes made by the *Rules Concerning Discretionary Review by the Secretary*, is different than the iteration of § 655.181(b)(3) that was in effect when the NPRM was published. Specifically, the *Rules Concerning Discretionary Review by the Secretary* removed the language in paragraph (b)(3) that stated the decision of the ALJ was the final decision of the Secretary, consistent with the principle that the Secretary could assume jurisdiction over a de novo appeal pursuant to 29 CFR 18.95. Section 655.171 of this final rule contains language implementing that principle, which § 655.181(b)(3), in turn, incorporates by stating that the appeal procedures of § 655.171 apply.



3. Section 655.182, Debarment; 29 CFR 501.16, Sanctions and Remedies—General; 29 CFR 501.19, Civil Money Penalty Assessment; 29 CFR 501.20, Debarment and Revocation; 29 CFR 501.21, Failure To Cooperate With Investigations; 29 CFR 501.41, Decision and Order of Administrative Law Judge; 29 CFR 501.42, Procedures for Initiating and Undertaking Review; 29 CFR 501.43, Responsibility of the Office of Administrative Law Judges; 29 CFR 501.44, Additional Information, if Required; and 29 CFR 501.45, Decision of the Administrative Review Board

The NPRM proposed amendments to the debarment provision in § 655.182 to improve integrity and compliance with program requirements, and to establish consistency in holding program violators accountable among the H–2A regulations and the other labor certification programs administered by the Department. The NPRM also proposed amendments to WHD’s debarment provision at 29 CFR 501.20 to conform with the proposed changes to 20 CFR 655.182(a) regarding the ability to debar an agent or attorney, and their successors in interest, based on the agent’s or attorney’s own substantial violations. The Department received some comments on these provisions, none of which necessitated substantive changes to the regulatory text. As noted above, the Department has revised § 655.182(h) to confirm its approach to debarment of associations, employer-members of associations, and joint employers. Therefore, as discussed below, these provisions remain substantively unchanged from the NPRM.

The Department proposed to revise § 655.182 to clarify that if an employer, agent, or attorney is debarred from participation in the H–2A program, the employer, agent, or attorney, or their successors in interest, may not file future *Applications for Temporary Employment Certification* during the period of debarment. Under the proposal, if such an application is filed, the Department will deny the application without review, rather than issuing a NOD before denying the application, as it does under the current regulations.

The Department also proposed to revise § 655.182 to allow for the debarment of agents or attorneys, and their successors in interest, based on their own misconduct. Since the 2008 H–2A Final Rule, the H–2A regulations have allowed the Department to debar an agent or attorney based on its participation in the employer’s substantial violation. *See* § 655.182(b);

2010 H–2A Final Rule, 75 FR 6884, 6936–6937; 2008 H–2A Final Rule, 73 FR 77110, 77188. As explained in the NPRM, the proposed revisions would allow the Department to hold agents and attorneys of the employer accountable for their own substantial violation(s), as well as for their participation in the employer’s substantial violation(s), as that term is defined in § 655.182(d). The Department also proposed conforming revisions to the definition of “successor in interest” in § 655.103(b) to reflect that a debarred agent’s or attorney’s successor in interest may be held liable for the debarred agent’s or attorney’s violation. The Department has adopted these changes as proposed. However, the Department has made one additional, minor revision to § 655.182(b), consistent with revisions to § 655.103(b), to clarify that neither a debarred employer, agent or attorney, nor a successor in interest to a debarred employer, agent or attorney may file an H–2A application.

The Department received one comment expressing support for the first proposal and several comments expressing general support for the second. Some commenters expressed concern, however, that the Department would not seek to debar the employer where the Department is pursuing debarment of an agent or attorney based on the agent’s or attorney’s own misconduct. The Department believes these concerns are misplaced. Under the changes adopted in this final rule, the Department may pursue debarment against the agent or attorney for their own misconduct in those rare instances where the Department determines the agent or attorney commits a substantial violation that the Department finds it cannot or, in its discretion, should not, attribute to the employer. The Department anticipates that, in most instances, it would be appropriate to debar the employer as well as the agent or attorney, because the ultimate responsibility for ensuring compliance with the program rests with the participating employer.

Some agent commenters objected to statements in the NPRM that expressed the Department’s concern with the role of agents in the H–2A program. The Department’s intent was simply to note that, in its experience, the participation of agents in the program can, but certainly does not always, undermine program compliance.

The Department received several other comments about the debarment provisions that were unrelated to the changes the NPRM proposed, and therefore are beyond the scope of the current rulemaking. For instance, some

employer and employer association commenters requested changes to ease the standard for debarment, such as requesting a *de minimis* exception from the kinds of violations that would lead to debarment from the H–2A program. Save for the addition of an H–2ALC’s failure to submit an original surety bond at § 655.182(d)(2) (discussed in the surety bond section above), the Department proposed no changes to the kinds of violations that are sufficient to warrant debarment, and thus the Department cannot consider this recommendation in the current rulemaking. The Department notes, however, that the Department considers debarment only in the case of substantial violations, as required by the statute. *See* 8 U.S.C. 1188(b)(2)(A).

Another commenter opposed shared debarment authority between WHD and OFLC. This comment is outside the scope of the current rulemaking, as the NPRM did not propose changes to the Department’s longstanding practice, reflected in the associated regulations, that both WHD and OFLC have debarment authority.

A workers’ rights advocacy organization commented that the proposed changes were insufficient to address perceived shortcomings to the H–2A debarment procedures. Specifically, the commenter noted a need to improve the debarment procedures’ treatment of successors in interest and cited specific enforcement efforts as demonstrative of the limitations of the regulation’s current provision. The commenter also advocated that the Department’s debarment procedures should promote employee participation in WHD investigations. The Department appreciates these comments but notes that the suggestions are not within the scope of the current rulemaking, as the Department did not propose any changes to the debarment procedures generally. As noted above, however, the Department proposed and is adopting as final conforming revisions to the definition of “successors in interest” in § 655.103(b) to reflect the changes detailed above.

#### *I. Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Operations*

The NPRM proposed amendments to certain provisions in this section largely to conform the labor certification process for temporary agricultural employment in range sheep herding, goat herding, and production of livestock operations to other changes proposed in the NPRM. The Department

received many comments on this section; the vast majority of which were outside the scope of this rulemaking and none of which necessitated substantive changes to the regulatory text.

Therefore, as discussed in detail below, the provisions contained in this section remain unchanged from the NPRM except for minor technical or clarifying changes.

### 1. Modernizing Recruitment Requirements

Between the publication of the 2019 proposed rule at 84 FR 36168 and this final rule, the Department published the 2019 H-2A Recruitment Final Rule that amended § 655.225 by removing paragraph (d) and redesignating paragraph (e) as paragraph (d). This final rule incorporates those changes.

### 2. Regulatory Revisions Implemented by This Final Rule

As proposed in the NPRM, the Department has revised §§ 655.200 through 655.235 to conform to the other revisions in this final rule. Minor changes include replacing a dash between two sections with the word “through” (e.g., replacing “§§ 655.200–655.235” with “§§ 655.200 through 655.235”) for technical consistency with other sections of this final rule. The Department received no comments regarding these minor changes, or the substantive changes discussed below, and therefore has adopted all proposed revisions in §§ 655.200 through 655.235. Aside from technical changes, the Department has made one minor change to the proposed text in § 655.215(b)(1), which is discussed further below.

The Department has revised § 655.205 to reflect revisions to the normal job order filing procedures in § 655.121 and to clarify variances from § 655.121 that remain for job opportunities involving herding or production of livestock on the range.

In addition, consistent with the Department’s reasoning and decision not to adopt the transition period for an employer to implement a new higher AEWR proposed in § 655.120(b), the Department did not adopt similar transition period language proposed in § 655.211(a)(2). The final rule requires an employer to start paying the higher rate on the effective date published in the **Federal Register**. The Department has also added the phrase “at least” to § 655.211 to clarify that employers must pay at least the rate required by the regulations, but as the regulations are meant to provide a minimum, employers may of course choose to offer and pay a higher rate. The phrase also

provides consistency with §§ 655.120 and 655.210(g).

The Department has also simplified and revised § 655.215(b) introductory text and (b)(1) to conform to other revisions in this final rule. In paragraph (b) introductory text, detailed language about additional required information is obsolete, as the job order Form ETA-790/790A addenda include data fields for employers to provide detailed information about the job opportunity. The obsolete language was removed.

As the language promulgated in the Department’s 2015 H-2A Herder Final Rule could have been interpreted to permit an *Application for Temporary Employment Certification* for herding or production of livestock on the range to cover multiple AIEs in more than two contiguous States but not a smaller geographic area, such as multiple AIEs within one State, the Department has included one minor change to language in paragraph (b)(1) for clarity. See 2015 H-2A Herder Final Rule, 80 FR 62958, 62998, 63068. Specifically, an *Application for Temporary Employment Certification* may cover multiple AIEs in one State, or multiple AIEs in two or more contiguous States. Accordingly, the text in this final rule has been revised to make clear that an “*Application For Temporary Employment Certification* and job order may cover multiple [AIEs] in one or more contiguous States,” as opposed to saying “and one or more contiguous [S]tates” as originally proposed (emphasis added).

Trade associations, an agent, and individual employers suggested removing the “contiguous State” restriction, stating that this limitation hinders access to job opportunities. However, the Department’s proposed revisions for this subpart were meant to serve as clarification only, and the Department did not propose substantive changes to the regulatory requirements. Therefore, the comments requesting that the Department remove the “contiguous State” restriction are outside the scope of this rulemaking.

In addition to minor revisions to § 655.220(b) and (c) for consistency within this final rule, the Department has revised paragraph (b) to reflect the centralization of job order dissemination from the NPC to the SWAs as set forth in § 655.121. Consistent with § 655.121, after the content of a job order for herding or production of livestock on the range has been approved, the NPC will transmit the job order to all applicable SWAs to begin recruitment. The Department also recently rescinded, in the separate 2021 H-2A Herder Final Rule, the 364-day provision that

governed the adjudication of temporary need for employers of sheep and goat herders (§ 655.215(b)(2)) to ensure the Department’s adjudication of temporary or seasonal need is conducted in the same manner for all H-2A applications. The text at § 655.215(b)(2) in this rule has been updated to reflect this recission.

Finally, the Department has made minor revisions in § 655.225(b) and (d) to simplify the language and reflect procedural changes made elsewhere in this final rule, such as revisions to the duration of the recruitment period at § 655.135(d).

### 3. Other Comments

A significant number of comments from a trade association, individual employers, and other commenters urged the Department to reconsider the wage rate methodology for herding and range livestock opportunities. However, the Department explicitly stated in the NPRM that it was not reconsidering, and therefore not seeking public comment on, this wage rate methodology. 84 FR 36168, 36220–36221. As a result, the comments regarding the wage rate methodology for herding and range livestock job opportunities are outside the scope of this rulemaking and will not be addressed further.

An immigration advocacy group, trade associations, and individual employers and other commenters expressed concerns and suggested changes regarding housing, the frequency of record keeping, the frequency of pay for employees, and the cost and profitability of business. A trade association and individual employers offered a number of suggested changes, which included the Department putting all forms and procedures online, providing for reimbursement for in-bound travel, allowing for a wage credit, and removing overtime pay statutes for sheepherders. However, the Department did not propose changes regarding these substantive issues and, thus, the comments are outside the scope of this rulemaking. With regard to removing or exempting specific occupations from statutory requirements, the suggestion would require a legislative change.

Other comments from a trade association, a State agricultural department, and individual employers and other commenters were general in nature and discussed the industry overall and expressed concern about the viability of their businesses moving forward. The Department understands the industry has concerns; however, these aforementioned comments and

suggestions are not within the scope of this rulemaking.

*J. Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, and Custom Combining*

1. Section 655.300, Scope and Purpose

The NPRM proposed to establish certain variances to the procedures for temporary agricultural labor certification for employers who seek to hire H-2A workers in animal shearing, commercial beekeeping, and custom combining to address the unique occupational characteristics of these occupations. To date, the Department has processed *Applications for Temporary Employment Certification* in these occupations using TEGLs specific to each of these occupations, which specify applicable variances from H-2A program requirements.<sup>111</sup>

In order to employ H-2A workers under these procedures, an employer's job opportunity must be in one of the covered occupations and must involve agricultural work to be performed on a scheduled itinerary covering multiple AIEs, including in multiple contiguous States. Unless otherwise specified in these variances, set forth in new §§ 655.300 through 655.304, employers must also comply with all H-2A requirements in §§ 655.100 through 655.185, including payment of at least the highest applicable wage rate, determined in accordance with § 655.122(l) for all hours worked.<sup>112</sup>

<sup>111</sup> See TEGL No. 17-06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H-2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=3041](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041); TEGL No. 33-10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H-2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=3043](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043); TEGL No. 16-06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H-2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=3040](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040). The NPRM also proposed to incorporate reforestation and pine straw activities into the H-2A program. Those activities have been considered under the H-2B program, and variances for the unique characteristics of those activities are provided for in TEGL No. 27-06, *Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations* (June 12, 2007), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=2446](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2446). However, following a consideration of the public submissions, and as discussed in the preamble to § 655.103(c), above, this final rule does not incorporate reforestation and pine straw activities into the H-2A program, and thus no specific variances are included for these activities.

<sup>112</sup> Compliance with § 655.122(l), as revised by this rule, requires an employer to "pay the worker at least the AEW; a prevailing wage, if the OFLC Administrator has approved a prevailing wage

The Department is adopting the variances proposed in the NPRM with minor revisions and technical changes. The Department received many comments on the proposed procedures in §§ 655.300 through 655.304. All of the commenters supported the proposed incorporation of variances for the commercial beekeeping, animal shearing, and custom combining occupations in the Department's H-2A regulations.

Some commenters requested additional variances not proposed in the NPRM. Several employer commenters requested a variance from the H-2A wage requirements in the case of job opportunities that involve animal shearing. The commenters stated that employers of animal shearers generally pay per piece or head, not hourly, and need a regional or national piece rate prevailing wage for shearers. The Department notes that the H-2A program does not prohibit the payment of a piece rate to covered workers, so long as the piece rate is accurately disclosed and the worker's average hourly earnings for the pay period equal at least the highest of the AEW, prevailing hourly wage, agreed-upon collective bargaining rate, or the Federal or State minimum wage. Indeed, historical prevailing wage rates for animal shearing have often been published as piece rates. Additionally, the Department believes that the prevailing wage methodology adopted in this final rule at § 655.120(c)(1) adequately addresses the needs of animal shearing employers and removes the need for the prevailing wage variance specified in the TEGL. The TEGL permitted use of a prevailing piece rate finding from an adjoining or proximate State or based on aggregated survey data for the occupation in a region to address situations such as inadequate sample sizes that would otherwise prevent a prevailing piece rate finding in a particular State.<sup>113</sup> Under this final rule, a prevailing wage survey may cover a regional area, where appropriate, based on the factors at § 655.120(c)(1)(vi).<sup>114</sup> Because the

survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of § 655.120(c); the agreed-upon collective bargaining rate; the Federal minimum wage; or the State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period."

<sup>113</sup> See TEGL No. 17-06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H-2A Program*, Attachment A, Section I.A (June 14, 2011).

<sup>114</sup> In the NPRM, the Department expressed its intent to codify existing practice, including regional

prevailing wage methodology adopted in this final rule accommodates the potential for a regional survey, a specific variance is no longer required to address situations in which a statewide survey fails to generate a prevailing piece rate wage result for this occupation. In addition, as a prevailing wage survey may set a prevailing wage by the piece rate based on employer responses, a specific variance is not required to accommodate piece rates. Regardless, the Department notes that this final rule does not require employers to change their existing payment practices, as the obligation to pay at least the amount required by § 655.122(l) continues unchanged.

A workers' rights advocacy organization submitted a comment that mentions reports of violations regarding the adequate payment for compensable time for workers employed as animal shearers and custom combining workers for travel time. In response, the Department reiterates that employers must account for all hours worked by the employee in meeting their wage obligations in § 655.122(l). As previously noted, in determining compensable hours worked under the H-2A Program, the Department applies FLSA hours worked principles. The principles applied in determining compensable hours worked are explained in more detail in 29 CFR part 785. As such, the Department reminds employers that any employee performing work while traveling (e.g., driving a combine or employer housing between locations, or transporting other workers along an itinerary) constitutes hours worked. See § 785.41. Additionally, certain transportation time may constitute hours worked for passengers. See §§ 785.33 through 785.41.

Some commenters requested a meal allowance credit towards the wage rate for workers in herding and range livestock production occupations. As explained in the preamble to the NPRM, however, the Department is not reconsidering and thus did not seek comment on the wage rate methodology for herding and range livestock production job opportunities. These comments are outside the scope of this rulemaking.

2. Section 655.301, Definition of Terms

The NPRM proposed definitions for the occupations subject to the procedures in §§ 655.300 through 655.304. As discussed below, the Department is adopting § 655.301 from

surveys where appropriate, through § 655.120(c)(1)(vi). 84 FR 36168, 36187.

the NPRM with clarifying and conforming changes. Commenters generally supported the proposed definitions. A workers' rights advocacy organization recommended adding a sentence to the definition of commercial beekeeping stating that the definition includes work performed under the supervision of either a fixed-site farmer/rancher or an itinerant beekeeping employer providing services to a fixed-site farmer/rancher, purportedly to "ensure accurate coverage of all applicable job opportunities." However, the commenter did not provide any explanation as to why the identity of the supervisor of an itinerant beekeeping worker is relevant to coverage of applicable job opportunities. The Department declines to adopt the commenter's proposal. Some commenters argued that itinerant beekeepers have been erroneously subject to the MSPA FLC registration requirements. The Department disagrees. Beekeepers providing pollination services on land that they do not own or operate are subject to MSPA FLC registration requirements. Moreover, the Department did not propose any substantive changes to § 655.132's requirement that H-2ALCs submit a copy of their MSPA registration certificate "if required by MSPA." These comments are therefore outside the scope of this rulemaking.

A workers' rights advocacy organization proposed expanding the definition of "custom combining"—though it did not provide a rationale for doing so—to cover additional types of equipment beyond that used in combining, and additional worksites beyond those covered by the definition of agriculture. The Department rejects the proposal. To avoid the possibility that readers will construe the definition more broadly than intended, the Department has deleted the following terms from the proposed definition of "custom combining" "associated with" and "including." The Department also has made other minor revisions for clarity, such as specifying that the type of equipment involved in the covered activities is combine equipment.

Several trade associations suggested that the NPRM inadvertently omitted certain aspects of custom combining, such as custom harvesters that harvest not only grain but also silage for livestock feed. The omission was not inadvertent. Harvesting silage does not require a combine, but rather a chopper or mower, and therefore falls outside the definition of custom combining. The TEGL was intended to cover only custom combining harvesters, as evidenced by the regulation authorizing

promulgation of the TEGLs (*i.e.*, § 655.102, which authorized special procedures for processing H-2A applications for, among other things, "custom combine harvesting crews").<sup>115</sup> The definition adopted in this final rule clarifies that intent.

In proposing the occupational definitions at § 655.301, the Department acknowledged that some of the listed activities may not otherwise constitute agricultural work under the current definition of agricultural labor or services in § 655.103(c) but are a necessary part of performing this work on an itinerary (*e.g.*, transporting equipment from one field to another). *See* 84 FR 36168, 36222. Accordingly, and solely for the purposes of the proposed variances in §§ 655.300 through 655.304, the Department explained that it would include these activities in the occupational definitions. *Id.* The Department did not receive any comments opposing the inclusion of specific activities listed in the proposed definitions. However, the Department acknowledges that only duties that fall within the definition of agricultural labor or services under § 655.103(c) may be certified under the H-2A program. Additionally, an application for a job opportunity that contains non-agricultural duties, or a combination of agricultural and non-agricultural duties, could not otherwise be certified. *See generally* § 655.161(a); 2010 H-2A Final Rule, 75 FR 6884, 6888. Accordingly, the Department clarifies in this final rule that, under the variances adopted in §§ 655.300 through 655.304, the activities included in the occupational definitions at § 655.301 are eligible for certification under the H-2A program. The Department therefore has made a technical, conforming revision to add new paragraph § 655.103(c)(5), which expressly provides that, for the purposes of § 655.103(c), agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in §§ 655.300 through 655.304.

<sup>115</sup> In light of this final rule's promulgation of specific variances to the procedures for H-2A temporary labor certification as necessary to address the unique occupational characteristics of animal shearing, commercial beekeeping, and custom combining for employers who seek to hire temporary agricultural foreign workers in these occupations, the rule also repeals § 655.102's authorization of the TEGLs, and it replaces it with a new § 655.102 that provides a transitional period for the orderly and seamless implementation of these variances in lieu of the TEGLs.

3. Section 655.302, Contents of Job Orders

a. Paragraph (a), Content of Job Offers

A workers' rights advocacy organization expressed general support for proposed § 655.302, but they recommended that job orders be required to include additional information about workers' compensation, rates of pay, the offered wage, and productivity standards for each State in which work will be performed. No change is required to address this comment. Unless a specific variance under § 655.302 is applicable and provides otherwise, an employer's job order must still comply with each of the content requirements at § 655.122. *See* § 655.302(a). For example, in order to satisfy its obligation to provide workers' compensation insurance coverage for injury and disease "arising out of and in the course of the worker's employment" and "for the entire period of employment" under § 655.122(e), an employer requiring work in multiple States (including a single AIE that crosses State lines) must satisfy this obligation in each State in which work will be performed. Similarly, § 655.122(c) and (l) require the employer to disclose the wage rate(s) offered and productivity standards in the job order. The Department's modernized job order form, Form ETA-790A, facilitates full disclosure of job offer information.

b. Paragraph (b), Job Qualifications and Requirements

A workers' rights advocacy organization opposed the Department's proposal to allow a job offer for the animal shearing and custom combining occupations to include a statement that applicants must possess up to 6 months of experience in similar occupations, and for the commercial beekeeping occupation to include a statement that applicants must possess up to 3 months of experience in similar occupations. The Department is retaining the NPRM proposal. The proposal was consistent with the TEGLs for these occupations. This final rule does not mandate that employers seeking workers for these occupations require such experience; rather, this final rule recognizes that such experience is consistent with the experience employers normally choose to require for these occupations, as has been observed in filings with OFLC. These occupations typically involve specialized skills (*e.g.*, operating heavy equipment; using shearing tools quickly and close to an animal's skin without injury; or detecting and addressing bee health issues). The regulatory text specifies the maximum amount of

experience that an employer may require absent an affirmative demonstration that such experience is a normal and accepted requirement. This provision does not mean an employer must require the maximum amount of experience in the job order—it simply sets a ceiling for what are considered to be normal requirements. Further, in the event that a SWA or OFLC CO obtains information indicating that the amount of experience required by the employer is not usual for a given State, AIE, or job opportunity, nothing in this rule precludes the SWA and/or OFLC from assessing the normalcy of the experience requirement under § 655.122(b).

The same commenter also requested that § 655.302(b) be revised to remove the verifiable experience requirement because such requirements are used as a barrier to exclude U.S. workers, but they are rarely applied to foreign workers. The Department does not believe that this change is necessary. The Department's regulations have long prohibited the preferential treatment of H-2A workers over other workers, including by prohibiting the imposition on U.S. workers of any restrictions or obligations that will not be imposed on the employer's H-2A workers. See § 655.122(a)(1). These protections continue to apply under this final rule. Employers should therefore ensure that any restrictions or obligations imposed on U.S. applicants are also imposed on H-2A workers, and the employer retains records of the imposition of these restrictions or obligations in the event of an audit by OFLC or enforcement by WHD.

An employer commenter opposed the provision in § 655.302(b) permitting beekeeping employers to specify in the job order that applicants must possess a valid driver's license or be able to obtain such a license no later than 30 days after the worker's arrival to the place of employment. The commenter noted that beekeeping employers do not require all workers to drive and when they do, it is often not possible to obtain a license within 30 days. This comment seemed to misunderstand the nature of the provision in § 655.302(b). Nothing in the regulation would require an employer to impose a driver's license requirement or to require workers to obtain a license within 30 days for every job order. On the contrary, only to the extent beekeeping employers choose to require that workers possess a driver's license, § 655.302(b) provides that the job offer may require that applicants either possess a driver's license or be able to obtain one within 30 days. However, nothing in § 655.302(b) would prevent

an employer from allowing applicants more than 30 days to obtain a driver's license.

#### c. Paragraph (c), Communication Devices

Pursuant to § 655.122(f), employers must provide each worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. Due to the potentially remote, isolated, and unique nature of the work to be performed by workers in animal shearing and custom combining occupations, the NPRM proposed to require the employer to provide each worker, without charge or deposit charge, effective means of communicating with persons capable of responding to the worker's needs in case of an emergency. The proposed requirement is consistent with that same requirement in place for workers primarily engaged in the herding and production of livestock on the range under the H-2A program, see § 655.210(d)(2), as well as those currently in place in the TEGLs for these occupations. Therefore, as discussed below, the Department is adopting paragraph (c) from the NPRM with a change for flexibility.

Several employer and association commenters opposed the requirement to provide communication devices for each worker in an animal shearing and custom combining crew. The commenters argued that crews in these occupations do not generally perform work in areas that are as remote and isolated as workers engaged in herding and production of livestock on the range. They also noted that workers generally have their own communication devices, so there is no need for the employer to bear the cost of providing a device to each worker. A workers' rights advocacy organization, on the other hand, argued that communication devices should be provided for all workers in those occupations, as well as for workers in commercial beekeeping occupations.

In light of the comments, the Department has decided to modify the NPRM proposal. This final rule requires the employer to provide at least one communication device to each animal shearing and custom combining crew (*i.e.*, group of workers working together as a unit). The Department's intent is to ensure that each worker have a meaningful way to seek assistance in case of emergencies. The Department's interest in ensuring meaningful access to communication devices may be accomplished by requiring one communication device per crew. Each worker in the crew must have

meaningful access to that device in the case of an emergency. To have meaningful access, each worker in the crew must be notified as to the location of the communication device at all times (*e.g.*, stored in a particular vehicle or equipment), trained in operation of the device (*e.g.*, informed of any passcodes), and be free to use the device to contact first responders or other emergency responders directly, without first contacting the employer or crew leader. Employers must have the ability to address language barriers in the event of an emergency. Employers can address language barriers by having on-call staff or otherwise making available (*e.g.*, through a conference call), a person capable of speaking the worker's language and communicating the worker's needs, or by using translation technology (*e.g.*, computer software, translation devices). This modification strikes a balance between the need to ensure that workers have access to a communication device for emergencies, while heeding the employer commenters' arguments that workers in the animal shearing and custom combining occupations usually work as a crew, and therefore individual devices are not necessary. Additionally, the Department agrees that, in contrast to herding and livestock workers on the range, these occupations are more likely to be working on farms and ranches, rather than in remote areas. However, the relatively less remote nature of the worksites characterizing these occupations (when compared to range herding and production of livestock) does not obviate the need for communication devices; this work can be dangerous and may occur in remote areas, thus necessitating that workers have the ability to call for help in case of an emergency.

The Department does not believe communication devices should be mandated for commercial beekeepers, contrary to the suggestion by a workers' rights advocacy organization. The TEGL for that occupation does not currently include such a requirement because workers in that occupation generally work in less remote locations where phones are more easily accessible.

The NPRM also posed questions about whether the regulation should identify other specific tools the employer must provide to each worker in the covered occupations. A workers' rights advocacy organization requested that the Department modify the proposed § 655.302(c) to include an explicit, nonexclusive list of such items that are typically required by the nature of the work under this subpart, to ensure employers provide the tools, supplies,

and equipment necessary for workers to do the job. Employer association commenters opposed the requirement that employers provide all tools, but they provided little detail regarding the tools that employers should not be required to provide to workers in commercial beekeeping and custom combining occupations.

This final rule retains the proposal in the NPRM, which does not identify the specific tools the employer must provide to workers in the covered occupations. There is much variability in the tools necessary to perform the work in these occupations, and they may vary by employer, region, and type of work.

Employer association commenters in the animal shearing occupations opposed the requirement that the employer provide all tools to shearing workers, arguing that shearing workers generally have their own set of shears and that requiring the employer to provide them would be burdensome and unnecessary. The requirement to provide all necessary tools to workers is not unique to animal shearing employers, as all H-2A employers must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. *See* § 655.122(f). In addition, the Department's regulation at § 655.122(p) prohibits an employer from making an unlawful deduction that is primarily for the benefit or convenience of the employer. Because all tools, supplies, and equipment required to perform the duties assigned are primarily for the benefit of the employer, these tools must be provided to the worker free of charge. *See* 29 CFR 531.3(d)(2). While employers must provide tools free of charge to workers, workers may choose to use their own tools if that is their preference.

#### d. Paragraph (d), Housing

The NPRM proposed that for job opportunities involving animal shearing and custom combining, the employer must specify in the job order that housing will be provided as set forth in § 655.304. This final rule retains the requirement in this section. The specific housing requirements for these occupations are discussed below in the preamble to § 655.304.

#### 4. Section 655.303, Procedures for Filing Applications for Temporary Employment Certification

The NPRM proposed that employers in the covered occupations continue to satisfy the regular requirements for filing an *Application for Temporary Employment Certification* under

§§ 655.130 through 655.132, and that, consistent with the TEGs, employers seeking workers in the covered occupations continue to provide the specific locations, estimated start and end dates, and, if applicable, names for each farm or ranch for which work will be performed. The NPRM, however, proposed an exception to the geographic limitations in §§ 655.130 through 655.132 for applications subject to the procedures in §§ 655.300 through 655.304. This exception allows such agricultural work to be performed on a scheduled itinerary covering multiple AIEs, including in multiple contiguous States. Further, the NPRM proposed an additional exception for applications in the commercial beekeeping occupation. Consistent with the current TEG for that occupation, the NPRM proposed allowing such applications to include one noncontiguous State at the beginning and end of the period of employment for retrieving bee colonies from and returning them to their overwintering location. Commenters expressed general support for the procedures in § 655.303. Therefore, as discussed below, this final rule retains the proposal in the NPRM with minor technical revisions.

Several employers and employer associations and agent commenters opposed the NPRM's proposal that applications for the covered occupations limit itineraries to contiguous States. Some of the employer and association commenters opposed the proposal on the basis that it would be a change from the geographic scope permitted under current practice and that the change would not permit them to continue performing the job duties associated with these occupations. Other commenters expressed concern that the proposal was limited to a starting State and its contiguous States only, which was not the intent of the proposal. The Department's use of the term "contiguous" was not intended to anchor all States on the itinerary to the starting State. Rather, the proposal was intended to permit covered employers to file applications with an itinerary spanning multiple States so long as each of the States included in the itinerary shared a border with another State on the itinerary. In other words, the Department intended to describe an itinerary covering a contiguous grouping of States akin, but not limited, to recognized regional groupings of States (*e.g.*, USDA farm production regions). For example, an animal shearing application could include an itinerary with work to be performed in California, Oregon, Idaho, and Utah; but not

California, Oregon, Idaho, and Colorado, as Colorado is not contiguous to any of the other States on the itinerary. A beekeeping application could include an itinerary with work in Texas, North Dakota, and South Dakota; or Texas, California, and Oregon; but not Texas, North Dakota, and California. Where an employer has planned work in groups of States that are not contiguous, or for beekeeping employers that are not contiguous apart from the overwintering State, the employer must file more than one *Application for Temporary Employment Certification*, where each satisfies the contiguous State itinerary requirement.

In adopting the NPRM proposal regarding contiguous States, the Department expects that most participating employers will be able to continue filing applications with minimal or no changes to current practice. Employers generally limit the time and distances between work locations on the itinerary, both for their own profitability and to satisfy wage and hour guarantees to workers. Further, the distances that can be covered within one itinerary are limited by the seasonality of the need for the duties to be performed. Therefore, employers typically file applications in which work will be performed along a contiguous-State route, involving a grouping of States.

Contrary to some commenters' suggestion, the limitation serves to advance legitimate Departmental goals while recognizing the need for employers in the covered occupations to have ample flexibility to follow an itinerary over a large geographic area. This final rule serves to ensure that applications reflect bona fide job opportunities for full-time, temporary work through the employer's asserted period of need. An employer must have sufficient evidence of the work it expects to perform across the itinerary at the time it submits its *Application for Temporary Employment Certification*. Long distances between places of employment on an itinerary suggest a lack of full-time work throughout the work contract. Although the three-fourths guarantee provides an assurance to workers of the minimum hours and wages they can expect under the work contract, that guarantee is intended to address the normal variability of weather, crop readiness, and other circumstances in agricultural work. The three-fourths guarantee is not intended to allow an employer to include periods without work, as would be the case during travel between distant places of employment. The Department further notes that the limitation in § 655.303 is



consistent with the requirement in § 655.215(b)(1) for herding and range livestock applications.

In addition, under the applicable hours worked principles, only certain time spent traveling between worksites constitutes compensable hours worked. See 29 CFR part 785. Because it is possible that time spent traveling between worksites would not constitute compensable hours worked for many H-2A and corresponding workers, permitting itineraries to include noncontiguous States (apart from those necessary for overwintering bees) could result in several non-compensable hours worked for these workers during longer trips.

Employer and employer association commenters expressed concern that the proposed § 655.303 would change current practice under the TEGLs by requiring an employer to file one H-2A application for each crew of itinerant workers. Those commenters noted that under current practice, employers with multiple crews sometimes operate along a single itinerary, traveling to separate locations when needed, and requested additional flexibility in the number of itineraries that may be filed under a single application. They stated that switching workers between crews sometimes becomes necessary—for example, if a worker is sick and another worker is needed to fill in to complete a job.

The NPRM proposal was intended to be consistent with the procedures and policy established in the TEGLs. In the TEGLs, the Department permitted a variance from § 655.132(a) to allow, for example, an itinerant animal shearing employer “who desires to employ one or more nonimmigrant workers on an itinerary” to submit “a planned itinerary of work in multiple [S]tates.”<sup>116</sup> The NPRM inadvertently introduced confusion by using the term “crew,” rather than “itinerary,” though no distinction from current practice was intended. The Department understands that employers may divide workers into various crews, with all of the crews performing work along the same planned route, with different crews working at different farms or ranches within the same area or some crews moving ahead of others to the next location on the planned route. Depending on agricultural needs (e.g., farm size and/or crop conditions) at

each farm or ranch, the number of workers or crews needed at each worksite may vary. As long as all of the workers covered by the application were performing labor or services along the same planned route, the Department would consider the employer to have one itinerary, even if the workers might be assigned to different particular contracts along that route. This understanding is consistent with a non-itinerant H-2ALC employing workers performing work at different locations within a single AIE.

To the extent employers in the covered occupations present work itineraries that contain different planned routes for some of the workers, they would be required to file more than one *Application for Temporary Employment Certification*. However, to the extent employers present an itinerary that contains one planned route for all of the workers, in which some workers are briefly assigned to different farm contracts, they will be able to file one *Application for Temporary Employment Certification*. For example, where an employer assigns some workers to farm contracts along one travel route and other workers to farm contracts along a different travel route, and the two groups of workers travel and work separately throughout the period of employment (or during all but a few occasions, such as for a particularly large job or at the beginning or end of the employer’s period of need), the employer has two distinct itineraries that cannot be combined on a single *Application for Temporary Employment Certification*. In contrast, an employer has a single itinerary and can file one *Application for Temporary Employment Certification* where its planned route involves all of the workers traveling together or along the same path and working in the same general areas at approximately the same times. The fact that some workers are assigned to one client farm and other workers are assigned to a different client farm in the same AIE does not create a separate itinerary. Likewise, and absent some countervailing information suggesting truly distinct itineraries, an employer has one itinerary and can file one *Application for Temporary Employment Certification* in situations where some workers remain longer in one location on the employer’s planned route performing their assigned farm contracts than other workers and some workers travel ahead to begin to work on other farm contracts at the next location on the employer’s planned route.

In light of the above clarification regarding the intended meaning, this

final rule retains the proposal in the NPRM with minor technical revisions.

Employer association commenters also asked that DOL make available the application procedure in § 655.205 to applications that involve animal shearing. This change is unnecessary as an animal shearing employer—or any other employer—with an emergency situation justifying waiver of the normal filing timeframes can file its application under § 655.134.

#### 5. Section 655.304, Standards for Mobile Housing

As discussed below, the Department is adopting § 655.304 from the NPRM with some changes. Due to the unique nature of animal shearing and custom combining occupations, the NPRM proposed to permit employers to provide mobile housing for workers engaged in these occupations. The Department chose not to permit commercial beekeeping employers to provide mobile housing for workers engaged in that occupation. This approach is consistent with the relevant TEGLs.<sup>117</sup> The NPRM included proposed standards for mobile housing for workers engaged in the animal shearing and custom combining occupations, which largely incorporated the housing standards in the TEGLs, with two key exceptions.

First, the TEGL for workers engaged in animal shearing occupations expressly provides that an animal shearing contractor may lease a mobile unit owned by a crew member or other person or make some other type of “allowance” to the unit owner. Under the proposed rule, such an arrangement with a crew member (e.g., employee) is not permitted. Employer and employer association commenters opposed this proposal, opining that it appeared the Department is attempting to require employees to live in employer-furnished housing and forbidding workers from living and traveling in their own lodging, if so preferred. The Department is not prohibiting workers from choosing to live and travel in their own mobile housing unit, if so preferred. As

<sup>117</sup> See TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H-2A Program*, Attachment B (June 14, 2011), <https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf>; TEGL No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H-2A Program*, Attachment A (June 14, 2011), <https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf>; TEGL No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H-2A Program*, Attachment A (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=3043](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043).

<sup>116</sup> See TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H-2A Program*, Attachment B, Sections I.B. and II.B (June 14, 2011), <https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf>.



commenters noted, all workers are free to decline employer-provided housing; however, WHD's enforcement experience indicates that most workers tend not to reject this housing, and any investigation will closely review whether the worker's rejection of the housing was truly voluntary. However, the INA requires every H-2A employer to furnish housing at no cost to workers. See 8 U.S.C. 1188(c)(4). Consistent with this statutory requirement, it is the employer's obligation to offer and furnish such housing at no cost to the worker; permitting an employer to rely on the workers to provide their own such housing, including through a lease agreement, is inconsistent with this statutory requirement.

Second, the proposed standards deviated from the TEGLs' approach of permitting employers of animal shearing and custom combining workers to provide housing that met the range housing standards (§ 655.235) at all times. In contrast, the NPRM proposed to allow such employers to comply with the range housing standards only when the housing is located on the range and proposed mobile housing standards to be used when the housing is not on the range. A workers' rights advocacy organization commenter stated that, with a small modification, the proposed mobile housing standards would be sufficient to meet the mobile housing needs of workers employed in animal shearing and custom combining occupations even when the housing is located on the range. Some commenters also expressed concern that it might not be clear which housing standards would apply in certain situations.

Upon further consideration, the Department has decided to modify § 655.304 to require employers seeking workers in the animal shearing and custom combining occupations to provide housing that complies with the mobile housing standards in § 655.304 regardless of where the housing is located, except as provided below. Thus, employers seeking workers in the covered occupations will generally not be permitted to comply with the range housing standards (§ 655.235) even when the housing is located on the range. For the most part, employers seeking workers in the animal shearing and custom combining occupations will be able to provide housing consistent with the mobile housing standards.

To account for the occasional instances where employers in the covered occupations provide housing located on the range in locations where compliance with all of the mobile housing standards is not feasible, this final rule establishes a procedure to

permit employers to request a variance from the mobile housing standards that would allow them to instead comply with a specific range housing standard for the limited time the housing is in that particular location on the range. There are minor distinctions between the mobile housing standards in § 655.304 and the range housing standards in § 655.235. Those distinctions are only appropriately invoked in a small subset of instances where the work is so remote that the mobile housing standard is not feasible for the covered occupations. Similar to the procedure in § 655.235(b)(4) and (l), employers may request a variance from the CO at the time of the application by:

- Identifying the particular mobile housing standard(s) in § 655.304, and attesting that compliance with the standard(s) is not feasible;
- Identifying the range location(s) where it is unable to meet the particular mobile housing standard(s) in § 655.304;
- Identifying the anticipated dates when the mobile unit(s) will be in those locations;
- Identifying the corresponding range housing standard(s) in § 655.235, and attesting that it will comply with such standard(s); and,
- Attesting to the reason(s) why the particular mobile housing standard(s) in § 655.304 cannot be met.

If the CO approves one or more variances to the mobile housing standards at § 655.304, the approval will specify the locations, dates, and specific variances approved. The variance procedure in § 655.304(a)(1) therefore eliminates any potential confusion about which housing standards would apply in any given situation. Further, this final rule will allow the Department to monitor the use of mobile housing, while maintaining employer flexibility where necessary.

Accordingly, this final rule also does not adopt the NPRM's proposal at § 655.304(a)(1) (consistent with animal shearing TEGL) to apply the range housing inspection procedures to mobile housing units used on the range. Instead, the inspection procedures at § 655.122(d)(6) apply to all mobile units used to house workers engaged in occupations subject to the procedures in §§ 655.300 through 655.304, except those covered by the exception at § 655.304(a)(2). Before issuing any temporary labor certification for workers engaged in custom combining or animal shearing work covered by the procedures at §§ 655.300 through 655.304, and who will be housed in mobile units, the CO must receive a housing certification based on an inspection conducted by the SWA or

that of another local, State, or Federal authority acting on behalf of the SWA—or, under the exception at § 655.304(a)(2), an authorized representative of the Federal or provincial government of Canada—reflecting the certifying authority's knowledge of the employer's planned use of the housing, confirming that all of the employer's mobile units have been inspected, consistent with the requirements of § 655.122(d)(6), and certified as meeting applicable housing standards.<sup>118</sup> The Department has made conforming revisions to § 655.122(d)(2), as discussed above.

If a mobile unit does not satisfy the housing standards at § 655.304(c) through (p) as a self-contained unit, the employer may satisfy those standards by providing supplemental facilities at each location on the itinerary to ensure that the housing standards at § 655.304(c) through (p) are satisfied throughout the work contract period. See § 655.304(b).

Some employer and employer association commenters, who generally opposed the obligation to provide housing at no cost to H-2A workers and workers in corresponding employment, also opposed specific aspects of the mobile housing standards, such as an employer's responsibility for the cost of laundering workers' clothes. The Department notes that an employer's obligation to provide housing at no cost to the workers extends to all required amenities within the housing, regardless of the housing standards applicable. For example, an employer cannot charge the worker for a bed or for a window because the housing standards require these basic amenities. Similarly, the employer cannot charge the worker for the laundry facilities provided, because housing standards require laundry facilities. When the housing provided does not have laundry facilities, and the

<sup>118</sup> One workers' rights advocacy organization commented that because it is "possible that worksites of intended employment may include provincial land owned or operated by Canadian employers," this final rule should be extended to cover such worksites. This comment appears to be based on an inaccurate reading of the custom combine TEGL. TEGL No. 16-06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H-2A Program* (June 14, 2011), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=3040](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040). That TEGL acknowledges that worksites located in the United States may be owned or operated by Canadian employers, and therefore states that if such employers provide mobile housing units or other similar vehicles, those employers must submit an inspection report of such vehicles conducted by an authorized representative of the Canadian Federal or provincial government. Nothing in this final rule permits worksites of intended employment to be located in Canada.

employer meets the obligation to provide laundry facilities by providing transportation to a laundromat, the employer must pay for laundering expenses. On the other hand, where an employer has provided functional laundry facilities but the employee chooses to go to a laundromat, the employer has complied with its obligation and is not responsible for laundering expenses.

A commenter also raised a concern regarding the impact that use and transportation of heating equipment may have on wilderness areas and proposed revisions to § 655.304 to note compliance with the Wilderness Act is required. Because the employer is already required to comply with all applicable laws, a provision specifying that compliance with a particular law is not necessary.

## VI. Discussion of Revisions to 29 CFR Part 501

In the NPRM, the Department proposed revisions to its regulations at 29 CFR part 501, which sets forth the responsibilities of WHD to enforce the legal, contractual, and regulatory obligations of employers under the H-2A program. The Department proposed these amendments concurrent with and in order to complement the changes that ETA proposed to its certification procedures in 20 CFR part 655, subpart B. Where the Department has adopted changes to 20 CFR part 655, subpart B, as discussed in the above section-by-section analysis of that subpart, the Department has adopted the relevant complementary and conforming revisions to this part.

In addition, since publication of the NPRM and through other rulemakings, the Department has revised the regulations in 29 CFR part 501 addressing the amounts and methods of payment of civil money penalties, and the timing and finality of decisions of the ARB. This final rule reflects these intervening rulemakings, as discussed below.

### A. Conforming Changes

As discussed in the NPRM, the Department proposed various revisions to 29 CFR part 501 that conformed to proposed revisions to 20 CFR part 655, subpart B. Where the Department has adopted proposed changes to 20 CFR part 655, subpart B, as discussed in the above section-by-section analysis of that subpart, the Department has adopted the appropriate complementary and conforming revisions to this part. These conforming revisions include, among others, clarification of the delegated authority of, and division of

responsibilities between, ETA and WHD under the H-2A program in § 501.1, and the addition or revision of certain definitions of terms in § 501.3. Any comments received on these proposed revisions, and any changes adopted in this final rule, are discussed above in the section-by-section analysis of 20 CFR part 655, subpart B.

### B. Section 501.9, Enforcement of Surety Bond

The Department proposed revisions to WHD's surety bond provision at 29 CFR 501.9 as described fully in the discussion of 20 CFR 655.132 above. As detailed above, the Department has adopted its proposed changes to 20 CFR 655.132, with certain revisions. Those revisions, however, do not necessitate changes to proposed 29 CFR 501.9. Accordingly, this final rule adopts 29 CFR 501.9 as proposed in the NPRM, without substantive change.

### C. Section 501.20, Debarment and Revocation

The Department proposed revisions to WHD's debarment provisions at 29 CFR 501.20 to maintain consistency with the proposed changes to 20 CFR 655.182(a), which would permit the Department to debar an agent or employer for substantially violating a term or condition of the temporary agricultural labor certification. The section also has been revised to make clear that joint employers under 20 CFR 655.131(b) are subject to debarment only for participation in a debarrable violation. The Department has responded to the comments received on these proposed changes in the above discussion of 20 CFR 655.182(a) and 655.131(b). Accordingly, this final rule adopts proposed 29 CFR 501.20 without substantive change.

### D. Terminology and Technical Changes

In addition to proposed revisions to conform to the terminology and technical changes proposed to 20 CFR part 655, subpart B, the Department proposed minor changes throughout this part to correct typographical errors and improve clarity and readability. Such changes are nonsubstantive and do not change the meaning of the current text. For example, the Department proposed throughout part 501 to replace the phrase "the regulations in this part" with the phrase "this part." The Department received no comments on these proposed revisions and accordingly adopts them without change in this final rule. The Department has made additional technical, nonsubstantive changes throughout this part and 20 CFR part

655, subpart B, for accuracy and clarity. For example, the Department has replaced the phrase "hereunder" in § 501.5 with a specific reference to the relevant authority and made technical changes to the cross-references in § 655.135(h).

### E. Intervening Rulemakings

Since publication of the NPRM, the Department has revised the regulations in 29 CFR part 501 on three occasions. First, on November 7, 2019, the Department published a final rule revising certain of its regulations governing the payment and collection of civil money penalties, including those under the H-2A program at § 501.22, by allowing for the payment of civil money penalties through an electronic payment alternative, and otherwise amending the regulations to ensure uniform payment instructions. *See Authorizing Electronic Payments of Civil Money Penalties*, 84 FR 59928 (Nov. 7, 2019). These revisions are reflected in this final rule at § 501.22.

Next, on January 15, 2020, the Department published a final rule to adjust for inflation the civil money penalties assessed or enforced by the Department, including the H-2A civil money penalties listed in § 501.19, pursuant to and as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act). *See Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020*, 85 FR 2293 (Jan. 15, 2020).

Relatedly, the Department received three comments on the NPRM opposing what these commenters perceived to be discretionary changes in the civil money penalty amounts currently reflected in § 501.19(b). As noted above, however, the Department issued its annual inflation adjustment to civil money penalty amounts for 2020, as required by the Inflation Adjustment Act, after publication of the NPRM. This final rule reflects the current, appropriate civil money penalty amounts at § 501.19. The Department will continue to annually adjust these amounts for inflation, as required by the Inflation Adjustment Act.

Finally, on May 20, 2020, the Department published a final rule to, among other changes and together with Secretary's Order 01-2020, establish a new discretionary review process and make technical changes to Departmental regulations governing the timing and finality of decisions of the ARB, including those under the H-2A

program at § 501.45. *See Rules Concerning Discretionary Review by the Secretary*, 85 FR 30608. These technical revisions are reflected in this final rule at § 501.45.

**VII. Administrative Information**

*A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)*

Under E.O. 12866, the OMB’s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way 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 OMB’s OIRA has determined that this final rule is a significant regulatory action, although it is not an economically significant action, under E.O. 12866 sec 3(f)(4) and, accordingly, OMB has reviewed this final rule. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory

objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

**Public Comments**

One commenter stated they no longer understood the rationale behind the move to e-filing and did not identify an analysis of the costs and benefits associated with the proposed changes to e-filing in the NPRM.

The NPRM stated that mandating e-filing would reduce costs and burdens for most employers (and the Department), reduce the frequency of delays related to filing applications and supporting documentation by mail, improve the consistency and quality of information collected, and promote administrative efficiency and accountability. The costs of e-filing were determined to be non-quantifiable due to a lack of information to determine whether the six percent of employers who currently choose not to e-file are doing so as a matter of preference or because they are incapable of doing so due to a lack of equipment or ability. The cost savings portion of the e-filing requirement is quantifiable and is presented in the regulatory impact analysis below.

One commenter said that the proposal seeks to shift costs from employers to H–2A workers by requiring employers to reimburse travel costs only from the U.S. consulate, rather than from the workers’ home communities.

Under the NPRM, the provision to define “the place from which the worker departed” as the U.S. embassy or consulate for certain H–2A workers was intended to provide workers, employers, and the Department with a consistent point from where costs can be calculated. In this final rule there is no

longer a change to how travel costs are reimbursed. Travel costs will continue to be reimbursed from the place of worker recruitment which may or may not be the worker’s home community. Consequently, there is no shift in cost burdens from employers to H–2A workers because the Department has decided to retain the current regulatory requirement.

**Outline of the Analysis**

Section VII.A.1 describes the need for this final rule, and section VII.A.2 describes the process used to estimate the costs and cost savings of the rule and the general inputs used, such as wages and number of affected entities. Section VII.A.3 explains how the provisions of this final rule will result in quantifiable costs and cost savings and presents the calculations the Department used to estimate them. In addition, section VII.A.3 describes the qualitative costs, cost savings, and benefits of this final rule. Section VII.A.4 summarizes the estimated first-year and 10-year total and annualized costs, cost savings, and net costs of this final rule. Finally, section VII.A.5 describes the regulatory alternatives that were considered during the development of this final rule.

**Summary of the Analysis**

The Department estimates that this final rule will result in costs and cost savings. As shown in Exhibit 1, this final rule is expected to have an annualized quantifiable cost of \$2.75 million and a total 10-year quantifiable cost of \$19.29 million at a discount rate of seven percent.<sup>119</sup> This final rule is estimated to have annualized quantifiable cost savings of \$0.16 million and total 10-year quantifiable cost savings of \$1.12 million at a discount rate of seven percent.<sup>120</sup> The Department estimates that this final rule would result in an annualized net quantifiable cost of \$2.59 million and a total 10-year net cost of \$18.17 million, both at a discount rate of seven percent and expressed in 2021 dollars.<sup>121</sup>

**EXHIBIT 1—ESTIMATED MONETIZED COSTS AND COST SAVINGS OF THIS FINAL RULE**  
[2021 \$millions]

	Costs	Cost savings	Net costs <sup>122</sup>
Undiscounted 10-Year Total .....	\$26.51	\$1.51	\$25.00
10-Year Total with a Discount Rate of 3% .....	22.96	1.32	21.64
10-Year Total with a Discount Rate of 7% .....	19.29	1.12	18.17
10-Year Average .....	2.65	0.15	2.50

<sup>119</sup> This final rule will have an annualized cost of \$2.69 million and a total 10-year cost of \$22.96 million at a discount rate of three percent in 2021 dollars.

<sup>120</sup> This final rule will have an annualized cost savings of \$0.15 million and a total 10-year cost savings of \$1.32 million at a discount rate of three percent in 2021 dollars.

<sup>121</sup> This final rule will have an annualized net cost of \$2.54 million and a total 10-year cost of \$21.64 million at a discount rate of three percent in 2021 dollars.

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND COST SAVINGS OF THIS FINAL RULE—Continued  
[2021 \$millions]

	Costs	Cost savings	Net costs <sup>122</sup>
Annualized at a Discount Rate of 3% .....	2.69	0.15	2.54
Annualized with at a Discount Rate of 7% .....	2.75	0.16	2.59

The total cost of this final rule is associated with rule familiarization and recordkeeping requirements for all H-2A employers,<sup>123</sup> as well as increases in the amount of surety bonds required for H-2ALCs. The two largest contributors to the cost savings of this final rule are the electronic submission of applications and application signatures, including the use of electronic surety bonds, and the electronic sharing of job orders submitted to the NPC with the SWAs. See the costs and cost savings subsections of section VII.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some cost, cost savings, and benefits of this final rule. The Department describes them qualitatively in section VII.A.3 (Subject-by-Subject Analysis).

1. Need for Regulation

The Department has determined that new rulemaking is necessary to modernize the H-2A program. The Department is updating its regulations to ensure that employers can access agricultural labor while maintaining the program's strong protections for the workforce. The changes adopted in this final rule will streamline the Department's review of H-2A applications and enhance WHD's enforcement capabilities, thereby reducing workforce instability that can

hinder the growth and productivity of our nation's farms, while allowing aggressive enforcement against program fraud and abuse that undermine the interests of workers. Among other changes to achieve these goals, the Department has decided to (1) require mandatory e-filing and accept electronic signatures; (2) update surety bond requirements and clarify recordkeeping requirements; and (3) revise the debarment language to allow the Department to debar agents and attorneys, and their successors in interest, based on their own substantial violations.

2. Analysis Considerations

The Department estimated the costs and cost savings of this final rule relative to the existing baseline (*i.e.*, the current practices for complying, at a minimum, with the H-2A program as currently codified at 20 CFR part 655, subpart B, and 29 CFR part 501). This existing baseline is consistent with the 2010 H-2A Final Rule.

In accordance with the regulatory analysis guidance articulated in OMB's Circular A-4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of this final rule (*i.e.*, costs and cost savings that accrue to entities affected). The analysis covers 10 years (from 2022 through 2031) to ensure it captures

major costs and cost savings that accrue over time. The Department expresses all quantifiable impacts in 2021 dollars and uses discount rates of three and seven percent, pursuant to Circular A-4.

Exhibit 2 presents the number of affected entities that are expected to be affected by this final rule. The number of affected entities is calculated using OFLC certification data from Fiscal Year (FY) 2016 through 2020.<sup>124</sup> The Department provides these estimates and uses them throughout this analysis to estimate the costs and cost savings of this final rule.

EXHIBIT 2—AVERAGE ANNUAL NUMBER OF AFFECTED ENTITIES BY TYPE  
[FY 2016–2020]

Entity type	Number
H-2A Applications Processed .....	11,527
Unique H-2A Applicants .....	8,204
Certified H-2A Employers .....	7,596
Certified H-2A Workers .....	184,323

a. Growth Rate

The Department estimated growth rates for applications processed and applications certified, and workers certified based on FY 2012–2020 H-2A program data, presented in Exhibit 3. Estimation of the growth rates for labor contractors is limited to FY 2013–2020 data.

EXHIBIT 3—HISTORICAL H-2A PROGRAM DATA

FY	Applications processed	Applications certified	Workers certified	Labor contractors
2012 .....	5,459	5,278	85,248	.....
2013 .....	5,973	5,706	98,814	284
2014 .....	6,726	6,476	116,689	340
2015 .....	7,567	7,194	139,725	388
2016 .....	8,684	8,297	165,741	415
2017 .....	10,097	9,797	199,924	483
2018 .....	11,698	11,319	242,853	566
2019 .....	13,095	12,626	258,446	588
2020 .....	14,063	13,552	275,430	715

<sup>122</sup> Net Costs = [Total Costs]—[Total Cost Savings]  
<sup>123</sup> The Department does not consider the cost of H-2A employers learning how to e-file. Based on H-2A certification data from FY 2019, 94.1 percent of applications are submitted electronically. Almost all of the remaining 5.9 percent of H-2A applicants

have access to email, so very few applicants will need to learn how to e-file.  
<sup>124</sup> Only three quarters of FY 2021 data were available at the time of analysis. To the extent that the COVID-19 pandemic impacted H-2A applications or workers, the inclusion of FY 2020 data allows for some impacts to be captured.

However, in FY 2020 Q1–Q3, there were 223,263 certified workers, and in FY 2021 Q1–Q3, there were 247,969 certified workers, indicating that FY 2021 is continuing the historical trend of year-over-year increases in workers certified and that the pandemic may have minimal impacts on program trends.

The geometric growth rate for certified H-2A workers using the program data in Exhibit 3 is calculated as 17.2 percent. This growth rate, applied to the analysis timeframe of 2022 to 2031, would result in more H-2A certified workers than projected BLS workers in the relevant H-2A SOC codes.<sup>125</sup> Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012–2020 H-2A program data to forecast workers, applications, and labor contractors estimate geometric growth rates based on the forecasted data. The Department ran multiple ARIMA models on each set of data and used common goodness of fit measures to determine how well each ARIMA model fit the data.<sup>126</sup> Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to project workers and applications through 2031. Then, a geometric growth rate was calculated using the forecasted data from each model and an average was taken across each model.

The growth rate in certified employers was estimated by calculating the geometric growth rate using data from the analysis period (FY 2016–FY 2020).

The resulting growth rates used in the analysis are presented in Exhibit 4. The estimated growth rates were applied to the estimated costs and cost savings of this final rule to forecast participation in the H-2A program.

EXHIBIT 4—ESTIMATED H-2A GROWTH RATES

Growth Rate	Value (percent)
H-2A applications processed growth rate .....	3.1
H-2A applications certified growth rate .....	4.5
H-2A workers certified growth rate .....	5.6
H-2A certified labor contractor employer growth rate .....	7.3
H-2A certified employer growth rate .....	3.8

b. Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of workers and the change in hours required to comply with this final rule for each activity in section VII.A.3 (Subject-by-Subject Analysis). For some activities, such as rule familiarization and application submission, all applicants will experience a change. For other activities, this final rule will affect only certified H-2A employers or H-2A certified labor contractors. These numbers are derived from OFLC certification data for the years 2016 through 2020 and represent an average of the fiscal years.<sup>127</sup> To calculate these estimates, the Department estimated the average amount of time (in hours) needed for each activity to meet the new requirements relative to the baseline.

c. Compensation Rates

In section VII.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of this final rule. Exhibit 5 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with this final rule. The Department used the mean hourly wage rate for private sector human resources specialists<sup>128</sup> and the wage rate for Federal employees at the NPC (Grade 12, Step 5).<sup>130</sup> Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (e.g., health and retirement benefits). For all labor groups (i.e., private sector, and Federal Government), we use an overhead rate of 17 percent<sup>131</sup> and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in June 2021. For the private sector employees, we use a fringe benefits rate of 42 percent.<sup>132</sup> For the Federal Government, we use a fringe benefits rate of 63 percent.<sup>133</sup> We then multiply the loaded wage factor by the corresponding occupational category wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 5 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 5—COMPENSATION RATES [2021 Dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
<b>Private Sector Employees</b>					
Human Resources (HR) Specialist .....	N/A	\$34.33	\$14.25 (\$34.33 × 0.42)	\$5.84 (\$34.33 × 0.17)	\$54.42

<sup>125</sup> Comparing BLS 2029 projections for combined agricultural workers with a 15.8 percent growth rate of H-2A workers yields estimated H-2A workers that are about 107 percent greater than BLS 2029 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, which may be accessed at <https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm>.

<sup>126</sup> The Department estimated models with different lags for autoregressive and moving averages, and orders of integration: ARIMA(0,2,0); (0,2,1); (0,2,2); (1,2,1); (1,2,2); (2,2,2). For each model we used the Akaike Information Criteria (AIC) goodness of fit measure.

<sup>127</sup> The total unique H-2A applicants in 2016, 2017, 2018, 2019, and 2020 were 7,446, 7,798,

8,580, 9,382, and 7,815, respectively. The total certified H-2A employers in 2016, 2017, 2018, 2019, and 2020 were 6,713, 7,187, 7,902, 8,391, and 7,785, respectively.

<sup>128</sup> BLS, *Occupational Employment and Wage Estimates, May 2020: 13-1071 Human Resources Specialists*, <https://www.bls.gov/oes/current/oes131071.htm> (last modified Mar. 31, 2021).

<sup>129</sup> Because the Occupational Employment Statistics wage rate is in 2020 dollars, the Department inflated it to 2021 dollars using the ECI to be consistent with the rest of the analysis, which is in 2021 dollars.

<sup>130</sup> Office of Personnel Management, *Salary Table 2020—CHI: Incorporating the 1% General Schedule Increase and a Locality Payment of 28.59% for the Locality Pay Area of Chicago-Naperville, IL-IN-WI* (Jan. 2021), [https://www.opm.gov/policy-data-](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/CHI_h.pdf)

[oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/CHI\\_h.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/CHI_h.pdf).

<sup>131</sup> Cody Rice, U.S. Environmental Protection Agency, *Wage Rates for Economic Analyses of the Toxics Release Inventory Program* (June 10, 2002), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>132</sup> BLS, *Employer Costs for Employee Compensation*, <https://www.bls.gov/news.release/ecec.toc.htm> (last modified Sept. 16, 2021) (ratio of total compensation to wages and salaries for all private industry workers).

<sup>133</sup> DOL, *DOL-Only Performance Accountability, Information, and Reporting System; OMB Control No. 1205-0521* (2018), [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201802-1205-003](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201802-1205-003).

**EXHIBIT 5—COMPENSATION RATES—Continued**  
[2021 Dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
<b>Federal Government Employees</b>					
NPC Staff .....	12	\$46.67	\$29.40 (\$46.67 × 0.63)	\$7.93 (\$46.67 × 0.17)	\$84.01

**3. Subject-by-Subject Analysis**

The Department’s analysis below covers the estimated costs and cost savings of this final rule. The Department emphasizes that many of the provisions in this final rule are existing requirements in the statute, regulations, or regulatory guidance. This final rule codifies these practices under one set of rules; therefore, they are not considered “new” burdens resulting from this final rule. Accordingly, the regulatory analysis focuses on the costs and cost savings that can be attributed exclusively to the new requirements in this final rule.

**a. Costs**

The following sections describe the costs of this final rule.

**Quantifiable Costs**

**i. Rule Familiarization**

When this final rule takes effect, H-2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year.

To estimate the first-year cost of rule familiarization, the Department applied the growth rate of H-2A applications processed (3.1 percent) to the number of unique H-2A applications (8,204) to determine the annual number H-2A applications impacted in the first year. The number of H-2A applications (8,462) was multiplied by the estimated amount of time required to review the rule (1 hour).<sup>134 135</sup> This number was then multiplied by the hourly compensation rate of Human Resources Specialists (\$54.42 per hour). This calculation results in a one-time undiscounted cost of \$460,502 in the first year after this final rule takes effect. This one-time cost yields a total average annual undiscounted cost of \$46,050. The annualized cost over the 10-year

<sup>134</sup> This estimate reflects the nature of this final rule. As a rulemaking to amend to parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

<sup>135</sup> Differences in the calculation of applications may occur due to the rounding of growth rate figures.

period is \$53,985 and \$65,565 at discount rates of three and seven percent, respectively.

**ii. Surety Bond Amounts**

An H-2ALC is required to submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations under the H-2A program in the form of a surety bond. See 20 CFR 655.132(b)(3); 29 CFR 501.9. Based on the Department’s experience implementing the bonding requirement and its enforcement experience with H-2ALCs, the Department is updating its regulations. These updates are intended to clarify and streamline the existing requirement while strengthening the Department’s ability to collect on such bonds. Further, the Department is adjusting the required bond amounts to reflect updates to the AEWR and to address the increasing number of temporary agricultural labor certifications that cover a significant number of workers under a single application and surety bond.

Currently, the required bond amounts range from \$5,000 to \$75,000, depending on the number of H-2A workers employed by the H-2ALC under the temporary agricultural labor certification. For temporary agricultural labor certifications covering fewer than 25 workers, the required bond amount is currently \$5,000. For temporary agricultural labor certifications covering 25–49 workers, 50–74 workers, 75–99 workers, and 100 or more workers, the required bond amounts are \$10,000, \$20,000, \$50,000, and \$75,000, respectively. Under this final rule, the Department will adjust the required bond amounts proportionally to the degree that a national average AEWR exceeds \$9.25 using the current bond amounts as the base amounts for this adjustment. The Department will calculate and publish an average AEWR when it calculates and publishes AEWR in accordance with § 655.120. The average AEWR will be calculated as a simple average of the AEWR applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and

Greenhouse) and, until the Department publishes a different average AEWR, bond amounts will be calculated using an average AEWR of \$14.28. To calculate the updated bond amounts, the Department will multiply the base amounts by the average AEWR and divide that number by \$9.25. For instance, for a temporary agricultural labor certification covering 100 workers, the required bond amount would be calculated by the Department using the following formula:

$$\$75,000 \text{ (base amount)} \times (\$14.28 \div \$9.25) = \$115,784 \text{ (updated bond amount).}$$

When the Department publishes a different average AEWR, that amount would replace \$14.28 in this calculation and the calculations that follow.

The Department also is increasing the required bond amounts for temporary agricultural labor certifications covering 150 or more workers. For such temporary agricultural labor certifications, the bond amount applicable to certifications covering 100 or more workers is used as a starting point and is increased for each additional set of 50 workers. The interval by which the bond amount increases will be based on the amount of wages earned by 50 workers over a 2-week period and, in its initial implementation, would be calculated using an average AEWR of \$14.28 as demonstrated:

$$\$14.28 \text{ (Average AEWR)} \times 80 \text{ hours} \times 50 \text{ workers} = \$57,120 \text{ in additional bond for each additional 50 workers over 100.}$$

For a crew of 275 workers, additional surety of \$171,360 would be required. This amount is calculated by determining the number of additional full sets of 50 workers beyond the first 100 workers covered by the temporary agricultural labor certification and then multiplying this number by the amount of additional surety required per each set of additional 50 workers (275 – 100 = 175; 175 ÷ 50 = 3.5; this is 3 additional sets of 50 workers; 3 × \$57,120 = \$171,360). As explained above, this additional surety is added to the bond

amount required for temporary agricultural labor certifications of 100 or more workers, resulting in a required bond amount of \$287,144 (\$115,784) for certifications of 100 or more workers + \$171,360 in additional surety).

While this may represent a significant increase in the face value of the required bond, the Department understands that employer premiums for FLC surety bonds generally range from one to four

percent on the standard bonding market (i.e., contractors with fair/average credit or better).<sup>136</sup>

For this analysis, the Department assumes that the bond premium faced by H-2ALCs will be four percent. To calculate the costs of the increase in the required bond amounts, the Department first calculated the average number of H-2ALCs in FY 2016 to 2020 and the current required bond amounts. Also,

the Department calculated the average number of additional sets of 50 workers in FY 2016 to 2020. Next, the Department calculated the required bond amounts for each category of number of workers using the average AEW of \$14.28, as well as the bond amount for each set of additional 50 workers per H-2ALC. Exhibit 6 presents these calculations.

EXHIBIT 6—COST INCREASES DUE TO CHANGES IN REQUIRED BOND AMOUNTS

Number of workers	Existing required bond amount	Average number of H-2ALCs in FY 16-20	Proposed required bond amount	Change in required bond amount	Cost increase (or decrease)
1-24 .....	\$5,000	315	\$7,718.92	\$2,718.92	\$108.76
25-49 .....	10,000	71	15,437.84	5,437.84	217.51
50-74 .....	20,000	51	30,875.68	10,875.68	435.03
75-100 .....	50,000	32	77,189.19	27,189.19	1,087.57
More than 100 .....	75,000	135	115,783.78	40,783.78	1,631.35
Each Additional Set of 50 Workers Greater than 100 .....	N/A	<sup>a</sup> 607	57,120.00	57,120.00	2,284.80

<sup>a</sup> This value represents the total number of additional sets of 50 for H-2ALCs with more than 100 workers.

For H-2ALCs with temporary agricultural labor certifications covering 1 to 24 workers the Department calculated the first-year cost by multiplying the average number of H-2ALCs in FY 2016 to 2020 with certifications covering 1 and 24 workers (315 H-2ALCs) by the change in the required bond amount (\$2,718.92) and the assumed bond premium (four percent). The Department calculated this for each additional category of number of workers. Additionally, the Department calculated the total cost due to the required bond amounts for additional sets of 50 workers by multiplying the average additional sets of 50 workers (607 sets) in the FY 2016 to 2020 by the required bond amount (\$57,120) and the assumed bond premium (four percent). To project the costs of this final rule these calculations were repeated in each year from 2022 through 2031.

After calculating annual total costs, the geometric growth rate of H-2ALCs (7.3 percent) was applied to account for anticipated increased H-2A applicants. The increased costs for each size category were summed to obtain the total annual costs resulting from the change in bond premiums. This calculation yields an average annual undiscounted cost of \$2.58 million.

The estimated total cost from the required bond amounts over the 10-year period is \$25.76 million undiscounted, or \$22.25 million and \$18.62 million at

discount rates of three and seven percent, respectively. The annualized cost over the 10-year period is \$2.61 million and \$2.65 million at discount rates of three and seven percent, respectively.

iii. Recordkeeping Earnings Records

This final rule requires an H-2A employer to maintain a worker's actual permanent home address, email address, and phone number(s), which are usually in the worker's country of origin. This information will greatly assist the Department in contacting an H-2A worker in the worker's home country, should the Department need to do so to conduct employee interviews as part of an investigation, to secure employee testimony during litigation, or to distribute back wages.

To calculate the estimated recordkeeping costs associated with collecting and maintaining this information, the Department first multiplied the number of certified H-2A employers (7,596 employers) by the 3.8 percent annual growth rate of certified H-2A employers to determine the annual impacted population of H-2A employers. The impacted number was then multiplied by the estimated time required to collect and maintain this information (2 minutes) to obtain the total amount of recordkeeping time required. The Department then

multiplied this estimate by the hourly compensation rate for Human Resources Specialists (\$54.42 per hour). This yields an annual cost ranging from \$14,298 in 2022 to \$19,955 in 2031.

Abandonment of Employment or Termination for Cause

This final rule revises § 655.122(n) to require an employer to maintain records of notification detailed in the same section for not less than 3 years from the date of the temporary agricultural labor certification. An employer is relieved from the requirements relating to return transportation and subsistence costs and three-fourths guarantee when the employer notifies the NPC (and the DHS in case of an H-2A worker), in a timely manner, if a worker voluntarily abandons employment before the end of the contract period or is terminated for cause. Additionally, the employer is not required to contact its former U.S. workers, who abandoned employment or were terminated for cause, to solicit their return to the job.

To estimate the recordkeeping costs associated with maintaining records of these notifications, the Department first multiplied the number of certified H-2A employers (7,596) by the 3.8 percent annual growth rate of certified H-2A employers to determine the annual impacted population of H-2A employers. The impacted number was then multiplied by the assumed percentage of employers per year that

<sup>136</sup> The Department reviewed premium rates on the websites of companies that offer FLC bonds and, as noted in the NPRM, found that employer premiums generally range from one to four percent

on the standard bonding market (i.e., contractors with fair/average credit or better). 84 FR 36168, 36205, 36233. The Department assumed contractors would have fair/average credit and so used a

premium of four percent to approximate the rate on the high side for premiums on the standard bond market. *Id.*



will have 1 or more workers abandon employment or be terminated for cause (70 percent). This amount was then multiplied by the estimated time required to maintain these records (2 minutes) to estimate the total amount of recordkeeping time required. This total time was then multiplied by the hourly compensation rate for Human Resources Specialists (\$54.42 per hour). This yields an annual cost ranging from \$10,009 in 2022 to \$13,968 in 2031.

#### Total Recordkeeping Costs

The total cost from the recordkeeping requirements over the 10-year period is estimated at \$288,778 undiscounted, or \$251,445 and \$212,599 at discount rates of three and seven percent, respectively. The annualized cost of the 10-year period is \$29,477 and \$30,269 at discount rates of three and seven percent, respectively.

#### Non-Quantifiable Costs

##### i. Housing

This final rule implements changes to the standards applicable to employers who choose to meet their H-2A housing obligations by providing rental and/or public accommodations. Under this final rule, the Department identified specific OSHA temporary labor camp standards that are applicable to rental or public accommodations. Where local health and safety standards for rental and/or public accommodations exist, the local standards apply in their entirety. However, if the local standards do not address one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant State standards on those issues will apply. If both the local and State standards are silent on one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant OSHA health and safety standards will apply. If there are no applicable local or State standards at all, only the OSHA health and safety standards listed in the regulation will apply. OSHA temporary labor camp standards that are not specifically mentioned in § 655.122(d)(1)(ii) will not be applicable to rental or public accommodations.

Generally, under the 2010 H-2A Final Rule, only certain rental and/or public accommodations are subject to the OSHA housing standards. As such, employers who are not currently subject to the OSHA standards are likely to experience costs related to ensuring their chosen rental and/or public accommodations comply with those standards. For example, employers that currently require workers to share beds

will be required to provide each worker with a separate bed. To comply with this final rule, such employers may be required to book additional rooms or provide different housing. The Department is unable to quantify an estimated cost due to a lack of data as to the number of employers that would be required to change current practices under this final rule. The Department invited comment on this analysis for relevant data or information that would allow for a quantitative analysis of possible costs in this final rule and received none.

##### ii. Requirement To File Electronically

During FY 2019, about six percent of employers choose not to file electronically. Under this final rule, employers will have two options—to file electronically or to file a request for accommodation because they are unable or limited in their ability to use or access electronic forms as result of a disability or lack of access to e-filing. Despite the vast majority of employers choosing to currently file electronically, the Department has not estimated costs for employers' time and travel to file electronically when they otherwise would not have. The Department believes these costs will be very small.

The Department also has not estimated any costs for accommodation requests. The Department expects to receive very few, if any, mailed-in accommodation requests. In its H-1B program, which has mandatory e-filing—albeit from a very different set of industry—the Department has not received any requests for accommodation due to a disability. Of the handful of internet access requests received annually, none were approved, as the requestors had public access nearby. For those requesting an accommodation in H-2A, the Department estimates that the cost to apply would be *de minimis*, consisting of the time and cost of a letter, printing out, and completing the forms.

##### b. Cost Savings

The following sections describe the cost savings of this final rule.

##### Quantifiable Cost Savings

###### i. Electronic Processing and Process Streamlining

The Department is modernizing and clarifying the procedures by which an employer files a job order and an *Application for Temporary Employment Certification* for H-2A workers under §§ 655.121 and 655.130 through 655.132. The NPC will electronically share job orders with SWAs, which will

result in both a material cost and a time cost savings for employers.

To ensure the most efficient processing of all applications, the Department must receive a complete application for review. Based on the Department's experience administering the H-2A program under the current rule, a common reason for issuing a NOD on an employer's application includes failure to complete all required fields on a form, failure to submit one or more supporting documents required by the regulation at the time of filing, or both. These incomplete applications create unnecessary processing delays for both the NPC and employers. In order to address this concern, this final rule requires an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator, unless the employer cannot file electronically due to disability or lack of internet access. The FLAG system used by the OFLC will not permit an employer to submit an application until the employer completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all required documentation, including a copy of the job order submitted in accordance with § 655.121. The Department estimates that 94 percent of applications are currently filed electronically and that this final rule would significantly increase the number of employers who submit electronic applications. This would result in material and time cost savings for employers. Electronic processing would also result in a time cost savings for the NPC. This final rule also provides that employers may file only one *Application for Temporary Employment Certification* for place(s) of employment contained within a single AIE covering the same occupation or comparable work by an employer for each period of employment, which will reduce the number of overall applications submitted. Finally, this final rule permits the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney or agent.

To estimate the material cost savings to employers due to electronic processing, the Department assumed that this final rule would result in six percent of H-2A employers switching to electronic processing of applications. The Department applied the growth rate of H-2A applications (3.1 percent) to the number of H-2A applications processed (11,527) to determine the

annual impacted number of applications. The Department then multiplied the percentage estimated to switch to electronic processing of applications (six percent) by the annual number of impacted H-2A applications to obtain the number of employers who would no longer be submitting by mail. For each application, a material cost was calculated by summing the price of a stamp (\$0.58), the price of an envelope (\$0.04), and the total cost of paper (\$0.61). The total cost of paper was calculated by multiplying the cost of a sheet of paper (\$0.01) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of \$993.

The total material cost savings from electronic processing over the 10-year period is estimated at \$9,933 undiscounted, or \$8,662 and \$7,338 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is \$1,015 and \$1,045 at discount rates of three and seven percent, respectively.

To estimate the time cost savings to employers due to electronic processing, the Department again estimated the number of affected applications by multiplying the assumed percentage of employers that would switch to electronic applications (six percent) by the total number of annually impacted H-2A applications. The Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes (0.083 hours) by the hourly compensation rate for Human Resources Specialists (\$54.42 per hour). This time cost savings was then multiplied by the estimated number of applications expected to switch to electronic submission. This yields average annual undiscounted cost savings of \$3,657.

The total time cost savings from electronic processing over the 10-year period is estimated at \$36,566 undiscounted, or \$31,886 and \$27,011 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is \$3,738 and \$3,846 at discount rates of three and seven percent, respectively.

To estimate the material cost savings to employers due to the NPC sharing job orders with the SWAs electronically, the Department assumed that 100 percent of unique H-2A applicants would be affected. For each annually impacted H-2A application, a material cost was

calculated by summing the price of a stamp (\$0.58), the price of an envelope (\$0.04), and the total cost of paper (\$0.61). The total cost of paper was calculated by multiplying the cost of a sheet of paper (\$0.01) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of \$16,836.

The total material cost savings over the 10-year period is estimated at \$168,361 undiscounted, or \$146,812 and \$124,368 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is \$17,211 and \$17,707 at discount rates of three and seven percent, respectively.

To estimate the time cost savings to employers resulting from the NPC electronically sharing job orders with the SWAs, the Department again assumed that 100 percent of unique H-2A applicants would be affected. For each annually impacted H-2A application, the Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes in hours (0.083 hours) by the hourly compensation rate for Human Resources Specialists (\$54.42 per hour). This cost savings was then multiplied by the estimated number of applications switching to electronic submission. This yields average annual undiscounted cost savings of \$61,976.

The total time cost savings over the 10-year period is estimated at \$619,762 undiscounted, or \$540,438 and \$457,818 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is \$63,356 and \$65,183 at discount rates of three and seven percent, respectively.

The Department assumes that the DOL staff will save approximately 1 hour for each application that is now submitted electronically. To calculate the time cost savings to the Federal Government due to electronic processing, the Department first calculated the number of employers that would now submit electronically by multiplying the assumed percentage (six percent) by the total number of annually impacted H-2A applications. This cost savings was then multiplied by the per-application time cost savings, calculated by multiplying the time savings (1 hour) by the hourly compensation rate for DOL staff (\$84.01 per hour). This yields

average annual undiscounted cost savings of \$68,008.

The total time cost savings over the 10-year period is estimated at \$680,079 undiscounted, or \$593,034 and \$502,374 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is \$69,522 and \$71,527 at discount rates of three and seven percent, respectively.

#### Non-Quantifiable Cost Savings

##### i. Cost Savings From Efficiencies Associated With Receiving More Complete and Accurate Applications

The Department is modernizing the process by which H-2A employers submit job orders to the SWAs and applications to the Department through e-filing and requiring the designation of a valid email address for sending and receiving official correspondence during application processing, except where the employer has limited ability to use or access electronic forms as result of a disability or lacks access to e-filing.

The Department believes that transitioning to electronic submissions would result in additional cost savings to employers and to the NPC from the cost savings described above. Currently, submissions that are incomplete or obviously inaccurate upon their receipt result in a NOD on the employer's application. As a result, employers who submit incomplete applications must start the submission process from the beginning. This can lead to costly delays for employers, as well as costly processing time for the NPC.

The requirement for electronic submissions would reduce the number of instances where incomplete applications are submitted because employers have not fully completed the form prior to submitting it. E-filing permits automatic notification that an application is incomplete or obviously inaccurate and provides employers with an immediate opportunity to correct the errors or upload missing documentation. Additionally, the adoption of electronic submissions should reduce the amount of time it takes to correct errors because entries can simply be deleted, rather than requiring the production of new copies of the form after an error is detected.

For the NPC, electronic filing and communications will improve the quality of information collected from employers, reduce administrative costs of communicating with employers to resolve obvious errors or receive complete information, and reduce the frequency of delays related to application processing.

ii. Cost Savings From Efficiencies Created by Acceptance of Electronic Signatures

The Department will enable employers, agents, and attorneys to use electronic methods to sign or certify any document required under this subpart using a valid electronic signature method. The current practice of accepting electronic (scanned) copies of original signatures on documents has generated efficiencies in the application process, and the Department believes leveraging modern technologies to accept electronic signature methods can achieve even greater efficiencies and result in cost savings to employers and the NPC.

Accepting electronic signature methods as a means of complying with original signature requirements for the H-2A program will reduce the costs for employers associated with printing, mailing, or delivering original signed paper documents or scanned copies of original signatures on documents to the NPC. Additionally, electronic signature methods give employers and their authorized attorneys or agents greater flexibility to conduct business with the Department—at any time and at any location with an internet connection—rather than needing to be located in a physical office. This frees valuable time for conducting other business tasks.

The NPC anticipates additional cost savings from use of electronic signature methods. The acceptance of documents containing electronic signatures will facilitate the NPC’s use of a more centralized document storage capability to access documents more efficiently during application processing, saving time and expense.

iii. Cost Savings From Efficiencies Created by the Use of Electronic Surety Bonds

The Department also is developing a process for accepting electronic surety bonds through the FLAG system and is requiring the use of a standardized bond form. The Department believes that these changes will result in a cost savings to H-2ALCs and the NPC. Currently all H-2ALCs, even the majority that submit other components of their applications electronically, must submit original paper surety bonds before the temporary agricultural labor certifications can be issued. Accepting original electronic surety bonds will reduce the costs associated with mailing or delivering the original surety bonds to the NPC and the costs for NPC to transfer these bonds to WHD for enforcement purposes. Additionally, using a standardized bond form will reduce the likelihood of errors and the amount of time required for the NPC to review the bonds for compliance.

c. Qualitative Benefits Discussion

i. Surety Bonds

The changes to the surety bond requirement, including the use of electronic surety bonds and a standardized bond form, will also result in unquantifiable benefits to the H-2ALCs in the form of a more streamlined application process with fewer delays. Accepting electronic surety bonds will mean that the NPC receives the required original bond with the rest of the application, and it will no longer be necessary to wait for the bond to arrive by mail or other delivery before issuing the temporary agricultural labor certification.

Further, these changes and the changes to the required bond amounts will enhance WHD’s enforcement capabilities by making it more certain that there will be a sufficient, compliant bond available to redress potential violations. This will advance the Department’s goal of aggressively enforcing against program fraud and abuse that undermine the interests of U.S. workers.

4. Summary of the Analysis

Exhibit 8 summarizes the estimated total costs and cost savings of this final rule over the 10-year analysis period. The change in the surety bond amounts has the largest effect as a cost.

EXHIBIT 8—ESTIMATED 10-YEAR MONETIZED COSTS AND COST SAVINGS OF THIS FINAL RULE BY PROVISION [2021 \$Millions]

Provision	Total cost	Total cost savings
Surety Bond .....	\$25.76	.....
Record Keeping .....	0.29	.....
Rule Familiarization .....	0.46	.....
Electronic Processing and Process Streamlining Cost .....	.....	\$1.51
Undiscounted 10-Year Total .....	26.51	1.51
10-Year Total with a Discount Rate of 3% .....	22.96	1.32
10-Year Total with a Discount Rate of 7% .....	19.29	1.12

Exhibit 9 summarizes the estimated total costs and cost savings of this final rule over the 10-year analysis period.

The Department estimates the annualized costs of this final rule at \$2.75 million and the annualized cost

savings at \$0.16 million, at a discount rate of seven percent. The Department estimates that this final rule would result in annualized net quantifiable costs of \$2.59 million and total 10-year net costs of \$18.17 million, both at a

discount rate of seven percent and expressed in 2021 dollars. The Department believes that the qualitative benefits outweigh the quantified net costs of this rule.

EXHIBIT 9—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COSTS OF THIS FINAL RULE [2021 \$Millions]

	Costs	Costs savings	Net costs
2022 .....	\$2.32	\$0.13	\$2.19
2023 .....	2.00	0.14	1.86
2024 .....	2.14	0.14	2.00
2025 .....	2.30	0.14	2.15
2026 .....	2.46	0.15	2.32
2027 .....	2.64	0.15	2.49

EXHIBIT 9—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COSTS OF THIS FINAL RULE—Continued  
[2021 \$Millions]

	Costs	Costs savings	Net costs
2028 .....	2.84	0.16	2.68
2029 .....	3.04	0.16	2.88
2030 .....	3.26	0.17	3.09
2031 .....	3.50	0.17	3.33
Undiscounted 10-Year Total .....	26.51	1.51	25.00
10-Year Total with a Discount Rate of 3% .....	22.96	1.32	21.64
10-Year Total with a Discount Rate of 7% .....	19.29	1.12	18.17
10-Year Average .....	2.65	0.15	2.50
Annualized with a Discount Rate of 3% .....	2.69	0.15	2.54
Annualized with a Discount Rate of 7% .....	2.75	0.16	2.59

5. Regulatory Alternatives

The Department considered two alternatives to the chosen approach for surety bonds. First the Department considered, as the first alternative, starting with the current (2010) bond amounts and then adjusting for wage growth as estimated by change in the average AEWR and for very large crew

sizes by requiring additional surety for each additional 50 workers sought. This is the same approach as this final rule’s surety bond structure except this alternative would replace the category for H–2ALCs requesting fewer than 25 workers with two categories: one with a lower required bond amount for H–2ALCs requesting fewer than 10 workers and another with the same required

bond amount as this final rule for H–2ALCs requesting 10 to 24 workers. This would provide some relief to H–2ALCs who use between one and nine workers. It would have the same remaining categories as in this final rule. The Department estimated the cost of this alternative using the same method as in this final rule. Exhibit 10 summarizes the cost increases for this alternative.

EXHIBIT 10—COST INCREASES DUE TO CHANGES IN REQUIRED BOND AMOUNTS

Number of workers	Existing required bond amount	Average number of H–2ALCs in FY 16–19	Proposed required bond amount	Change in required bond amount	Cost increase
1–9 .....	\$5,000	196	\$3,087.57	–\$1,912.43	–\$76.50
10–24 .....	5,000	120	7,718.92	2,718.92	108.76
25–49 .....	10,000	71	15,437.84	5,437.84	217.51
50–74 .....	20,000	51	30,875.68	10,875.68	435.03
75–100 .....	50,000	32	77,189.19	27,189.19	1,087.57
More than 100 .....	75,000	135	115,783.78	40,783.78	1,631.35
Each Additional Set of 50 Workers Greater than 100 .....	N/A	<sup>a</sup> 607	57,120.00	57,120.00	2,284.80

The total estimated cost of the first alternative over the 10-year period is \$25.22 million undiscounted, or \$21.78 million and \$18.23 million at discount rates of three and seven percent, respectively. The annualized cost of the 10-year period is \$2.55 million and \$2.60 million at discount rates of three and seven percent, respectively. The Department prefers the approach used in this final rule because it maintains a high proportion of sufficient bonds.

Under the second regulatory alternative the Department considered, the Department would base required bond amounts on estimated gross payroll based on the number of workers, applicable wage rates, and length of certification; then require a surety bond equaling five percent of this value. Under this alternative, the bond computation would account for more factors that potentially impact an H–2ALC’s back wage liability and would thus be application-specific.

The Department calculates the cost of this second alternative by first estimating gross payroll (*i.e.*, number of workers × applicable wage rate × number of weekly hours × number of weeks in season) for each temporary agricultural labor certification and then taking the applicable percentage—five percent. The difference in bond amounts required under this alternative, then, is for each temporary agricultural labor certification the difference between the bond an H–2ALC would pay under the 2010 H–2A Final Rule (between \$5,000 and \$75,000 based on number of workers) and the calculated alternative surety bond. Then, the assumed bond premium (four percent) is applied to calculate the cost for each temporary agricultural labor certification from FY 2016 to FY 2020 and the cost across certifications is summed for an annual total cost. To project the annual cost of this second alternative, the growth rate of H–2ALCs

(7.3 percent) is applied to the average annual total cost from FY 2016 to FY 2020.

The estimated total cost of the second alternative over the 10-year period is \$6.46 million undiscounted, or \$5.58 million and \$4.67 million at discount rates of three and seven percent, respectively. The annualized cost of the 10-year period is \$654,196 and \$664,778 at discount rates of three and seven percent, respectively. The Department prefers the chosen surety bond approach because it is expected to result in a higher proportion of sufficient bonds, thus providing greater protection for workers, while being easier to understand and administer because the bond amounts do not need to be calculated for every temporary agricultural labor certification.

Exhibit 11 summarizes the estimated costs associated with the three considered surety bond approaches.

EXHIBIT 11—ESTIMATED MONETIZED COSTS OF THIS FINAL RULE AND REGULATORY ALTERNATIVES  
[2021 \$Millions]

	Final rule	Regulatory alternative 1	Regulatory alternative 2
Total 10-Year Cost .....	\$25.76	\$25.21	\$6.46
Total with 3% Discount .....	22.25	21.78	5.58
Total with 7% Discount .....	18.62	18.22	4.67
Annualized Cost with 3% Discount .....	2.61	2.55	0.65
Annualized Cost with 7% Discount .....	2.65	2.59	0.66

*B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)*

The RFA, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), hereafter jointly referred to as the RFA, requires Federal agencies engaged in rulemaking to assess the impact of regulations that will have a significant economic impact on a substantial number of small entities.

The Department believes that this final rule will not have a significant economic impact on a substantial number of small entities. Based on this determination, the Department certifies that this final rule does not have a significant economic impact on a substantial number of small entities. Therefore, a final regulatory flexibility analysis updating the initial regulatory flexibility analysis included in the NPRM is not required. The factual basis for this certification is set forth below and is based on the Department’s analysis of each actual individual small entity impacted by this final rule.

1. Description of the Number of Small Entities to Which This Final Rule Will Apply

a. Definition of Small Entity

The RFA defines a “small entity” as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by the Small Business Administration (SBA), in effect as of August 19, 2019, to classify entities as small.<sup>137</sup> SBA establishes separate standards for

individual 6-digit North American Industry Classification System (NAICS) industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than \$7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and noncommercial banks) are classified by total assets (small defined as less than \$550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.<sup>138</sup>

b. Number of Small Entities

The Department collected NAICS code, employment, and annual revenue data for unique entities in the certification data, from the business information provider Data Axle, and merged those data into the H–2A disclosure data for FY 2020 and FY 2021. This process allowed the Department to identify the number and type of small entities in the H–2A disclosure data as well as their annual revenues.

The Department identified 9,927 unique employers (excluding labor contractors). Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H–2A employers in the FY 2020 and FY 2021 certification data. Of those

2,615 employers, the Department determined that 2,105 were small (80.5 percent). These unique small entities had an average of 11 employees and average annual revenue of approximately \$3.62 million. Of these small unique entities, 2,085 of them had revenue data available from Data Axle.

The Department identified 1,344 unique employers that are labor contractors. Of those 1,344 labor contractors, the Department was able to obtain data matches of revenue and employees for 152 H–2ALCs in the FY 2020 and FY 2021 certification data. Of those 152 labor contractors, the Department determined that 137 were small (90.1 percent). These unique small labor contractors had an average of 15 employees and average annual revenue of approximately \$3.81 million. Of these small unique labor contractors, 134 of them had revenue data available from Data Axle.

The Department’s analysis of the impact of this proposed rule on small entities is based on the number of small unique entities (2,242 small entities with revenue data = 2,085 small non-labor contractor entities and 134 small labor contractor entities). The remaining unmatched entities are assumed to have impacts similar to these matched entities. To provide clarity on the agricultural industries impacted by this regulation, Exhibit 12 shows the number of unique non-H–2ALC small entity employers with temporary agricultural labor certifications in FY 2020 to 2021 within the top-10 NAICS code at the 6-digit. Exhibit 13 shows the number of unique H–2ALC small entity employers with temporary agricultural labor certifications in FY 2020 to 2021 within the top-10 NAICS code at the 6-digit.

EXHIBIT 12—NUMBER OF H–2A SMALL NON-LABOR CONTRACTOR EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent
111998 .....	All Other Miscellaneous Crop Farming .....	611	29
444220 .....	Nursery, Garden Center, and Farm Supply Stores .....	162	8

<sup>137</sup> SBA, *Table of Small Business Size Standards Matched to North American Industry Classification*

*System Codes* (Aug. 2019), <https://www.sba.gov/document/support-table-size-standards>.

<sup>138</sup> See <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act> for details.

EXHIBIT 12—NUMBER OF H-2A SMALL NON-LABOR CONTRACTOR EMPLOYERS BY NAICS CODE—Continued

6-Digit NAICS	Description	Number of employers	Percent
561730	Landscaping Services	134	6
445230	Fruit and Vegetable Markets	127	6
424480	Fresh Fruit and Vegetable Merchant Wholesalers	84	4
111339	Other Noncitrus Fruit Farming	78	4
112990	All Other Animal Production	57	3
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	51	2
424910	Farm Supplies Merchant Wholesalers	41	2
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	39	2
Other NAICS		721	34

EXHIBIT 13—NUMBER OF H-2A SMALL LABOR CONTRACTOR EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	11	8
236115	New Single-Family Housing Construction (except For-Sale Builders)	11	8
111998	All Other Miscellaneous Crop Farming	10	7
115115	FLCs and Crew Leaders	8	6
561311	Employment Placement Agencies	7	5
115113	Crop Harvesting, Primarily by Machine	7	5
541110	Offices of Lawyers	6	4
445230	Fruit and Vegetable Markets	5	4
115112	Soil Preparation, Planting, and Cultivating	5	4
115116	Farm Management Services	4	3
Other NAICS		62	46

2. Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small businesses from the baseline<sup>139</sup> of this final rule. We estimated the costs of (a) new surety bond amounts required for H-2ALCs based on the number of H-2A employees; (b) recordkeeping costs associated with maintaining records of employee's home address in their respective home countries; (c) recordkeeping costs incurred by the abandonment or dismissal with cause of employees; and (d) time to read and review this final rule. The cost estimates included in this analysis for the provisions of this final rule are consistent with those presented in the E.O. 12866 section.

The Department estimates that small businesses not classified as H-2ALCs, 2,085 unique employers, would incur a one-time cost of \$54.42 to familiarize themselves with the rule and an annual cost of \$3.59 associated with

recordkeeping requirements.<sup>140</sup> While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department is unable to quantify these costs savings due to data limitations concerning the proportion of small businesses who currently select to file electronically. However, the Department conservatively estimates this cost as de minimis by excluding them from the unquantified cost savings discussed in the previous section. In total, the Department estimates that small businesses not classified as labor contractors will incur a total first-year cost of \$58.01 (= \$54.42 + \$3.59). The Department uses the first-year cost estimate because it is the highest cost incurred by businesses over the analysis timeframe.

This final rule includes the provision pertaining to surety bonds that applies to only H-2ALCs, so the Department estimates the impact on those entities separately. See § 655.132(c). To estimate the impact of this final rule on these entities, the Department used the SBA size standards to classify 151 H-2ALCs

as small employers. These small entities averaged 15 employees, 48 certified workers, and annual revenues of approximately \$3.81 million.

The Department estimates that the average small H-2ALC would incur a one-time cost of \$54.42 to familiarize itself with the rule, annual costs of \$3.59 associated with recordkeeping requirements, and calculated the increase in required surety bond amounts based on the number of certified workers associated with the average temporary agricultural labor certification for each H-2ALC.<sup>141</sup> While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department ignores those cost savings for purposes of the RFA analysis. In total, the Department estimates that each small business classified as an H-2ALC will incur a total first-year cost of \$275.52 (= \$54.42 + \$3.59 + \$217.51).

The Department determined the proportion of each small entity's total revenue that would be affected by the costs of this final rule to determine if this final rule would have a significant and substantial impact on small business. The cost impacts included the

<sup>139</sup> 2010 H-2A Final Rule, 75 FR 6884; TEGL No. 17-06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H-2A Program* (June 14, 2011); TEGL No. 33-10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H-2A Program* (June 14, 2011); TEGL No. 16-06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H-2A Program* (June 14, 2011).

<sup>140</sup> \$54.42 = 1 hr × \$54.42, where \$54.42 is the fully loaded wage rate for an HR Specialist. Recordkeeping requirements include the following: \$1.80 to collect and maintain records of workers' email address and phone number(s) home and \$1.80 to maintain records of notification to the NPC (and DHS) of employment abandonment or termination for cause.

<sup>141</sup> For example, an H-2ALC with a temporary agricultural labor certification for 48 workers is estimated to face a cost of \$217.51, the annual incremental cost per H-2ALC with 25 to 49 H-2A workers.

estimated first-year costs and the wage burden cost introduced by this final rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small businesses incurring a significant impact as the threshold for a substantial impact on small business. A threshold

of three percent of revenues has been used in prior rulemakings for the definition of significant economic impact.<sup>142</sup> This threshold is also consistent with that sometimes used by other agencies.<sup>143</sup> Of the 2,085 unique small non-labor contractor employers with work occurring in 2020–2021 and revenue data, 100 percent of employers

had less than 3 percent of their total revenue affected. Of the 134 small labor contractors with work occurring in 2020–2021 and revenue data, 97 percent of labor contractors had less than 3 percent of their total revenue affected. Exhibit 14 is a breakdown of small employers by the proportion of revenue affected by the costs of this final rule.

EXHIBIT 14—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	Non-labor contractors by NAICS code					
	111998	444220	561730	445230	All other	Total
<1% .....	611 (100.0%)	162 (100.0%)	134 (100.0%)	127 (100.0%)	1051 (100.0%)	2085 (100.0%)
1%–2% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
2%–3% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
3%–4% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
4%–5% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
>5% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
Total >3% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
	Labor contractors by NAICS code					
<1% .....	11 (100.0%)	11 (100.0%)	9 (100.0%)	8 (100.0%)	87 (92.6%)	126 (94.7%)
1%–2% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (2.1%)	2 (1.5%)
2%–3% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (1.1%)	1 (0.8%)
3%–4% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (1.1%)	1 (0.8%)
4%–5% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
>5% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	3 (3.2%)	3 (2.3%)
Total >3% .....	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	4 (4.3%)	4 (3.0%)

C. Paperwork Reduction Act

In order to meet its statutory responsibilities under the INA, the Department collects information necessary to render determinations on requests for temporary agricultural labor certification, which allow employers to bring foreign labor into the United States on a seasonal or other temporary basis under the H–2A program. The Department uses the collected information to determine if employers are meeting their statutory and regulatory obligations. This information is subject to the PRA, 44 U.S.C. 3501 *et seq.* A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control

Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The Department has OMB approval for its H–2A program information collection under Control Number 1205–0466.

In accordance with the PRA, the information collection requirements that must be implemented as a result of this regulation must receive approval from OMB. Therefore, the Department submitted a clearance package in connection with the NPRM that contained proposed revisions to the information collection pending OMB approval under 1205–0466.<sup>144</sup> In this package, the Department proposed changes to the forms used to collect

required information (*i.e.*, Forms ETA–9142A and appendices; Form ETA–790/790A and addenda; and Form ETA–232<sup>145</sup>) to conform to proposed revisions to the Department’s H–2A regulations and introduced a new surety bond form, Form ETA–9142A, Appendix B, *H–2A Labor Contractor Surety Bond*, to facilitate satisfaction of an existing filing requirement for H–2ALC employers. These proposed modifications reflected the regulatory changes in the NPRM, such as consistent use of defined terms, revised assurances, elimination of “no” check boxes where such a response equates to a noncompliant filing, and adding fields to confirm, for example, submission of the new electronic surety bond form and the employer’s participation in optional pre-filing recruitment, if applicable. In addition, the Department’s package

<sup>142</sup> *See, e.g.*, NPRM, *Increasing the Minimum Wage for Federal Contractors*, 79 FR 60634 (Oct. 7, 2014) (establishing a minimum wage for contractors); Final Rule, *Discrimination on the Basis of Sex*, 81 FR 39108 (June 15, 2016).

<sup>143</sup> *See, e.g.*, Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II*, 79 FR 27106 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by

more than three percent annually are not economically significant).

<sup>144</sup> The Department had requested OMB’s approval of revisions to the information collection tools to modernize and streamline the forms and electronic filing process. OMB approved the request under 1205–0466 on August 22, 2019.

<sup>145</sup> As explained in the NPRM, through this rulemaking, the Department will revise and consolidate the collection of information through the Form ETA–232/232A, which is a collection of information from SWAs, not employers, that is

currently authorized under OMB Control Number 1205–0017, into the agency’s primary H–2A information collection requirements under OMB Control Number 1205–0466. The SWAs will use the new Form ETA–232, *Domestic Agricultural In-Season Wage Report*, to report to OFLC the results of wage surveys in compliance with the revised PWD methodology in this final rule, which OFLC will use to establish prevailing wage rates for the H–2A program. This consolidation and revision will align all data collection for the H–2A program under a single OMB-approved ICR.



contained proposed revisions to the information collection to reflect new collections (e.g., notice of intent to stagger entry of H-2A workers under the option proposed at § 655.130(f)). Although the information collection requirements in this rulemaking fall under OMB Control Number 1205-0537, OMB authorized the NPRM Information Collection Request (ICR) as OMB Control Number 1205-0537, approved on October 20, 2019, due to the Department's separate pending ICR under OMB Control Number 1205-0466, which OMB subsequently approved on August 22, 2019.<sup>146</sup> The public was given 60 days to comment on the information collection.

The Department did not receive comments on the ICR itself; however, commenters addressed aspects of the information collection while discussing the proposed regulations. After considering public comments submitted in response to the NPRM, the Department modified the proposed regulations, as discussed in the preamble above, and the information collection in this ICR. The information collection changes to implement this final rule must be assessed under the PRA. For administrative purposes only, the Department is submitting this ICR under control number 1205-0537, the control number OMB assigned to the clearance package approved in connection with the NPRM. Once all of the outstanding actions are complete, the Department intends to submit a nonmaterial change request to transfer the burden from this OMB Control Number (1205-0537) to the existing OMB control number for the H-2A Foreign Labor Certification Program (1205-0466) and proceed to discontinue the use of this OMB Control Number 1205-0537.

In response to comments, the Department made additional modifications to the forms implemented with this final rule to clarify requirements, reflect the provisions of this final rule (e.g., prevailing wage survey methodology), and conform to similar collections (e.g., manner of collecting name information). In addition to editing language on the forms, the Department modified some data collection fields after considering public comments. Many commenters addressed the Department's proposal to collect information about an employer's intent to stagger entry of H-2A workers through a notice submitted to the NPC, which would require an employer to

submit a narrative notice to the NPC and could be difficult to disclose to prospective U.S. worker applicants during recruitment. The estimated burden hours for employers had changed from the estimate provided for the NPRM, reflecting the Department's decision not to adopt three optional information collections proposed in the NPRM. First, the Department did not adopt the proposal to allow an employer the option of staggering the entry of some of its H-2A workers under a single temporary agricultural labor certification. Second, the Department did not adopt the proposal to allow an employer the option of engaging in pre-filing recruitment activities. Third, the Department did not adopt the proposal to allow an employer to request post-certification changes to specific worksites in the AIE where H-2A workers are authorized to work. These decisions eliminated the related notification and document retention burden that had been included in the estimated burden hours of the NPRM. In addition, several comments addressing joint employment scenarios indicated that a change to the manner in which the Department collects information about the role of agricultural associations in filing H-2A applications on behalf of their employer-members and, generally, when joint employment is involved could increase clarity for filers. The Department modified this collection on the Form ETA-9142A by separating one item in Section A into two parts to more clearly collect information about the type of employer filing (i.e., individual employer or joint employers) and, if applicable, the role of the agricultural association in the filing. Further, many comments addressed the Department's housing inspection and compliance requirements, in part, expressing concern about the complexity of those requirements and evidence of compliance with applicable standards. In response to these comments, the Department revised Form ETA-790A and ETA-790A, Addendum B, to refocus the fields related to housing type and compliance.

As a result, the forms implemented with this final rule align information collection requirements with the Department's regulation and continue the ongoing efforts to provide greater clarity to employers on regulatory requirements, standardize and streamline information collection to reduce employer time and burden preparing applications, and promote greater efficiency and transparency in the review and issuance of labor certification decisions under the H-2A

visa program. Overall, these revisions discussed above decrease public burden to respond to the information collection required under this final rule from that proposed in connection with the NPRM by 5 minutes.

This final rule adopts more robust information requirements for requests for administrative review, as explained in the preamble discussion of § 655.171, which merit increasing the burden estimate for employers who appeal final determinations. As a result, this final rule increases the public time burden related to appeal by 40 minutes; thus, the estimated time burden related to appeals is now estimated at 1 hour (60 minutes). In addition to this final rule, the Department issued a companion 2020 H-2A AEWV Final Rule governing the methodology for establishing the AEWV (85 FR 70445), which appeared at paragraphs (b)(1), (2), and (5) of the NPRM. The revised methodology simplifies the process of determining the hourly AEWV applicable to an employer's job opportunity and, therefore, reduces the time burden of determining the offered wage by 3 minutes, a burden accounted for in this ICR, although it is not currently a burden felt by employers due to the 2020 H-2A AEWV Final Rule injunction discussed above.

The information collection change in requirements associated with this final rule are summarized as follows:

*Title:* H-2A Temporary Agricultural Employment Certification Program.

*Agency:* DOL-ETA.

*Type of Review:* New Information Collection Request.

*OMB Control Number:* 1205-0537.

*Affected Public:* Individuals or Households, Private Sector—businesses or other for-profits, Government, State, Local, and Tribal Governments.

*Form(s):* ETA-9142A, H-2A Application for Temporary Employment Certification; ETA-9142A—Appendix A; ETA-9142A—Appendix B, H-2A Labor Contractor Surety Bond; ETA-9142A—H-2A Approval Final Determination; Temporary Agricultural Labor Certification; ETA-790/790A, H-2A Agricultural Clearance Order; ETA-790/790A—Addendum A; ETA-790/790A—Addendum B; ETA-790/790A—Addendum C; ETA-232, Domestic Agricultural In-Season Wage Report.

*Total Annual Respondents:* 11,702.

*Annual Frequency:* On Occasion.

*Total Annual Responses:* 373,176.

*Estimated Time per Response (averages):*

—Forms ETA-9142A, Appendix A, Appendix B—3.05 hours per response.

<sup>146</sup> OMB Control Number 1205-0466 is subsequently up for renewal again. The ICR expires on August 31, 2022.

—Forms ETA-790/790A—0.70 hours per response.

—Form ETA-232—3.30 hours per response.

*Estimated Total Annual Burden Hours:* 72,803.

*Total Annual Burden Cost for Respondents:* \$0.

**D. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, codified at 2 U.S.C. 1501 *et seq.*) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. UMRA requires Federal agencies to assess a regulation's effects on State, local, and tribal governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any regulation that includes any Federal mandate in a proposed or final agency rule that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or upon the private sector, except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

This final rule does not result in unfunded mandates for the public or private sector because private employers' participation in the program is voluntary, and State governments are reimbursed for performing activities required under the program. The requirements of title II of the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

**E. Executive Order 13132 (Federalism)**

This final rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with sec. 6 of E.O. 13132,<sup>147</sup> it is determined that this final rule does not have sufficient federalism implications to warrant the preparation

of a federalism summary impact statement.

**F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)**

The Department has reviewed this final rule in accordance with E.O. 13175<sup>148</sup> and has determined that it does not have tribal implications. This final 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 tribal governments.

**List of Subjects**

**20 CFR Part 653**

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

**20 CFR Part 655**

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

**29 CFR Part 501**

Administrative practice and procedure, Agricultural, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

For the reasons stated in the preamble, the Department of Labor amends 20 CFR parts 653 and 655 and 29 CFR part 501 as follows:

**Title 20—Employees' Benefits**

**PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM**

■ 1. The authority citation for part 653 continues to read as follows:

**Authority:** Secs. 167, 189, 503, Public Law 113-128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

■ 2. Amend § 653.501 by revising the first sentence and adding a sentence following the first sentence of paragraph (c)(2)(i) to read as follows:

**§ 653.501 Requirements for processing clearance orders.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(i) The wages offered are not less than the applicable prevailing wages, as defined in § 655.103(b) of this chapter, or the applicable Federal or State minimum wage, whichever is higher. The working conditions offered are not less than the prevailing working conditions among similarly employed farmworkers in the area of intended employment. \* \* \*

\* \* \* \* \*

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

■ 3. 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) and (ii), 8 U.S.C. 1103(a)(6), 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); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A 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).

Subpart E issued under 48 U.S.C. 1806.  
Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

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; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

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).

■ 4. Revise subpart B to read as follows:

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

- Sec.
- 655.100 Purpose and scope of this subpart.
- 655.101 Authority of the agencies, offices, and divisions in the Department of Labor.
- 655.102 Transition procedures.

<sup>147</sup> E.O. 13132, *Federalism*, 64 FR 43255 (Aug. 10, 1999).

<sup>148</sup> E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 FR 67249 (Nov. 9, 2000).

655.103 Overview of this subpart and definition of terms.

#### Pre-Filing Procedures

655.120 Offered wage rate.  
655.121 Job order filing requirements.  
655.122 Contents of job offers.  
655.123 [Reserved]  
655.124 Withdrawal of a job order.

#### Application for Temporary Employment Certification Filing Procedures

655.130 Application filing requirements.  
655.131 Agricultural association and joint employer filing requirements.  
655.132 H-2A labor contractor filing requirements.  
655.133 Requirements for agents.  
655.134 Emergency situations.  
655.135 Assurances and obligations of H-2A employers.  
655.136 Withdrawal of an *Application for Temporary Employment Certification* and job order.

#### Processing of Applications for Temporary Employment Certification

655.140 Review of applications.  
655.141 Notice of deficiency.  
655.142 Submission of modified applications.  
655.143 Notice of acceptance.  
655.144 Electronic job registry.  
655.145 Amendments to *Applications for Temporary Employment Certification*.

#### Post-Acceptance Requirements

655.150 Interstate clearance of job order.  
655.151–655.152 [Reserved]  
655.153 Contact with former U.S. workers.  
655.154 Additional positive recruitment.  
655.155 Referrals of U.S. workers.  
655.156 Recruitment report.  
655.157 Withholding of U.S. workers prohibited.  
655.158 Duration of positive recruitment.

#### Labor Certification Determinations

655.160 Determinations.  
655.161 Criteria for certification.  
655.162 Approved certification.  
655.163 Certification fee.  
655.164 Denied certification.  
655.165 Partial certification.  
655.166 Requests for determinations based on nonavailability of U.S. workers.  
655.167 Document retention requirements of H-2A employers.

#### Post-Certification

655.170 Extensions.  
655.171 Appeals.  
655.172 Post-certification withdrawals.  
655.173 Setting meal charges; petition for higher meal charges.  
655.174 Public disclosure.

#### Integrity Measures

655.180 Audit.  
655.181 Revocation.  
655.182 Debarment.  
655.183 Less than substantial violations.  
655.184 Applications involving fraud or willful misrepresentation.  
655.185 Job service complaint system; enforcement of work contracts.

#### Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Occupations

655.200 Scope and purpose of herding and range livestock regulations in this section and §§ 655.201 through 655.235.  
655.201 Definition of herding and range livestock terms.  
655.205 Herding and range livestock job orders.  
655.210 Contents of herding and range livestock job orders.  
655.211 Herding and range livestock wage rate.  
655.215 Procedures for filing herding and range livestock *Applications for Temporary Employment Certification*.  
655.220 Processing herding and range livestock *Applications for Temporary Employment Certification*.  
655.225 Post-acceptance requirements for herding and range livestock.  
655.230 Range housing.  
655.235 Standards for range housing.

#### Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations

655.300 Scope and purpose.  
655.301 Definition of terms.  
655.302 Contents of job orders.  
655.303 Procedures for filing *Applications for Temporary Employment Certification*.  
655.304 Standards for mobile housing.

#### § 655.100 Purpose and scope of this subpart.

(a) *Purpose.* (1) A temporary agricultural labor certification issued under this subpart reflects a determination by the Secretary of Labor (Secretary), pursuant to 8 U.S.C. 1188(a), that:

(i) There are not sufficient able, willing, and qualified United States (U.S.) workers available to perform the agricultural labor or services of a temporary or seasonal nature for which an employer desires to hire temporary foreign workers (H-2A workers); and  
(ii) The employment of the H-2A worker(s) will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of foreign workers in the H-2A nonimmigrant classification, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(a). It also establishes standards and obligations with respect to the terms

and conditions of the temporary agricultural labor certification with which H-2A employers must comply, as well as the rights and obligations of H-2A 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 agricultural labor certification.

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

(a) *Authority and role of the Office of Foreign Labor Certification.* The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, e.g., a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 29 CFR part 501, and this subpart ("the H-2A program"), and to carry out other statutory responsibilities required by 8 U.S.C. 1188. The regulations governing WHD's investigatory and enforcement functions, including those related to the enforcement of temporary agricultural labor certifications issued under this subpart, are in 29 CFR part 501.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to § 655.182 and 29 CFR 501.20.

#### § 655.102 Transition procedures.

(a) The National Processing Center (NPC) shall continue to process an *Application for Temporary Employment Certification* submitted prior to November 14, 2022, in accordance with 20 CFR part 655, subpart B, in effect as of November 13, 2022.

(b) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after November 14, 2022, and that has a first date of need no later than February 12, 2023, in accordance with 20 CFR part

655, subpart B, in effect as of November 13, 2022.

(c) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after November 14, 2022, and that has a first date of need later than February 12, 2023, in accordance with all job order and application filing requirements under this subpart.

**§ 655.103 Overview of this subpart and definition of terms.**

(a) *Overview.* In order to bring nonimmigrant workers to the United States to perform agricultural work, an employer must first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. This subpart describes a process by which the DOL makes such a determination and certifies its determination to the DHS.

(b) *Definitions.* For the purposes of this subpart:

*Act.* The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

*Administrative Law Judge (ALJ).* A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

*Administrator.* See definitions of OFLC Administrator and WHD Administrator in this paragraph (b).

*Adverse effect wage rate (AEWR).* The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

*Agent.* A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural 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 under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101.

*Agricultural association.* Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing

establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

*Applicant.* A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

*Application for Temporary Employment Certification.* The Office of Management and Budget (OMB)-approved Form ETA-9142A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

*Area of intended employment (AIE).* The geographic area within normal commuting distance of the place of employment for which temporary agricultural labor 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 place of employment, or quality of the regional transportation network). If a place of employment is within an MSA, including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (e.g., near the border of) the MSA.

*Attorney.* Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia (DC). Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101, may represent an employer under this subpart.

*Average adverse effect wage rate (average AEWR).* The simple average of the adverse effect wage rates (AEWR) applicable to the SOC 45-2092

(Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and published by the OFLC Administrator in accordance with § 655.120. An average AEWR remains valid until replaced with an adjusted average AEWR.

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

*Certifying Officer (CO).* The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H-2A program. The OFLC Administrator is the national CO. Other COs may be designated by the OFLC Administrator to also make the determinations required under this subpart.

*Chief Administrative Law Judge (Chief ALJ).* The chief official of the Department's Office of Administrative Law Judges or the Chief ALJ's designee.

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

*Department of Homeland Security (DHS).* The Department of Homeland Security, as established by 6 U.S.C. 111.

*Employee.* A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

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

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

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) Is a person on whose behalf an *Application for Temporary Employment Certification* is filed.

**Employment and Training Administration (ETA).** The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations in 8 CFR chapter I, subchapter B, for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

**Federal holiday.** Legal public holiday as defined at 5 U.S.C. 6103.

**First date of need.** The first date the employer requires the labor or services of H-2A workers as indicated in the *Application for Temporary Employment Certification*.

**Fixed-site employer.** Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation.

**H-2A labor contractor (H-2ALC).** Any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this subpart, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

**H-2A Petition.** The USCIS Form I-129, Petition for a Nonimmigrant Worker, with H Supplement or successor form and/or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2A nonimmigrant workers.

**H-2A worker.** Any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of

a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

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

**Job opportunity.** Full-time employment at a place in the United States to which U.S. workers can be referred.

**Job order.** The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA-790/ETA-790A and all appropriate addenda), as submitted to the NPC.

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

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H-2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H-2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H-2A workers sponsored under the *Application for Temporary Employment Certification*.

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under § 655.131(b) are, at all times, joint employers of all the H-2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

**Master application.** An *Application for Temporary Employment Certification* filed by an association of agricultural producers as a joint employer with its employer-members. A master application must cover the same occupations or comparable agricultural employment; the first date of need for all employer-members listed on the

*Application for Temporary Employment Certification* may be separated by no more than 14 calendar days; and may cover multiple areas of intended employment within a single State but no more than two contiguous States.

**Metropolitan Statistical Area (MSA).** A geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan 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).** The offices within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification*.

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

**OFLC Administrator.** The primary official of OFLC, or the OFLC Administrator's designee.

**Period of employment.** The time during which the employer requires the labor or services of H-2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification*.

**Piece rate.** A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

**Place of employment.** A worksite or physical location where work under the job order actually is performed by the H-2A workers and workers in corresponding employment.

**Positive recruitment.** The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of OFLC, in recruiting and interviewing individuals in the area where the employer's job opportunity is located, and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to

the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

*Prevailing practice.* A practice engaged in by employers, that:

(i) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(ii) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H-2A and non-H-2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of labor contractors.

*Prevailing wage.* A wage rate established by the OFLC Administrator for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area based on a survey conducted by a State that meets the requirements in § 655.120(c).

*Secretary of Homeland Security.* The chief official of DHS, or the Secretary of Homeland Security's designee.

*Secretary of Labor (Secretary).* The chief official of the Department, or the Secretary's designee.

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

*Strike.* 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.* (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 29 CFR part 501, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

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

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

(H) Similarity of products and services; and

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

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

*Temporary agricultural labor certification.* Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification*, job order, and all supporting documentation, with respect to an employer seeking to file an H-2A Petition with DHS to employ one or more foreign nationals as an H-2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188, and this subpart.

*United States.* The continental United States, 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.

*U.S. Citizenship and Immigration Services (USCIS).* An operational component of DHS.

*U.S. worker.* A worker who is:

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

(ii) An individual who is lawfully admitted for permanent residence in the United States, 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 DHS to be employed in the United States; or

(iii) 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).* The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 29 CFR part 501, and this subpart.

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

*WHD Administrator.* The primary official of WHD, or the WHD Administrator's designee.

*Work contract.* All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 29 CFR part 501, or this subpart. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(c) *Definition of agricultural labor or services.* For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C. 1011(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (c)(1) through (3) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (c) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or

maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (c)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as

an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Logging employment is operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites.

(5) *Employment as defined and specified in §§ 655.300 through 655.304.* For the purpose of paragraph (c) of this section, agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in §§ 655.300 through 655.304.

(d) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

#### Pre-Filing Procedures

##### § 655.120 Offered wage rate.

(a) *Employer obligation.* Except for occupations covered by §§ 655.200 through 655.235, to comply with its obligation under § 655.122(l), an employer must offer, advertise in its

recruitment, and pay a wage that is at least the highest of:

(1) The AEW;R;  
(2) A prevailing wage rate, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of paragraph (c) of this section;

(3) The agreed-upon collective bargaining wage;

(4) The Federal minimum wage; or  
(5) The State minimum wage.

(b) *AEWR determinations.*

(1) [Reserved]

(2) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the AEW;Rs for each State as a notice in the **Federal Register**.

(3) If an updated AEW;R for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEW;R is higher than the highest of the previous AEW;R, a prevailing wage for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must pay at least the updated AEW;R upon the effective date of the updated AEW;R published in the **Federal Register**.

(4) If an updated AEW;R for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEW;R is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(5) [Reserved]

(c) *Prevailing wage determinations.*

(1) The OFLC Administrator will issue a prevailing wage for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity if all of the following requirements are met:

(i) The SWA submits to the Department a wage survey for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and a Form ETA-232 providing the methodology of the survey;

(ii) The survey was independently conducted by the State, including any State agency, State college, or State university;

(iii) The survey covers work performed in a single crop activity or



agricultural activity and, if applicable, a distinct work task or tasks performed in that activity;

(iv) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area surveyed or contacted a randomized sample of such employers, except where the estimated universe of employers is less than five. Where the estimated universe of employers is less than five, the surveyor contacted all employers in the estimated universe;

(v) The survey reports the average wage of U.S. workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area using the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey;

(vi) The survey covers an appropriate geographic area based on available resources to conduct the survey, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the State;

(vii) Where the estimated universe of U.S. workers is at least 30, the survey includes the wages of at least 30 U.S. workers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. Where the estimated universe of U.S. workers is less than 30, the survey includes the wages of all such U.S. workers;

(viii) Where the estimated universe of employers is at least five, the survey includes wages of U.S. workers employed by at least five employers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. Where the estimated universe of employers is less than five, the survey includes wages of U.S. workers employed by all such employers; and

(ix) Where the estimated universe of employers is at least 4, the wages paid by a single employer represent no more than 25 percent of the sampled wages in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. This paragraph (c)(1)(ix) does not apply where the estimated universe of employers is less than four.

(2) A prevailing wage issued by the OFLC Administrator will remain valid for 1 year after the wage is posted on the OFLC website or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed on the job order expires during the work contract,

the employer must continue to guarantee at least the expired prevailing wage rate.

(3) If a prevailing wage for the geographic area and crop activity or agricultural activity and distinct work task(s), if applicable, is adjusted during a work contract, and is higher than the highest of the AEWWR, a previous prevailing wage for the geographic area and crop activity or agricultural activity or, if applicable, a distinct work task or tasks performed in that activity, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must pay at least that higher prevailing wage upon the Department's notice to the employer of the new prevailing wage.

(4) If a prevailing wage for the geographic area and crop activity or agricultural activity and distinct work task(s), if applicable, is adjusted during a work contract, and is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(d) *Appeals.* (1) If the employer does not include the appropriate offered wage rate on the *Application for Temporary Employment Certification*, the CO will issue a Notice of Deficiency (NOD) requiring the employer to correct the wage rate.

(2) If the employer disagrees with the wage rate required by the CO, the employer may appeal only after the *Application for Temporary Employment Certification* is denied, and the employer must follow the procedures in § 655.171.

#### **§ 655.121 Job order filing requirements.**

(a) *What to file.* (1) Prior to filing an *Application for Temporary Employment Certification*, the employer must submit a completed job order, Form ETA-790/790A, including all required addenda, to the NPC designated by the OFLC Administrator, and must identify it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H-2A workers. The employer must include in its submission to the NPC a valid Federal Employer Identification Number (FEIN) as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(2) Where the job order is being placed in connection with a future master application to be filed by an agricultural association as a joint employer with its employer-members, the agricultural association may submit a single job order to be placed in the name of the agricultural association on behalf of all employers named on the

job order and the future *Application for Temporary Employment Certification*.

(3) Where the job order is being placed in connection with a future application to be jointly filed by two or more employers seeking to jointly employ a worker(s) (but is not a master application), any one of the employers may submit a single job order to be placed on behalf of all joint employers named on the job order and the future *Application for Temporary Employment Certification*.

(4) The job order must satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and the requirements set forth in § 655.122.

(b) *Timeliness.* The employer must submit a completed job order to the NPC no more than 75 calendar days and no fewer than 60 calendar days before the employer's first date of need.

(c) *Location and method of filing.* The employer must submit a completed job order to the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any job order submitted using a method other than the designated electronic method(s), unless the employer submits the job order by mail as set forth in § 655.130(c)(2) or requests a reasonable accommodation as set forth in § 655.130(c)(3).

(d) *Original signature.* The job order must contain an electronic (scanned) copy of the original signature of the employer or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized agent or attorney.

(e) *SWA review.* (1) Upon receipt of the job order, the NPC will transmit an electronic copy of the job order to the SWA serving the area of intended employment for intrastate clearance. If the job opportunity is located in more than one State within the same area of intended employment, the NPC will transmit the job order to any one of the SWAs having jurisdiction over the place(s) of employment.

(2) The SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F, and this subpart, and will work with the employer to address any noted deficiencies. The SWA must notify the employer in writing of any deficiencies in its job order not later than 7 calendar days from the date the SWA received the job order. The SWA notification will state the reason(s) the job order fails to meet the applicable

requirements, state the modification(s) needed for the SWA to accept the job order, and offer the employer an opportunity to respond to the deficiencies within 5 calendar days from the date the notification was issued by the SWA. Upon receipt of a response, the SWA will review the response and notify the employer in writing of its acceptance or denial of the job order within 3 calendar days from the date the response was received by the SWA. If the employer's response is not received within 12 calendar days after the notification was issued, the SWA will notify the employer in writing that the job order is deemed abandoned, and the employer will be required to submit a new job order to the NPC meeting the requirements of this section. Any notice sent by the SWA to an employer that requires a response must be sent using methods to assure next day delivery, including email or other electronic methods, with a copy to the employer's representative, as applicable.

(3) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer may file an *Application for Temporary Employment Certification* pursuant to the emergency filing procedures contained in § 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted in the preceding sentence. The CO will process the emergency *Application for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167.

(f) *Intrastate clearance.* Upon its acceptance of the job order, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers. Where the employer's job order references an area of intended employment that falls within the jurisdiction of more than one SWA, the originating SWA will notify the NPC that a copy of the approved job order must be forwarded to the other SWAs serving the area of intended employment. Upon receipt of the SWA notification, the NPC will promptly transmit an electronic copy of the approved job order to the other SWAs serving the area of intended employment.

(g) *Duration of job order posting.* The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(h) *Modifications to the job order.* (1) Prior to the issuance of a final determination on an *Application for Temporary Employment Certification*, the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. Such modifications must be made, or certification will be denied pursuant to § 655.164.

(2) The employer may request a modification of the job order, Form ETA-790/790A, prior to the submission of an *Application for Temporary Employment Certification*. However, the employer may not reject referrals against the job order based upon a failure on the part of the applicant to meet the amended criteria, if such referral was made prior to the amendment of the job order. The employer may not request a modification of the job order on or after the date of filing an *Application for Temporary Employment Certification*.

(3) The employer must provide all workers recruited in connection with the *Application for Temporary Employment Certification* with a copy of the modified job order or work contract which reflects the amended terms and conditions, on the first day of employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first.

#### § 655.122 Contents of job offers.

(a) *Prohibition against preferential treatment of H-2A 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-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions that must be offered to U.S. workers consistent with this section.

(b) *Job qualifications and requirements.* Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or

comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(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 (q) of this section.

(d) *Housing—(1) Obligation to provide housing.* The employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing must meet the full set of the DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations.* Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the DOL OSHA standards at 29 CFR 1910.142(b)(2) (minimum square footage); (b)(3) (beds, cots, or bunks, and suitable storage facilities); (b)(9) (minimum square footage in a room where workers cook, live, and sleep); (b)(10) (where the employer chooses to meet its meal obligations under paragraph (g) of this section by furnishing free and convenient cooking and kitchen facilities to the workers, the provision of stoves, sanitary kitchen facilities); (b)(11) (heating, cooking, and water heating equipment installed properly); (c) (water supply); (d)(1) (adequate toilet facilities); (d)(9) (adequate toilet paper); (d)(10) (toilets kept in sanitary condition); (f) (laundry, handwashing, and bathing facilities); (g) (lighting); (h)(2) (garbage containers kept clean); (h)(3) (garbage containers emptied when full, but at least twice a week); and (j) (insect and rodent control), State standards addressing

such concerns will apply. In the absence of applicable local or State standards addressing such concerns, the relevant DOL OSHA standards at 29 CFR 1910.142(b)(2), (3), (9), (10), and (11), (c), (d)(1), (9), and (10), (f), (g), (h)(2) and (3), and (j) will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing.

(2) *Standards for range and mobile housing.* An employer employing workers under §§ 655.200 through 655.235 must comply with the housing requirements in §§ 655.230 and 655.235. An employer employing workers under §§ 655.300 through 655.304 must comply with the housing standards in § 655.304.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage that is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) *Compliance with applicable standards—(i) Timeliness.* The determination as to whether housing provided to workers under this section meets the applicable standards must be made not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification*.

(ii) *Certification of employer-provided housing.* The SWA (or another local, State, or Federal authority acting on behalf of the SWA) with jurisdiction over the location of the employer-provided housing must inspect and provide to the employer and CO documentation certifying that the employer-provided housing is sufficient to accommodate the number of workers requested and meets all applicable standards under paragraph (d)(1)(i) of this section.

(iii) *Certification of rental and/or public accommodations.* The employer

must provide to the CO a written statement, signed and dated, that attests that the accommodations are compliant with the applicable standards under paragraph (d)(1)(ii) of this section and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). If applicable local or State rental or public accommodation standards under paragraph (d)(1)(ii) of this section require an inspection, the employer also must submit to the CO a copy of the inspection report or other official documentation from the relevant authority. If the applicable standards do not require an inspection, the employer's written statement must confirm that no inspection is required.

(iv) *Certified housing that becomes unavailable.* If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State, or Federal safety and health standards, in accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to provide housing that complies with the applicable standards will result in either a denial of a pending *Application for Temporary Employment Certification* or revocation of the temporary agricultural labor certification granted under this subpart.

(e) *Workers' compensation.* (1) The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary agricultural labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph (e), including the name of the insurance carrier, the insurance policy number, and proof of insurance for the entire period of employment, or, if appropriate, proof of State law coverage.

(f) *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.

(g) *Meals.* The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of the FLSA at 29 U.S.C. 203(m), including the recordkeeping requirements found at 29 CFR 516.27.

(h) *Transportation; daily subsistence—(1) Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to 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 payment must be at least as much as the employer would

charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a). Note that the FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages.

(2) *Transportation from place of employment.* If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in § 655.135(d) with respect to the referrals made after the employer's date of need.

(3) *Transportation between living quarters and place of employment.* The employer must provide transportation between housing provided or secured by the employer and the employer's place of employment at no cost to the worker.

(4) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable local, State, or Federal laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.104 or 500.105, and 29 CFR 500.120 through 500.128. The job offer must include a description of the modes of transportation (e.g., type of vehicle) that will be used for inbound, outbound, daily, and any other transportation. If workers' compensation is used to cover transportation in lieu of vehicle insurance, the employer must either

ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and it must have property damage insurance.

(i) *Three-fourths guarantee—(1) Offer to worker.* The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph (i)(1) a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks  $\times$  48 hours/week = 480 hours  $\times$  75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks  $\times$  48 hours/week = (480 hours - 8 hours (Federal holiday))  $\times$  75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However,

all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or H-2A worker less employment than that required under this paragraph (i)(1), the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

(2) *Guarantee for piece rate paid worker.* If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) *Displaced H-2A worker.* The employer is not liable for payment of the three-fourths guarantee to an H-2A worker whom the CO certifies is displaced because of the employer's compliance with its obligation to hire U.S. workers who apply or are referred after the employer's date of need described in § 655.135(d) with respect to referrals made during that period.

(5) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the United States from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) *Earnings records.* (1) An employer must keep accurate and adequate records with respect to each worker's earnings, including, but not limited to, field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's permanent address and, when available, the worker's permanent email address and phone number(s); and the amount of and reasons for any and all deductions taken from the worker's wages. In the case of H-2A workers, the permanent address must be the worker's permanent address in the worker's home country.

(2) Each employer must keep the records required by paragraph (j) of this section, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G-28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph (j)(2).

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the date of the certification.

(k) *Hours and earnings statements.* The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

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

(7) Beginning and ending dates of the pay period; and

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

(l) *Rates of pay.* Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the AEWR; a prevailing wage if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of § 655.120(c); the agreed-upon collective bargaining rate; the Federal minimum wage; or the State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly, or monthly basis that equals or exceeds the AEWR, prevailing wage rate, the Federal minimum wage, the State minimum wage, or any agreed-upon collective bargaining rate, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the prevailing piece rate for the crop activity or agricultural activity and,

if applicable, a distinct work task or tasks performed in that activity in the geographic area if one has been issued by the OFLC Administrator; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for temporary agricultural labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the area of intended employment.

(m) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) *Abandonment of employment or termination for cause.* If a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and DHS in the case of an H-2A worker, in writing or by any other method specified by the Department in a notice published in the **Federal Register** or specified by DHS not later than 2 working days after such abandonment occurs, 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 (i) of this section, and, in the case of a U.S. worker, the employer will not be obligated to contact that worker under § 655.153. Abandonment will be deemed to begin after a worker fails to report to work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. The employer is required to maintain records of such notification to the NPC, and DHS in the case of an H-2A worker, for not less than 3 years from the date of the certification.

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an

event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2A employer, whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* (1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized

deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. 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.

(q) *Disclosure of work contract.* The employer must provide to an H-2A worker not later than the time at which the worker applies for the visa, or to a worker in corresponding employment not later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H-2A worker going from an H-2A employer to a subsequent H-2A employer, the copy must be provided not later than the time an offer of employment is made by the subsequent H-2A employer. For an H-2A worker that does not require a visa for entry, the copy must be provided not later than the time of an offer of employment. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

**§ 655.123 [Reserved]**

**§ 655.124 Withdrawal of a job order.**

(a) The employer may withdraw a job order if the employer no longer plans to file an *Application for Temporary Employment Certification*. However, the employer is still obligated to comply with the terms and conditions of employment contained in the job order with respect to all workers recruited in connection with that job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the job order and stating the reason(s) for the withdrawal.

**Application for Temporary Employment Certification Filing Procedures**

**§ 655.130 Application filing requirements.**

All employers who desire to hire H-2A foreign agricultural workers must apply for a certification from the Secretary by filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. This section provides the procedures employers must follow when filing.

(a) *What to file.* An employer that desires to apply for temporary agricultural labor certification of one or more nonimmigrant workers must file a completed *Application for Temporary Employment Certification*, all supporting documentation and information required at the time of filing under §§ 655.131 through 655.135, and, unless a specific exemption applies, a copy of Form ETA-790/790A, submitted as set forth in § 655.121(a). The *Application for Temporary Employment Certification* must include a valid FEIN as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's first date of need.

(c) *Location and method of filing—(1) Electronic filing.* The employer must file the *Application for Temporary Employment Certification* and all required supporting documentation with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits the application in accordance with paragraph (c)(2) or (3) of this section.

(2) *Filing by mail.* Employers that lack adequate access to electronic filing may file the application by mail. The employer must indicate that it is filing by mail due to lack of adequate access to electronic filing. The OFLC Administrator will identify the address to which such filing must be mailed by public notice(s) and by instructions on DOL's website.

(3) *Reasonable accommodation.* Employers who are unable or limited in their ability to use and/or access the electronic *Application for Temporary Employment Certification*, or any other form or documentation required under this subpart, as a result of a disability may request a reasonable



accommodation to enable them to participate in the H-2A program. An employer in need of such an accommodation may contact the NPC in writing to the address designated in a notice published in the **Federal Register** or 202-513-7350 (this is not a toll-free number), or for individuals with hearing or speech impairments, 1-877-889-5627 (this is the TTY toll-free Federal Information Relay Service number) for assistance in using, accessing, or filing any form or documentation required under this subpart, including the *Application for Temporary Employment Certification*. All requests for an accommodation should include the employer's name, a detailed description of the accommodation needed, and the preferred method of contact. The NPC will respond to the request for a reasonable accommodation within 10 business days of the date of receipt.

(d) *Original signature*. The *Application for Temporary Employment Certification* must contain an electronic (scanned) copy of the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent) or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Scope of applications*. (1) Except as otherwise permitted by this subpart, all places of employment on an *Application for Temporary Employment Certification* must be within a single area of intended employment. Where a job opportunity involves work at multiple places of employment after the workday begins, the *Application for Temporary Employment Certification* may include places of employment outside of a single area of intended employment only as is necessary to perform the duties specified in the *Application for Temporary Employment Certification*, and provided that the worker can reasonably return to the worker's residence or the employer-provided housing within the same workday.

(2) An employer may file only one *Application for Temporary Employment Certification* covering the same area of intended employment, period of employment, and occupation or comparable work to be performed.

(f) *Information dissemination*. Information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity

measures such as audits may be forwarded from OFLC to WHD or any other Federal agency, as appropriate, for investigative or enforcement purposes.

**§ 655.131 Agricultural association and joint employer filing requirements.**

(a) *Agricultural association filing requirements*. If an agricultural association files an *Application for Temporary Employment Certification*, in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.

(1) The agricultural association must identify in the *Application for Temporary Employment Certification* for H-2A workers whether it is filing as a sole employer, a joint employer, or an agent. The agricultural association must retain documentation substantiating the employer or agency status of the agricultural association and be prepared to submit such documentation in response to a NOD from the CO prior to issuing a Final Determination, or in the event of an audit or investigation.

(2) The agricultural association may file a master application on behalf of its employer-members. The master application is available only when the agricultural association is filing as a joint employer. An agricultural association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, as long as the first dates of need for each employer-member named in the *Application for Temporary Employment Certification* are separated by no more than 14 calendar days and all places of employment are located in no more than two contiguous States. The agricultural association must identify in the *Application for Temporary Employment Certification* by name, address, total number of workers needed, period of employment, first date of need, and the crops and agricultural work to be performed, each employer-member that will employ H-2A workers.

(3) An agricultural association filing a master application as a joint employer may sign the *Application for Temporary Employment Certification* on behalf of its employer-members. An agricultural association filing as an agent may not sign on behalf of its employer-members but must obtain each employer-member's signature on the *Application for Temporary Employment Certification* prior to filing.

(4) If the application is approved, the agricultural association, as appropriate, will receive a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

(b) *Joint employer filing requirements*. (1) If an employer files an *Application for Temporary Employment Certification* on behalf of one or more other employers seeking to jointly employ H-2A workers in the same area of intended employment, in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply:

(i) The *Application for Temporary Employment Certification* must identify the name, address, and the crop(s) and agricultural work to be performed for each employer seeking to jointly employ the H-2A workers;

(ii) No single joint employer may employ an H-2A worker, or any combination of H-2A workers, for more than a total of 34 hours in any workweek; and

(iii) The *Application for Temporary Employment Certification* must be signed and dated by each joint employer named in the application, in accordance with the procedures contained in § 655.130(e). By signing the *Application for Temporary Employment Certification*, each joint employer named in the application attests to the conditions of employment required of an employer participating in the H-2A program, and assumes full responsibility for the accuracy of the representations made in the *Application for Temporary Employment Certification* and for compliance with all of the assurances and obligations of an employer in the H-2A program at all times during the period the *Application for Temporary Employment Certification* is valid; and

(2) If the application is approved, the joint employer who submits the *Application for Temporary Employment Certification* will receive, on behalf of the other joint employers, a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

**§ 655.132 H-2A labor contractor filing requirements.**

An H-2A labor contractor (H-2ALC) must meet all of the requirements of the definition of *employer* in § 655.103(b) and comply with all the assurances, guarantees, and other requirements contained in this part, including



§ 655.135, and in part 653, subpart F, of this chapter. The H-2ALC must include in or with its *Application for Temporary Employment Certification* at the time of filing the following:

(a) The name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site.

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.

(c) Proof of its ability to discharge financial obligations under the H-2A program by including with the *Application for Temporary Employment Certification* an original surety bond meeting the following requirements.

(1) *Requirements for the bond.* The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue NW, Room S-3502, Washington, DC 20210. Consistent with the enforcement procedure set forth at 29 CFR 501.9(b), the bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits, including any assessment of interest, owed to an H-2A worker or to a worker engaged in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 29 CFR part 501 relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond must remain in full force and effect for all liabilities incurred during the period of the labor certification, including any extension thereof. The bond may not be cancelled absent a finding by the WHD Administrator that the labor certification has been revoked.

(2) *Amount of the bond.* Unless a higher amount is sought by the WHD Administrator pursuant to 29 CFR 501.9(a), the required bond amount is the base amount adjusted to reflect the average AEW, as defined in § 655.103, and further adjusted if the labor certification will be used for the employment of 150 or more workers.

(i) The base amounts are \$5,000 for a labor certification for which an H-2ALC employs fewer than 25 workers; \$10,000

for a labor certification for which an H-2ALC employs 25 to 49 workers; \$20,000 for a labor certification for which an H-2ALC employs 50 to 74 workers; \$50,000 for a labor certification for which an H-2ALC employs 75 to 99 workers; and \$75,000 for a labor certification for which an H-2ALC employs 100 or more workers.

(ii) The bond amount is calculated by multiplying the base amount by the average AEW in effect at the time of bond submission, as provided in paragraph (c)(3) of this section, and dividing by \$9.25. Thus, the required bond amounts will vary based on changes in the average AEW.

(iii) For a labor certification for which an H-2ALC employs 150 or more workers, the bond amount applicable to the certification of 100 or more workers is further adjusted for each additional 50 workers as follows: the bond amount is increased by a value which represents 2 weeks of wages for 50 workers, calculated using the average AEW (*i.e.*, 80 hours × 50 workers × Average AEW); this increase is applied to the bond amount for each additional group of 50 workers.

(iv) The required bond amounts shall be calculated and published in the **Federal Register** after the OFLC Administrator has calculated the average AEW or any adjustment thereto.

(3) *Form of the bond and method of filing.* The bond shall consist of an executed Form ETA-9142A—Appendix B, and must contain the name, address, phone number, and contact person for the surety, and valid documentation of power of attorney. The bond must be filed using the method directed by the OFLC Administrator at the time of filing:

(i) *Electronic surety bonds.* When the OFLC Administrator directs the use of electronic surety bonds, this will be the required method of filing bonds for all applications subject to mandatory electronic filing. Consistent with the application filing requirements of § 655.130(c) and (d), the bond must be completed, signed by the employer and the surety using a verifiable electronic signature method, and submitted electronically with the *Application for Temporary Employment Certification* and supporting materials unless the employer is permitted to file by mail or a different accommodation under § 655.130(c)(2) or (3).

(ii) *Electronic submission of copy.* Until such time as the OFLC Administrator directs the use of electronic surety bonds, employers may submit an electronic (scanned) copy of the surety bond with the application,

provided that the original bond is received within 30 days of the date that the labor certification is issued.

(iii) *Mailing original bond with application.* For applications not subject to mandatory electronic filing due under § 655.130(c)(2) or (3), employers may submit the original bond as part of its mailed, paper application package, or consistent with the accommodation provided.

(d) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (a) of this section.

(e) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that:

(1) All housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA; and

(2) All transportation between all places of employment and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable local, State, or Federal laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.104 or 500.105 and 500.120 through 500.128, except where workers' compensation is used to cover such transportation as described in § 655.122(h).

#### § 655.133 Requirements for agents.

(a) An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer.

(b) In addition the agent must provide a copy of the MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, identifying the specific farm labor contracting activities the agent is authorized to perform.

#### § 655.134 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period for filing for employers who did not make use of temporary foreign agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause, provided the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

(b) *Employer requirements.* The employer requesting a waiver of the required time period must submit to the

NPC: all documentation required at the time of filing by § 655.130(a), except evidence of a job order submitted pursuant to § 655.121; a completed job order on the Form ETA-790/790A and all required addenda; and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior year's agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause 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 or similar unforeseeable man-made catastrophic events (e.g., a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control.

(c) *Processing of emergency applications.* (1) Upon receipt of a complete emergency situation(s) waiver request, the CO promptly will transmit a copy of the job order to the SWA serving the area of intended employment. The SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F, and § 655.122. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO of the noted deficiencies within 5 calendar days of the date the job order is received by the SWA.

(2) The CO will process emergency *Applications for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167. The CO may notify the employer, in accordance with the procedures contained in § 655.141, that the application cannot be accepted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.161. Such notification will so inform the employer of the opportunity to submit a modified *Application for*

*Temporary Employment Certification* and/or job order in accordance with the procedures contained in § 655.142.

#### **§ 655.135 Assurances and obligations of H-2A employers.**

An employer seeking to employ H-2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances:

(a) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship status. Rejections of any U.S. workers who applied or apply for the job must be only 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 hires and rejections as required by § 655.167.

(b) *No strike or lockout.* The place(s) of employment for which the employer is requesting a temporary agricultural labor certification does not currently have employees on strike or being locked out in the course of a labor dispute.

(c) *Recruitment requirements—(1) General requirements.* 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 an application is made) for the job opportunity until the end of the period as specified in paragraph (d) of this section and must independently conduct the positive recruitment activities, as specified in § 655.154, until the date on which the H-2A workers depart for the place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of employment.

(2) *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 U.S. worker is being recruited so that the worker incurs little or no cost due to the interview. Employers cannot provide potential H-2A workers with more favorable treatment than U.S. workers with respect to the requirement for, and conduct of, interviews.

(3) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity until the end of the recruitment period, as set forth in § 655.135(d). The employer must accept and hire all applicants who are qualified and who will be available for the job opportunity. U.S. applicants can be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired.

(d) *Fifty percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer must provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed. Start of the work contract timeline is calculated from the first date of need stated on the *Application for Temporary Employment Certification*, under which the foreign worker who is in the job was hired. This paragraph (d) will not apply to any employer who certifies to in the *Application for Temporary Employment Certification* that the employer:

(1) Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in 29 U.S.C. 203(u);

(2) Is not an employer-member of an association that has petitioned for certification under this subpart for its employer-members; and

(3) Has not otherwise associated with other employers who are petitioning for temporary foreign workers under this subpart.

(e) *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 laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents. H-2A employers may also be subject to the FLSA. The FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.

(f) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek.

(g) *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 except for lawful, job-related reasons within 60 days of the first date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the *Application for Temporary Employment Certification* to those laid-off U.S. worker(s) and the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired. A layoff for lawful, job-related reasons such as lack of work or the end of the growing season is permissible if all H-2A workers are laid off before any U.S. worker in corresponding employment.

(h) *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. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188; or

(5) Exercised or asserted on behalf of themselves or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188.

(i) *Notify workers of duty to leave United States.* (1) The employer must inform H-2A workers of the requirement that they leave the United States at the end of the period certified by the Department or separation from the employer, whichever is earlier, as

required under paragraph (i)(2) of this section, unless the H-2A worker is being sponsored by another subsequent H-2A employer.

(2) As explained further in the DHS regulations, a temporary agricultural labor certification limits the validity period of an H-2A Petition. See 8 CFR 214.2(h)(5)(vii). A foreign worker may not remain beyond their authorized period of stay, as determined by DHS, nor beyond separation from employment prior to completion of the H-2A contract, absent an extension or change of such worker's status under the DHS regulations. See 8 CFR 214.2(h)(5)(viii)(B).

(j) *Comply with the prohibition against employees paying fees.* The employer and its agents have not sought or received payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H-2A labor certification, including payment of the employer's attorney fees, application fees, or recruitment costs. For purposes of this paragraph (j), 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. The provision in this paragraph (j) 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.

(k) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees. The contract must include the following statement: "Under this agreement, [name of foreign labor contractor or recruiter] and any agent or employee of [name of foreign labor contractor or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorney fees, agent fees, application fees, or any fees related to obtaining H-2A labor certification." This documentation is to be made available upon request by the CO or another Federal party.

(l) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188.

#### **§ 655.136 Withdrawal of an Application for Temporary Employment Certification and job order.**

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order at any time before the CO makes a determination under § 655.160.

However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

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

#### **Processing of Applications for Temporary Employment Certification**

##### **§ 655.140 Review of applications.**

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart, and make a decision to issue a NOD under § 655.141, a Notice of Acceptance (NOA) under § 655.143, or a Final Determination under § 655.160.

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

##### **§ 655.141 Notice of deficiency.**

(a) *Notification timeline.* If the CO determines the *Application for*

*Temporary Employment Certification* 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 calendar days of the CO's receipt of the *Application for Temporary Employment Certification*. A copy of this notification will be sent to the SWA serving the area of intended employment.

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

(1) State the reason(s) 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 5 business days from date of receipt stating the modification that is needed for the CO to issue the NOA;

(3) State that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made not later than 30 calendar days before the first date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* or job order within 5 business days and in a manner specified by the CO; and

(4) State that if the employer does not comply with the requirements of § 655.142, the CO will deny the *Application for Temporary Employment Certification*.

#### **§ 655.142 Submission of modified applications.**

(a) *Submission requirements and certification delays*. If in response to a NOD the employer chooses to submit a modified *Application for Temporary Employment Certification* or job order, the CO's Final Determination will be postponed by 1 calendar day for each day that passes beyond the 5 business-day period allowed under § 655.141(b) to submit a modified *Application for Temporary Employment Certification* or job order, up to a maximum of 5 calendar days. The CO may issue one or more additional NODs before issuing a Final Determination. The *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Employment Certification* or job order within 12 calendar days after the NOD was issued.

(b) *Provisions for denial of modified Application for Temporary Employment Certification*. If the modified *Application for Temporary Employment Certification* or job order does not cure

the deficiencies cited in the NOD(s) or otherwise fails to satisfy the criteria required for certification, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.164.

(c) *Appeal from denial of modified Application for Temporary Employment Certification*. The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* are the same as for a non-modified *Application for Temporary Employment Certification* as long as the employer timely requests an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

#### **§ 655.143 Notice of acceptance.**

(a) *Notification timeline*. When the CO determines the *Application for Temporary Employment Certification* and job order meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification*. A copy of the notice will be sent to the SWA serving the area of intended employment.

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

(1) Authorize conditional access to the interstate clearance system and direct each SWA receiving a copy of the job order to commence recruitment of U.S. workers as specified in § 655.150;

(2) Direct the employer to engage in positive recruitment of U.S. workers under §§ 655.153 and 655.154 and to submit a report of its positive recruitment efforts meeting the requirements of § 655.156. If the OFLC Administrator's annual determination of labor supply States under § 655.154 requires the employer to engage in a specific additional positive recruitment activity in a labor supply State, the NOA will describe the precise nature of the additional positive recruitment required and will specify the documentation or other supporting evidence that must be maintained by the employer as proof that positive recruitment requirements were met;

(3) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 and will terminate on the date specified in § 655.158;

(4) State any other documentation or assurances needed for the *Application for Temporary Employment Certification* to meet the requirements for certification under this subpart;

(5) State that the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need, except as provided for under § 655.142 for modified *Applications for Temporary Employment Certification* or when the *Application for Temporary Employment Certification* does not meet the requirements for certification but is expected to before the first date of need; and

(6) Where appropriate to the job opportunity and area of intended employment, direct the SWA to provide written notice of the job opportunity to organizations that provide employment and training services to workers likely to apply for the job and/or to place written notice of the job opportunity in other physical locations where such workers are likely to gather.

#### **§ 655.144 Electronic job registry.**

(a) *Location of and placement in the electronic job registry*. Upon acceptance of the *Application for Temporary Employment Certification* under § 655.143, the CO will promptly place for public examination a copy of the job order on an electronic job registry maintained by the Department, including any required modifications approved by the CO, as specified in § 655.142.

(b) *Length of posting on electronic job registry*. Unless otherwise provided, the Department will keep the job order posted on the electronic job registry in active status until the end of the recruitment period, as set forth in § 655.135(d).

#### **§ 655.145 Amendments to Applications for Temporary Employment Certification.**

(a) *Increases in number of workers*. The *Application for Temporary Employment Certification* may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial *Application for Temporary Employment Certification* by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the employer demonstrates that the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. All requests for increasing the

number of workers must be made in writing.

(b) *Minor changes to the period of employment.* The *Application for Temporary Employment Certification* may be amended to make minor changes in the total period of employment. Changes will not be effective until submitted in writing and approved by the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. If the request is for a delay in the first date of need and is made after workers have departed for the employer's place of employment, the CO may only approve the change if the employer includes with the request a written assurance signed and dated by the employer that all workers who are already traveling to the place of employment will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

#### Post-Acceptance Requirements

##### § 655.150 Interstate clearance of job order.

(a) *CO approves for interstate clearance.* The CO will promptly transmit a copy of the approved job order for interstate clearance, at minimum, to all States listed in the job order as anticipated place(s) of employment and all other States designated by the OFLC Administrator as States of traditional or expected labor supply for the anticipated place(s) of employment under § 655.154(d).

(b) *Duration of posting.* Each of the SWAs to which the CO transmits the job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

##### §§ 655.151–655.152 [Reserved]

##### § 655.153 Contact with former U.S. workers.

The employer must contact, by mail or other effective means, U.S. workers employed by the employer in the

occupation at the place of employment during the previous year and solicit their return to the job. This contact must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 and before the date specified in § 655.158. Documentation sufficient to prove contact must be maintained in the event of an audit or investigation. An employer has no obligation to contact U.S. workers it terminated for cause or who abandoned employment at any time during the previous year if the employer provided timely notice to the NPC of the termination or abandonment in the manner described in § 655.122(n).

##### § 655.154 Additional positive recruitment.

(a) *Where to conduct additional positive recruitment.* In addition to the CO's posting of the job opportunity on an electronic job registry in accordance with § 655.144, the employer must conduct positive recruitment as required by the OFLC Administrator's determination of traditional or expected labor supply States, which is published annually in accordance with paragraph (d) of this section.

(b) *Additional requirements should be comparable to non-H-2A employers in the area.* The location(s) and method(s) of the positive recruitment required of the employer must be no less than the normal recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of intended employment, taking into consideration the kind and degree of recruitment efforts which the employer may make to obtain foreign workers.

(c) *Nature of the additional positive recruitment.* The OFLC Administrator's labor supply State determination will identify areas of labor supply within a State, and the NOA issued under § 655.143 will describe the precise nature of the additional positive recruitment required of the employer, if any. The employer will not be required to conduct positive recruitment in more than three States for each area of intended employment listed on the employer's *Application for Temporary Employment Certification* and job order.

(d) *Determination of labor supply States.* (1) The OFLC Administrator will make an annual determination with respect to each State whether there are other traditional or expected labor supply States and, within a traditional or expected labor supply State, areas in which there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work in that State. The OFLC Administrator will publish the

determination annually on OFLC's website.

(2) The determination will become effective on the date of publication on OFLC's website for employers who have not commenced positive recruitment under this subpart and will remain valid until the OFLC Administrator publishes a new determination.

(3) The determination as to whether any State is a source of traditional or expected labor supply to another State will be based primarily upon information provided by the SWAs to the OFLC Administrator within 120 calendar days preceding the determination.

##### § 655.155 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, able, willing, and available for employment.

##### § 655.156 Recruitment report.

(a) *Requirements of a recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted on a date specified by the CO in the NOA set forth in § 655.143 and contain the following information:

(1) Identify the name of each recruitment source and date(s) of advertisement;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker;

(3) Confirm that former U.S. workers were contacted, with a description by what means they were contacted and the date(s) of such contact, or state there are no former U.S. workers to contact; and

(4) If applicable, for each U.S. worker who applied for the position but was not hired, explain 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 until the end of the recruitment period, as set forth in § 655.135(d). The updated report must be made available in the event of a post-certification audit or upon request by the Department. The Department may share recruitment report information with any other Federal agency, as set forth in § 655.130(f).

##### § 655.157 Withholding of U.S. workers prohibited.

(a) *Filing a complaint.* Any employer who has reason to believe that a person

or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the place of employment of H-2A workers in order to force the hiring of U.S. workers during the recruitment period, as set forth in § 655.135(d), may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(b) *Duty to investigate.* Upon receipt, the CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(c) *Duty to suspend the recruitment period.* Where the CO determines, after conducting the interviews required by paragraph (b) of this section, that the employer's complaint is valid and justified, the CO will immediately suspend the applicable recruitment period, as set forth in § 655.135(d), to the employer. The CO's determination is the final decision of the Secretary.

#### § 655.158 Duration of positive recruitment.

Except as otherwise noted, the obligation to engage in positive recruitment described in §§ 655.150 through 655.154 will terminate on the date H-2A workers depart for the employer's place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of employment.

#### Labor Certification Determinations

##### § 655.160 Determinations.

Except as otherwise noted in this section, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification*. An *Application for Temporary Employment Certification* that is modified under § 655.142 or that otherwise does not meet the requirements for certification in this subpart is not subject to the 30-day timeframe for certification.

##### § 655.161 Criteria for certification.

(a) The criteria for certification include whether the employer has complied with the applicable requirements of parts 653 and 654 of this chapter, and all requirements of this subpart, which are necessary to grant the labor certification.

(b) In making a determination as to 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, whom the employer has not rejected for a lawful, job-related reason.

##### § 655.162 Approved certification.

If temporary agricultural labor certification is granted, the CO will send a Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.130(c), the CO will send the Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order by means normally assuring next day delivery. The CO will send the certified *Application for Temporary Employment Certification* and job order, including any approved modifications, directly to USCIS using an electronic method(s) designated by the OFLC Administrator.

##### § 655.163 Certification fee.

A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part will include a bill for the required certification fees. Each employer of H-2A workers under the *Application for Temporary Employment Certification* (except joint employer agricultural associations, which may not be assessed a fee in addition to the fees assessed to the employer-members of the agricultural association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the *Application for Temporary Employment Certification* (in whole or in part), as follows:

(a) *Amount.* The *Application for Temporary Employment Certification* fee for each employer receiving a temporary agricultural labor certification is \$100 plus \$10 for each H-2A worker certified under the *Application for Temporary Employment Certification*, provided that the fee to an

employer for each temporary agricultural labor certification received will be no greater than \$1,000. There is no additional fee to the association filing the *Application for Temporary Employment Certification*. The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its H-2A employer-members, the aggregate fees for all employers of H-2A workers under the *Application for Temporary Employment Certification* must be paid by one check or money order.

(b) *Timeliness.* Fees must be received by the CO no more than 30 calendar days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182.

##### § 655.164 Denied certification.

If temporary agricultural labor certification is denied, the CO will send a Final Determination notice to the employer and a copy, if appropriate, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.130(c), the CO will send the Final Determination notice by means normally assuring next day delivery. The Final Determination notice will:

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

(b) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the denial under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the denial is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification*.

##### § 655.165 Partial certification.

The CO may issue a partial certification, reducing either the period of employment or the number of H-2A workers being requested or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*, an audit, or otherwise. The number of workers certified will be reduced by one for each U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and has not been rejected for lawful, job-related reasons, to perform the labor



or services. If a partial labor certification is issued, the CO will send the Final Determination notice approving partial certification using the procedures at § 655.162. The Final Determination notice will:

(a) State the reason(s) the period of employment and/or the number of H-2A workers requested has been reduced, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the partial certification under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the partial certification is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification*.

**§ 655.166 Requests for determinations based on nonavailability of U.S. workers.**

(a) *Standards for requests.* If a temporary agricultural labor certification has been partially granted or denied based on the CO's determination that able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the first date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or available, the employer may request a new temporary agricultural labor certification determination from the CO. Prior to making a new determination, the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request under paragraph (c) of this section. An employer may appeal a denial of such a determination in accordance with the procedures contained in § 655.171.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO in writing using an electronic method(s) designated by the OFLC Administrator, unless the employer requests to file the request by mail as set forth in § 655.130(c). If the employer

requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

(c) *Notification of determination.* If the CO determines that U.S. workers have become unavailable and cannot identify sufficient available U.S. workers who are able, willing, eligible, and qualified or who are likely to become available, the CO will grant the employer's request for a new determination on the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162 or § 655.165. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful, job-related reasons.

**§ 655.167 Document retention requirements of H-2A employers.**

(a) *Entities required to retain documents.* All employers must retain documents and records demonstrating compliance with this subpart.

(b) *Period of required retention.* Records and documents must be retained for a period of 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of determination if the *Application for Temporary Employment Certification* is denied or withdrawn.

(c) *Documents and records to be retained by all employers.* All employers must retain:

(1) Proof of recruitment efforts, including:

(i) Job order placement as specified in § 655.121;

(ii) Contact with former U.S. workers as specified in § 655.153; and

(iii) Additional positive recruitment efforts as specified in § 655.154.

(2) Substantiation of information submitted in the recruitment report prepared in accordance with § 655.156, such as evidence of nonapplicability of contact of former employees as specified in § 655.153.

(3) The final recruitment report and any supporting resumes and contact information as specified in § 655.156(b).

(4) Proof of workers' compensation insurance or State law coverage as specified in § 655.122(e).

(5) Records of each worker's earnings as specified in § 655.122(j).

(6) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in 29 CFR 501.10 and specified in § 655.122(q).

(7) If applicable, records of notice to the NPC and DHS of the abandonment of employment or termination for cause of a worker as set forth in § 655.122(n).

(d) *Additional retention requirement for agricultural associations filing an Application for Temporary Employment Certification.* In addition to the documents specified in paragraph (c) of this section, associations must retain documentation substantiating their status as an employer or agent, as specified in § 655.131.

**Post-Certification**

**§ 655.170 Extensions.**

An employer may apply for extensions of the period of employment in the following circumstances.

(a) *Short-term extension.* Employers seeking extensions of 2 weeks or less of the certified *Application for Temporary Employment Certification* must apply directly to DHS for approval. If granted, the *Application for Temporary Employment Certification* will be deemed extended for such period as is approved by DHS.

(b) *Long-term extension.* Employers seeking extensions of more than 2 weeks may apply to the CO. 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). Such requests must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. The CO will not grant an extension where the total work contract period under that *Application for Temporary Employment Certification* and extensions would last longer than 1 year, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.171.

(c) *Disclosure.* The employer must provide to the workers a copy of any approved extension in accordance with § 655.122(q), as soon as practicable.

**§ 655.171 Appeals.**

(a) *Request for review.* Where authorized in this subpart, an employer seeking review of a decision of the CO must request an administrative review



or de novo hearing before an ALJ of that decision to exhaust its administrative remedies. In such cases, the request for review:

(1) Except as provided in § 655.181(b)(3), must be received by the Chief ALJ, and the CO who issued the decision, within 10 business days from the date of the CO's decision;

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

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

(4) Must clearly state whether the employer is seeking administrative review or a de novo hearing. If the request does not clearly state the employer is seeking a de novo hearing, then the employer waives its right to a hearing, and the case will proceed as a request for administrative review;

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

(6) May contain any legal argument that the employer believes will rebut the basis of the CO's action, including any briefing the employer wishes to submit where the request is for administrative review;

(7) May contain only such evidence as was actually before the CO at the time of the CO's decision, where the request is for administrative review; and

(8) May contain new evidence for the ALJ's consideration, where the request is for a de novo hearing, provided that the new evidence is introduced at the hearing.

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

(c) *Assignment.* The Chief ALJ will immediately assign an ALJ to consider the particular case, which may be a single member or a three-member panel of the BALCA.

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

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

(3) *Scope of review.* The ALJ will consider the documents in the OFLC administrative file that were before the CO at the time of the CO's decision and any written submissions from the parties or amici curiae that do not contain new evidence. The ALJ may not consider evidence not before the CO at the time of the CO's decision, even if such evidence is in the administrative file. After due consideration, the ALJ will affirm, reverse, or modify the CO's decision, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95.

(4) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the employer's attorney or agent (if applicable), the CO, and counsel for the CO within 7 business days of the submission of the CO's brief or 10 business days after receipt of the OFLC administrative file, whichever is later, using means normally assuring next-day delivery.

(e) *De novo hearing—(1) Conduct of hearing.* Where the employer has requested a de novo hearing the procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 14 business days after the ALJ's receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence during the hearing as appropriate;

(iii) The ALJ may authorize discovery and the filing of pre-hearing motions, and so limit them to the types and quantities which in the ALJ's discretion will contribute to a fair hearing without unduly burdening the parties;

(iv) The ALJ's decision must be rendered within 10 calendar days after the hearing; and

(v) If the employer waives the right to a hearing, such as by asking for a decision on the record, or if the ALJ determines there are no disputed material facts to warrant a hearing, then the standard and scope of review for administrative review applies.

(2) *Standard and scope of review.* The ALJ will review the evidence presented during the hearing and the CO's

decision de novo. The ALJ may determine that there are no issues of material fact, or only some issues of material fact, for which there is a genuine dispute, and may subsequently limit the hearing to only issues of material fact for which there is a genuine dispute. If new evidence is submitted with a request for a de novo hearing, and the ALJ subsequently determines that a hearing is warranted, the new evidence provided with the request must be introduced at the hearing to be considered by the ALJ. After a de novo hearing, the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95.

(3) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the employer's attorney or agent (if applicable), the CO, and counsel for the CO by means normally assuring next-day delivery.

#### § 655.172 Post-certification withdrawals.

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order after the CO grants certification under § 655.160. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the certification and stating the reason(s) for the withdrawal.

#### § 655.173 Setting meal charges; petition for higher meal charges.

(a) *Meal charges.* An employer may charge workers up to \$14.00 per day for providing them with three meals. The maximum charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12-month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the OFLC Administrator in the **Federal Register**. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of the FLSA

at 29 U.S.C. 203(m), including the recordkeeping requirements found at 29 CFR 516.27.

(b) *Petitions for higher meal charges.* The employer may file a petition with the CO to request approval to charge more than the applicable amount set under paragraph (a) of this section.

(1) *Filing a higher meal charge request.* To request approval to charge more than the applicable amount set under paragraph (a) of this section, the employer must submit the documentation required by either paragraph (b)(1)(i) or (ii) of this section. A higher meal charge request will be denied, in whole or in part, if the employer's documentation does not justify the higher meal charge requested.

(i) *Meals prepared directly by the employer.* Documentation submitted must include only the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served, and the number of days meals were provided. The cost of the following items may be included in the employer's charge to workers for providing prepared meals: food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period must be retained and must be available for inspection for a period of 3 years.

(ii) *Meals provided through a third party.* Documentation submitted must identify each third party that the employer will engage to prepare meals, describe how the employer will fulfill its obligation to provide three meals per day to workers through its agreement with the third party, and document the third party's charge(s) to the employer for the meals to be provided. Neither the third party's charge(s) to the employer nor the employer's meal charge to workers may include a profit, kick back, or other direct or indirect benefit to the employer, a person affiliated with the employer, or to another person for the employer's benefit. Receipts and other cost records documenting payments made to the third party that prepared the meals and meal charge deductions from employee pay must be retained for the period provided in § 655.167(b) and must be available for inspection by the CO and WHD during an investigation.

(2) *Effective date and scope of validity of a higher meal charge approval.* The employer may begin charging the higher rate upon receipt of approval from the CO, unless the CO sets a later effective date in the decision, and after disclosing to workers any change in the meal charge or deduction. A favorable decision from the CO is valid only for the meal provision arrangement documented under paragraph (b)(1) of this section and the approved higher meal charge amount. If the approved meal provision arrangement changes, the employer may charge no more than the maximum permitted under paragraph (a) of this section until a new petition for a higher meal charge based on the new arrangement is approved.

(3) *Appeal rights.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief ALJ, pursuant to § 655.171.

#### **§ 655.174 Public disclosure.**

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

#### **Integrity Measures**

##### **§ 655.180 Audit.**

The CO may conduct audits of applications for which certifications have been granted.

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

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's agent or attorney. 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 fully comply with the audit process may result in the revocation of the certification or program debarment.

(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 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 may refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

#### **§ 655.181 Revocation.**

(a) *Basis for DOL revocation.* The OFLC Administrator may revoke a temporary agricultural labor certification approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process;

(2) The employer substantially violated a material term or condition of the approved temporary agricultural labor certification, as defined in § 655.182;

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (as discussed in § 655.180), or law enforcement function under 8 U.S.C. 1188, 29 CFR part 501, 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 or a court order secured by the Secretary under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(b) *DOL procedures for revocation—*

(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's temporary agricultural labor certification, the OFLC Administrator 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 it will inform the employer of its right to submit rebuttal evidence or to appeal as provided in this paragraph (b)(1) and in paragraph (b)(3) of this section. If the employer does not file rebuttal evidence or an appeal within 14 calendar days of the date of the Notice of Revocation, the Notice is the final agency action and will take effect immediately at the end of the 14-day period.

(2) *Rebuttal.* The employer may submit evidence to rebut the grounds stated in the Notice of Revocation within 14 calendar days of the date the

Notice is issued. If rebuttal evidence is timely filed by the employer, the OFLC Administrator will inform the employer of the OFLC Administrator's final determination on the revocation within 14 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification should be revoked, the OFLC Administrator will inform the employer of its right to appeal as provided in this paragraph (b)(2) and in paragraph (b)(3) of this section. If the employer does not appeal the OFLC Administrator's final determination within 10 calendar days, it will become the final agency action.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the OFLC Administrator after the review of rebuttal evidence, according to the appeal procedures of § 655.171. In such cases, the appeal must be received by the Chief ALJ, and the OFLC Administrator, within the time periods established in paragraphs (b)(1) and (2) of this section.

(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 agricultural labor certification is revoked, the OFLC Administrator 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 agricultural labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(1);

(2) The worker's outbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.122(i); and

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

#### **§ 655.182 Debarment.**

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part

501 subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H-2A workers; workers in corresponding employment; or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Effect on future applications.* No application for H-2A workers may be filed by a debarred employer, or by any successor in interest to a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, subject to the term limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Statute of limitations and period of debarment.* (1) The OFLC Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

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

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H-2A workers and/or workers in corresponding employment;

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

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

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

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180;

(vii) Employing an H-2A 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;

(viii) A violation of the requirements of § 655.135(j) or (k);

(ix) A violation of any of the provisions listed in 29 CFR 501.4(a); or

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

(2) The employer's failure to pay a necessary certification fee in a timely manner;

(3) The H-2ALC's failure to submit an original surety bond meeting the requirements of § 655.132(c) within 30 days of the date the temporary agricultural labor certification was issued or failure to submit additional surety within 30 days of a finding under 20 CFR 501.9(a) that the face value of the bond is insufficient;

(4) Fraud involving the *Application for Temporary Employment Certification*; or

(5) A material misrepresentation of fact during the application process.

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

(1) Previous history of violation(s) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(2) The number of H-2A 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) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;

(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 whether the person has previously violated 8 U.S.C. 1188; and

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

(f) *Debarment procedure*—(1) *Notice of Debarment.* If the OFLC Administrator makes a determination to debar an employer, agent, or attorney, the OFLC Administrator 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 it will 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 will be the final agency action and the debarment will take effect at the end of the 30-day period.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 30 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party should be debarred, the OFLC Administrator will inform the party of its right to request a debarment hearing according to the procedures of paragraph (f)(3) of this section. The party must request a hearing within 30 calendar days after the date of the OFLC Administrator's final determination, or the OFLC Administrator's determination will be the final agency action and the debarment will take effect at the end of the 30-calendar-day period.

(3) *Hearing.* The recipient of a Notice of Debarment may 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 OFLC Administrator after review of rebuttal evidence submitted pursuant to paragraph (f)(2) of this section. To obtain a debarment hearing, the debarred party must, within 30 calendar days of the date of the Notice or the final determination, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street NW, Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the OFLC Administrator. 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 properly filed within 30 calendar days from the issuance of the Notice of Debarment or final determination. The timely filing of a request for a hearing stays the debarment pending the outcome of the hearing. Within 10 calendar days of receipt of the request for a hearing, the OFLC Administrator 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 OFLC Administrator'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 immediately 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 will be deemed 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 such 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 such presentation must be submitted.

(6) *ARB decision.* The ARB's decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ. If the ARB fails to issue a decision within 90 calendar days from the notice granting the petition, the ALJ's decision will be the final agency decision.

(g) *Concurrent debarment jurisdiction.* OFLC and WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and WHD may inform one another and may 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 promptly.

(h) *Debarment of associations, employer-members of associations, and joint employers.* If the OFLC Administrator determines that an individual employer-member of an agricultural association, or a joint employer under § 655.131(b), has committed a substantial violation, the debarment determination will apply only to that employer-member unless the OFLC Administrator determines that the agricultural association or another agricultural association member or joint employer under § 655.131(b), participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) or joint employer(s) under § 655.131(b), as well.

(i) *Debarment involving agricultural associations acting as joint employers.* If the OFLC Administrator determines that an agricultural association acting as a joint employer with its employer-members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the OFLC Administrator determines that the employer-member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its employer-members during the period of the debarment.

(j) *Debarment involving agricultural associations acting as sole employers.* If the OFLC Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

#### **§ 655.183 Less than substantial violations.**

(a) *Requirement of special procedures.* If the OFLC Administrator determines that a less than substantial violation has occurred but has reason to believe that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before

and after the temporary agricultural labor certification determination. These special procedures may include special on-site positive recruitment and streamlined interviewing and referral techniques. The special procedures are designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary agricultural labor certification. Such requirements will be reasonable; will not require the employer to offer better wages, working conditions, and benefits than those specified in § 655.122; and will be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart.

(b) *Notification of required special procedures.* The OFLC Administrator will notify the employer (or agent or attorney) in writing of the special procedures that will be required in the coming year. The notification will state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary agricultural labor certification, and will offer the employer an opportunity to request an administrative review or a de novo hearing before an ALJ. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.171 will apply.

(c) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (a) of this section, the OFLC Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H-2A certification determination will be reduced by 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC Administrator in a written temporary agricultural labor certification determination. The notice will offer the employer an opportunity to request administrative review or a de novo hearing before an ALJ. If administrative review or a de novo hearing is requested, the procedures prescribed in § 655.171 will apply, provided that if the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (a) of this section, the

reduction in the number of workers requested will be 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year.

**§ 655.184 Applications involving fraud or willful misrepresentation.**

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification*, the CO may refer the matter to DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If WHD, a court, or DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* and certification has been granted, a finding under this paragraph (b) will be cause to revoke the certification. The finding of fraud or willful misrepresentation may also constitute a debarable violation under § 655.182.

**§ 655.185 Job service complaint system; enforcement of work contracts.**

(a) *Filing with DOL.* Complaints arising under this subpart must be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints involving allegations of fraud or misrepresentation must be referred by the SWA to the CO for appropriate handling and resolution. Complaints that involve work contracts must be referred by the SWA to WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, WHD may report the results of its investigation to the OFLC Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) *Filing with the Department of Justice.* Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if the Immigrant and Employee Rights Section becomes aware of a violation of the regulations in this subpart, it may provide such information to the appropriate SWA and the CO.

**Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Occupations**

**§ 655.200 Scope and purpose of herding and range livestock regulations in this section and §§ 655.201 through 655.235.**

(a) *Purpose.* The purpose of this section and §§ 655.201 through 655.235 is to establish certain procedures for employers who apply to the Department to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the range, as defined in § 655.201. Unless otherwise specified in this section and §§ 655.201 through 655.235, employers whose job opportunities meet the qualifying criteria under this section and §§ 655.201 through 655.235 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to this section and §§ 655.201 through 655.235.* The procedures in this section and §§ 655.201 through 655.235 apply to job opportunities with the following unique characteristics:

(1) The work activities involve the herding or production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock), as defined under § 655.201;

(2) The work is performed on the range for the majority (meaning more than 50 percent) of the workdays in the work contract period. Any additional work performed at a place other than the range must constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock); and

(3) The work activities generally require the workers to be on call 24 hours per day, 7 days a week.

**§ 655.201 Definition of herding and range livestock terms.**

The following are terms that are not defined in §§ 655.100 through 655.185 and are specific to applications for labor certifications involving the herding or production of livestock on the range.

*Herding.* Activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the range.

*Livestock.* An animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of §§ 655.200 through 655.235, livestock refers to those species raised on the range.

*Production of livestock.* The care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides on the range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock. This term also includes duties performed off the range that are closely and directly related to herding and/or the production of livestock. The following are non-exclusive examples of ranch work that is closely and directly related: repairing fences used to contain the herd; assembling lambing jugs; cleaning out lambing jugs; feeding and caring for the dogs that the workers use on the range to assist with herding or guarding the flock; feeding and caring for the horses that the workers use on the range to help with herding or to move the sheep camps and supplies; and loading animals into livestock trucks for movement to the range or to market. The following are examples of ranch work that is not closely and directly related: working at feedlots; planting, irrigating and harvesting crops; operating or repairing heavy equipment; constructing wells or dams; digging irrigation ditches; applying weed control; cutting trees or chopping wood; constructing or repairing the bunkhouse or other ranch buildings; and delivering supplies from the ranch to the herders on the range.

*Range.* The range is any area located away from the ranch headquarters used by the employer. The following factors are indicative of the range: it involves land that is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in a remote, isolated area; and typically range housing is required so that the herder can be in constant attendance to the herd. No one factor is controlling, and the totality of the circumstances is considered in determining what should be considered range. The range does not include feedlots, corrals, or any area where the stock involved would be near ranch headquarters. Ranch headquarters, which is a place where the business of the ranch occurs and is often where the owner resides, is limited and does not embrace large acreage; it only includes the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The range also

does not include any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health.

*Range housing.* Range housing is housing located on the range that meets the standards articulated under § 655.235.

**§ 655.205 Herding and range livestock job orders.**

An employer whose job opportunity has been determined to qualify for the procedures in §§ 655.200 through 655.235 is not required to comply with the job order filing timeframe requirements in § 655.121(a) and (b) or the job order review process in § 655.121(e) and (f). Rather, the employer must submit the job order along with a completed *Application for Temporary Employment Certification*, as required in § 655.215, to the designated NPC for the NPC's review.

**§ 655.210 Contents of herding and range livestock job orders.**

(a) *Content of job offers.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* The job offer must include a statement that the workers are on call for up to 24 hours per day, 7 days per week and that the workers spend the majority (meaning more than 50 percent) of the workdays during the contract period in the herding or production of livestock on the range. Duties may include activities performed off the range only if such duties constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). All such duties must be specifically disclosed on the job offer. The job offer may also specify that applicants must possess up to 6 months of experience in similar occupations involving the herding or production of livestock on the range and require reference(s) for the employer to verify applicant experience. An employer may specify other appropriate job qualifications and requirements for its job opportunity. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers engaged in herding or the production of livestock on the range. Any such

requirements must be applied equally to both U.S. and foreign workers. Each job qualification and requirement listed in the job offer must be bona fide, and the CO may require the employer to submit documentation to substantiate the appropriateness of any other job qualifications and requirements specified in the job offer.

(c) *Range housing.* The employer must specify in the job order that range housing will be provided. The range housing must meet the requirements set forth in § 655.235.

(d) *Employer-provided items.* (1) The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. The employer must specify in the job order which items it will provide to the worker.

(2) Because of the unique nature of the herding or production of livestock on the range, this equipment must include effective means of communicating with persons capable of responding to the worker's needs in case of an emergency including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order:

(i) The type(s) of electronic communication device(s) and that such device(s) will be provided without charge or deposit charge to the worker during the entire period of employment; and

(ii) If there are periods of time when the workers are stationed in locations where electronic communication devices may not operate effectively, the employer must specify in the job order, the means and frequency with which the employer plans to make contact with the workers to monitor the worker's well-being. This contact must include either arrangements for the workers to be located, on a regular basis, in geographic areas where the electronic communication devices operate effectively, or arrangements for regular, pre-scheduled, in-person visits between the workers and the employer, which may include visits between the workers and other persons designated by the employer to resupply the workers' camp.

(e) *Meals.* The employer must specify in the job offer and provide to the worker, without charge or deposit charge:

(1) Either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to

enable the worker to prepare their own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and

(2) Adequate potable water, or water that can be easily rendered potable and the means to do so. Standards governing the provision of water to range workers are also addressed in § 655.235(e).

(f) *Hours and earnings statements.* (1) The employer must keep accurate and adequate records with respect to the worker's earnings and furnish to the worker on or before each payday a statement of earnings. The employer is exempt from recording the hours actually worked each day, the time the worker begins and ends each workday, as well as the nature and amount of work performed, but all other regulatory requirements in § 655.122(j) and (k) apply.

(2) The employer must keep daily records indicating whether the site of the employee's work was on the range or off the range. If the employer prorates a worker's wage pursuant to paragraph (g)(2) of this section because of the worker's voluntary absence for personal reasons, it must also keep a record of the reason for the worker's absence.

(g) *Rates of pay.* The employer must pay the worker at least the monthly AEWR, as specified in § 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof.

(1) The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, or any agreed-upon collective bargaining rate, whichever is highest, and must be paid to each worker free and clear without any unauthorized deductions.

(2) The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if a worker is voluntarily unavailable to work for personal reasons.

(h) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly. Employers must pay wages when due.

#### **§ 655.211 Herding and range livestock wage rate.**

(a) *Compliance with rates of pay.* (1) To comply with its obligation under § 655.210(g), an employer must offer, advertise in its recruitment, and pay each worker employed under §§ 655.200 through 655.235 a wage that is at least the highest of the monthly AEWR established under this section, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action.

(2) If the monthly AEWR established under this section is adjusted during a work contract, and is higher than both the agreed-upon collective bargaining wage and the applicable minimum wage imposed by Federal or State law or judicial action in effect at the time the work is performed, the employer must pay at least that adjusted monthly AEWR upon the effective date of the updated monthly AEWR published by the Department in the **Federal Register**.

(b) *Publication of the monthly AEWR.* The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to the monthly AEWR as a document in the **Federal Register**.

(c) *Monthly AEWR rate.* (1) The monthly AEWR shall be \$7.25 multiplied by 48 hours, and then multiplied by 4.333 weeks per month; and

(2) Beginning for calendar year 2017, the monthly AEWR shall be adjusted annually based on the Employment Cost Index (ECI) for wages and salaries published by the Bureau of Labor Statistics (BLS) for the preceding October-October period.

(d) *Transition rates.* (1) For the period from November 16, 2015, through calendar year 2016, the Department shall set the monthly AEWR at 80 percent of the result of the formula in paragraph (c) of this section.

(2) For calendar year 2017, the Department shall set the monthly AEWR at 90 percent of the result of the formula in paragraph (c) of this section.

(3) For calendar year 2018 and beyond, the Department shall set the monthly AEWR at 100 percent of the result of the formula in paragraph (c) of this section.

#### **§ 655.215 Procedures for filing herding and range livestock Applications for Temporary Employment Certification.**

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for filing an *Application*

*for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification* and job order.

(1) The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment in one or more contiguous States.

(2) An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous States with different first dates of need. Unless modifications to a sheep or goat herding or production of livestock job order are required by the CO or requested by the employer, pursuant to § 655.121(h), the agricultural association is not required to re-submit the job order during the calendar year with its *Application for Temporary Employment Certification*.

#### **§ 655.220 Processing herding and range livestock Applications for Temporary Employment Certification.**

(a) *NPC review.* Unless otherwise specified in §§ 655.200 through 655.235, the CO will review and process the *Application for Temporary Employment Certification* and job order in accordance with the requirements outlined in §§ 655.140 through 655.145, and will work with the employer to address any deficiencies in the job order in a manner consistent with §§ 655.140 through 655.141.

(b) *Notice of acceptance.* Once the job order is determined to meet all regulatory requirements, the NPC will issue a NOA consistent with § 655.143(b), provide notice to the employer authorizing conditional access to the interstate clearance system, and transmit an electronic copy of the approved job order to each SWA with jurisdiction over the anticipated place(s) of employment. The CO will direct the SWA to place the job order promptly in clearance and commence recruitment of U.S. workers. Where an agricultural association files as a joint employer and submits a single job order on behalf of its employer-members, the CO will transmit a copy of the job order to the SWA having jurisdiction over the location of the agricultural association, those SWAs having jurisdiction over other States where the work will take place, and to the SWAs in all States designated under § 655.154(d), directing each SWA to place the job order in



intrastate clearance and commence recruitment of U.S. workers.

(c) *Electronic job registry.* Under § 655.144(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, the Department will keep the job order posted on the OFLC electronic job registry until the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all employer-members identified on the job order.

**§ 655.225 Post-acceptance requirements for herding and range livestock.**

(a) Unless otherwise specified in this section, the requirements for recruiting U.S. workers by the employer and SWA must be satisfied, as specified in §§ 655.150 through 655.158.

(b) Pursuant to § 655.150(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, each of the SWAs to which the job order was transmitted by the CO or the SWA having jurisdiction over the location of the agricultural association must keep the job order on its active file the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all employer-members identified on the job order, and must refer to the agricultural association each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(c) Any eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity and is hired will be placed at the location nearest to them absent a request for a different location by the U.S. worker. Employers must make reasonable efforts to accommodate such placement requests by the U.S. worker.

(d) An agricultural association that fulfills the recruitment requirements for its employer-members is required to maintain a written recruitment report containing the information required by § 655.156 for each individual employer-member identified in the application or job order, including any approved modifications.

**§ 655.230 Range housing.**

(a) Housing for work performed on the range must meet the minimum standards contained in §§ 655.235 and 655.122(d)(2).

(b) The SWA with jurisdiction over the location of the range housing must inspect and certify that such housing used on the range is sufficient to accommodate the number of certified

workers and meets all applicable standards contained in § 655.235. The SWA must conduct a housing inspection no less frequently than once every three calendar years after the initial inspection and provide documentation to the employer certifying the housing for a period lasting no more than 36 months. If the SWA determines that an employer's housing cannot be inspected within a 3-year timeframe or, when it is inspected, the housing does not meet all the applicable standards in § 655.235, the CO may deny the H-2A application in full or in part or require additional inspections, to be carried out by the SWA, in order to satisfy the regulatory requirement.

(c)(1) The employer may self-certify its compliance with the standards contained in § 655.235 only when the employer has received a certification from the SWA for the range housing it seeks to use within the past 36 months.

(2) To self-certify the range housing, the employer must submit a copy of the valid SWA housing certification and a written statement, signed and dated by the employer, to the SWA and the CO assuring that the housing is available, sufficient to accommodate the number of workers being requested for temporary agricultural labor certification, and meets all the applicable standards for range housing contained in § 655.235.

(d) The use of range housing at a location other than the range, where fixed-site employer-provided housing would otherwise be required, is permissible only when the worker occupying the housing is performing work that constitutes the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). In such a situation, workers must be granted access to facilities, including but not limited to toilets and showers with hot and cold water under pressure, as well as cooking and cleaning facilities, that would satisfy the requirements contained in § 655.122(d)(1)(i). When such work does not constitute the production of livestock, workers must be housed in housing that meets all the requirements of § 655.122(d).

**§ 655.235 Standards for range housing.**

An employer employing workers under this section and §§ 655.200 through 655.230 may use a mobile unit, camper, or other similar mobile housing vehicle, tents, and remotely located stationary structures along herding trails, which meet the following standards:

(a) *Housing site.* Range housing sites must be well drained and free from depressions where water may stagnate.

(b) *Water supply.* (1) An adequate and convenient supply of water that meets the standards of the State or local health authority must be provided.

(2) The employer must provide each worker at least 4.5 gallons of potable water, per day, for drinking and cooking, delivered on a regular basis, so that the workers will have at least this amount available for their use until this supply is next replenished. Employers must also provide an additional amount of water sufficient to meet the laundry and bathing needs of each worker. This additional water may be non-potable, and an employer may require a worker to rely on natural sources of water for laundry and bathing needs if these sources are available and contain water that is clean and safe for these purposes. If an employer relies on alternate water sources to meet any of the workers' needs, it must take precautionary measures to protect the worker's health where these sources are also used to water the herd, dogs, or horses, to prevent contamination of the sources if they collect runoff from areas where these animals excrete.

(3) The water provided for use by the workers may not be used to water dogs, horses, or the herd.

(4) In situations where workers are located in areas that are not accessible by motorized vehicle, an employer may request a variance from the requirement that it deliver potable water to workers, provided the following conditions are satisfied:

(i) It seeks the variance at the time it submits its *Application for Temporary Employment Certification*;

(ii) It attests that it has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located, and that these sources will remain available during the period the worker is at that location;

(iii) It attests that it shall provide each worker an effective means to test whether the water is potable and, if not potable, the means to easily render it potable; and

(iv) The CO approves the variance.

(5) Individual drinking cups must be provided.

(6) Containers appropriate for storing and using potable water must be provided and, in locations subject to freezing temperatures, containers must be small enough to allow storage in the housing unit to prevent freezing.

(c) *Excreta and liquid waste disposal.*

(1) Facilities, including shovels, must be provided and maintained for effective

disposal of excreta and liquid waste in accordance with the requirements of the State health authority or involved Federal agency; and

(2) If pits are used for disposal by burying of excreta and liquid waste, they must be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with State and local health and sanitation requirements.

(d) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants;

(2) Housing, other than tents, must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering;

(3) Each housing unit must have at least one window that can be opened or skylight opening directly to the outdoors; and

(4) Tents appropriate to weather conditions may be used only where the terrain and/or land use regulations do not permit the use of other more substantial housing.

(e) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or

whenever a predetermined safe temperature or pressure is exceeded.

(5) A heater may be used in a tent if the heater is approved by a testing service and if the tent is fireproof.

(f) *Lighting.* (1) In areas where it is not feasible to provide electrical service to range housing units, including tents, lanterns must be provided (kerosene wick lights meet the definition of lantern); and

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

(g) *Bathing, laundry, and hand washing.* Bathing, laundry, and hand washing facilities must be provided when it is not feasible to provide hot and cold water under pressure.

(h) *Food storage.* When mechanical refrigeration of food is not feasible, the worker must be provided with another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator. Other proven methods of safeguarding fresh foods, such as dehydrating or salting, are acceptable.

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

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

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

(2) Provision must be made for collecting or burying refuse, which includes garbage, at least twice a week or more often if necessary, except where the terrain in which the housing is located cannot be accessed by motor vehicle and the refuse cannot be buried, in which case the employer must provide appropriate receptacles for storing the refuse and for removing the trash when the employer next transports supplies to the location.

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

(l) *Sleeping facilities.* A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement, unless a variance is requested from and granted by the CO. When filing an application for

certification and only where it is demonstrated to the CO that it is impractical to provide a comfortable and clean bed, cot, or bunk, with a clean mattress, for each range worker, the employer may request a variance from this requirement to allow for a second worker to join the range operation. Such a variance must be used infrequently, and the period of the variance will be temporary (*i.e.*, the variance shall be for no more than 3 consecutive days). Should the CO grant the variance, the employer must supply a sleeping bag or bed roll for the second occupant free of charge or deposit charge.

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

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

(3) Housing units for range use must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Tents are not required to have a second means of escape, except when large tents with walls of rigid material are used.

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

#### **Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations**

##### **§ 655.300 Scope and purpose.**

(a) *Purpose.* The purpose of this section and §§ 655.301 through 655.304 is to establish certain procedures for employers who apply to the DOL to obtain labor certifications to hire temporary agricultural foreign workers to perform animal shearing, commercial beekeeping, and custom combining, as defined in this subpart. Unless otherwise specified in this section and §§ 655.301 through 655.304, employers whose job opportunities meet the qualifying criteria under this section and §§ 655.301 through 655.304 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to this section and §§ 655.301 through 655.304.* The procedures in this section and §§ 655.301 through 655.304 apply to job

opportunities for animal shearing, commercial beekeeping, and custom combining, as defined under § 655.301, where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment.

**§ 655.301 Definition of terms.**

The following terms are specific to applications for labor certifications involving animal shearing, commercial beekeeping, and custom combining.

*Animal shearing.* Activities associated with the shearing and crutching of sheep, goats, or other animals producing wool or fleece, including gathering, moving, and sorting animals into shearing yards, stations, or pens; placing animals into position, whether loose, tied, or otherwise immobilized, prior to shearing; selecting and using suitable handheld or power-driven equipment and tools for shearing; shearing animals with care according to industry standards; marking, sewing, or disinfecting any nicks and cuts on animals due to shearing; cleaning and washing animals after shearing is complete; gathering, storing, loading, and delivering wool or fleece to storage yards, trailers or other containers; and maintaining, oiling, sharpening, and repairing equipment and other tools used for shearing. Transporting equipment and other tools used for shearing qualifies as an activity associated with animal shearing for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew. Wool or fleece grading, which involves examining, sorting, and placing unprocessed wool or fleece into containers according to government or industry standards, qualifies as activity associated with animal shearing for the purposes of this definition only where such activity is performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew.

*Commercial beekeeping.* Activities associated with the care or husbandry of bee colonies for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers, including assembling, maintaining, and repairing hives, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing,

raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies.

*Custom combining.* Activities for agricultural producers consisting of: operating self-propelled combine equipment (*i.e.*, equipment that reaps or harvests, threshes, and swath or winnow the crop); performing manual or mechanical adjustments to combine equipment, including cutters, blowers and conveyers; performing safety checks on self-propelled combine equipment; and maintaining and repairing equipment and other tools for performing swathing or combining work; and, where performed by workers employed by the same employer as the custom combining crew and who work and travel with the custom combining crew: transporting harvested crops to elevators, silos, or other storage areas, and transporting combine equipment and other tools used for custom combining work from one field to another. Neither the planting and cultivation of crops and related activities, nor component parts of custom combining not performed by the harvesting entity (*e.g.*, grain cleaning), are considered custom combining for the purposes of this definition.

**§ 655.302 Contents of job orders.**

(a) *Content of job offers.* Unless otherwise specified in §§ 655.300 through 655.304, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* (1) For job opportunities involving animal shearing, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must possess experience with an industry shearing method or pattern, must be willing to join the employer at the time the job opportunity is available and at

the place the employer is located, and must be available to complete the scheduled itinerary under the job order. U.S. applicants whose experience is based on a similar or related industry shearing method or pattern must be afforded a break-in period of no less than 5 working days to adapt to the employer's preferred shearing method or pattern.

(2) For job opportunities involving commercial beekeeping, the job offer may specify that applicants must possess up to 3 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must not have bee, pollen, or honey-related allergies, must possess a valid commercial U.S. driver's license or be able to obtain such license not later than 30 days after the first workday after the arrival of the worker at the place of employment, must be willing to join the employer at the time and place the employer is located, and must be available to complete the scheduled itinerary under the job order.

(3) For job opportunities involving custom combining, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must be willing to join the employer at the time and place the employer is located and must be available to complete the scheduled itinerary under the job order.

(4) An employer may specify other appropriate job qualifications and requirements for its job opportunity, subject to § 655.122(a) and (b).

(c) *Employer-provided communication devices.* For job opportunities involving animal shearing and custom combining, the employer must provide to at least one worker per crew, without charge or deposit charge, effective means of communicating with persons capable of responding to the workers' needs in case of an emergency, including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order the type(s) of electronic communication device(s) and that such devices will be provided without charge or deposit charge to at least one worker per crew during the entire period of employment.

(d) *Housing.* For job opportunities involving animal shearing and custom combining, the employer must specify in the job order that housing will be provided as set forth in § 655.304.

**§ 655.303 Procedures for filing Applications for Temporary Employment Certification.**

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.300 through 655.304, the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification*. The employer must identify each place of employment with as much geographic specificity as possible, including the names of each farm or ranch, their physical locations, and the estimated period of employment at each place of employment where work will be performed under the job order.

(c) *Scope of applications.* The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment in one or more contiguous States. An *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping may include one noncontiguous State at the beginning and end of the period of employment for the overwintering of bee colonies.

(d) *Agricultural association filings.* An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous States. An agricultural association filing as a joint employer may file an *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping including one noncontiguous State at the beginning and end of the period of employment for the overwintering of bee colonies.

**§ 655.304 Standards for mobile housing.**

(a) *Use of mobile housing.* An employer employing workers engaged in animal shearing or custom combining under this section and §§ 655.301 through 655.303 may use a mobile unit, camper, or other similar mobile housing unit that complies with all of the following standards, except as provided in paragraph (a)(1) or (2) of this section:

(1) In situations where the mobile housing unit will be located on the range (as defined in § 655.201) to enable work to be performed on the range, and where providing housing that meets each of the standards for mobile housing in this section is not feasible, an

employer may request a variance from the particular mobile housing standard(s) with which compliance is not feasible. The CO will specify the locations, dates, and specific variances, if approved. The following conditions must be satisfied for an employer to obtain a variance:

(i) The employer seeks the variance at the time it submits its *Application for Temporary Employment Certification*;

(ii) The employer identifies the particular mobile housing standard(s), and attests that compliance with the standard(s) is not feasible;

(iii) The employer identifies the location(s) in which the particular mobile housing standard(s) cannot be met;

(iv) The employer identifies the anticipated dates that the mobile housing unit will be in those location(s);

(v) The employer identifies the corresponding range housing standard(s) in § 655.235 that will be met instead, and attests that it will comply with such standard(s);

(vi) The employer attests to the reason why the particular mobile housing(s) standard cannot be met; and,

(vii) The CO approves the variance.

(2) A Canadian employer performing custom combining operations in the United States whose mobile housing unit is located in Canada when not in use must have the housing unit inspected and approved by an authorized representative of the Federal or provincial government of Canada, in accordance with inspection procedures and applicable standards for such housing under Canadian law or regulation.

(b) *Compliance with mobile housing standards.* The employer may comply with the standards for mobile housing in this section in one of two ways:

(1) The employer may provide a mobile housing unit that complies with all applicable standards; or

(2) The employer may provide a mobile housing unit and supplemental facilities (e.g., located at a fixed housing site) if workers are afforded access to all facilities contained in these standards.

(c) *Housing site.* (1) Mobile housing sites must be well drained and free from depressions where water may stagnate. They shall be located where the disposal of sewage is provided in a manner that neither creates, nor is likely to create, a nuisance or a hazard to health.

(2) Mobile housing sites shall not be in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards.

(3) Mobile housing sites shall be free from debris, noxious plants (e.g., poison

ivy, etc.), and uncontrolled weeds or brush.

(d) *Drinking water supply.* (1) An adequate and convenient supply of potable water that meets the standards of the local or State health authority must be provided.

(2) Individual drinking cups must be provided.

(3) A cold water tap shall be available within a reasonable distance of each individual living unit when water is not provided in the unit.

(4) Adequate drainage facilities shall be provided for overflow and spillage.

(e) *Excreta and liquid waste disposal.*

(1) Toilet facilities, such as portable toilets, recreational vehicle (RV) or trailer toilets, privies, or flush toilets, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the applicable local, State, or Federal health authority, whichever is most stringent.

(2) Where mobile housing units contain RV or trailer toilets, such facilities must be connected to sewage hookups whenever feasible (i.e., in campgrounds or RV parks).

(3) If wastewater tanks are used, the employer must make provisions to regularly empty the wastewater tanks.

(4) If pits are used for disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with local and State health and sanitation requirements.

(f) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition, and must provide shelter against the elements to occupants.

(2) Housing must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering.

(3) Each housing unit must have at least one window or a skylight that can be opened directly to the outdoors.

(g) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

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

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

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

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

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

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

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

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

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

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

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

Wall surfaces next to cooking areas must be made of fire-resistant material.

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

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

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

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

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

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

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

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

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

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

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

■ 5. Revise 29 CFR part 501 to read as follows:

## Title 29—Labor

### PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

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**Authority:** 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; 28 U.S.C. 2461 note; and sec. 701, Pub. L. 114–74, 129 Stat. 584.

#### Subpart A—General Provisions

##### § 501.0 Introduction.

The regulations in this part cover the enforcement of all contractual obligations, including requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B, applicable to the

employment of H–2A workers 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 the regulations in this part or 20 CFR part 655, subpart B.

#### § 501.1 Purpose and scope.

(a) *Statutory standards.* The standard in 8 U.S.C. 1188 provides that:

(1) An H–2A Petition to import an H–2A worker, as defined at 8 U.S.C. 1188, may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied for and received a temporary agricultural labor certification from the Secretary of Labor (Secretary). The temporary agricultural labor certification establishes that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the H–2A Petition; and

(ii) The employment of the H–2A worker in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR part 655, subpart B, or the regulations in this part, including imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations. See 8 U.S.C. 1188(g)(2).

(b) *Authority and role of the Office of Foreign Labor Certification.* The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, e.g., a Certifying Officer (CO).

(c) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part (“the H–2A program”), and to carry out other

statutory responsibilities required by 8 U.S.C. 1188. Certain investigatory, inspection, and law enforcement functions to carry out the provisions under 8 U.S.C. 1188 have been delegated by the Secretary to the WHD. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and workers in corresponding employment are enforced by WHD, including whether employment was offered to U.S. workers as required under 8 U.S.C. 1188 or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. 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 certification(s), and to seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages and reinstatement of laid off or displaced U.S. workers.

(d) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

(e) *Effect of regulations.* The enforcement functions carried out by WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part apply to the employment of any H–2A worker and any other worker in corresponding employment as the result of any *Application for Temporary Employment Certification* processed under 20 CFR 655.102(c).

#### § 501.2 Coordination between Federal agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the worker will be immediately forwarded to the appropriate WHD office for appropriate action under the regulations in this part.

(b) Information received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H–2A program, other Departments or agencies

as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is imposed will be cited in a single debarment proceeding. OFLC and WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

#### § 501.3 Definitions.

(a) *Definitions of terms used in this part.* The following defined terms apply to this part:

*Act.* The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

*Administrative Law Judge (ALJ).* A person within the Department of Labor’s (Department or DOL) Office of Administrative Law Judges (OALJ) appointed pursuant to 5 U.S.C. 3105.

*Administrator.* See definitions of OFLC Administrator and WHD Administrator in this paragraph (a).

*Adverse effect wage rate (AEWR).* The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

*Agent.* A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural 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 under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

*Agricultural association.* Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

*Applicant.* A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

*Application for Temporary Employment Certification.* The Office of Management and Budget (OMB)-approved Form ETA-9142A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

*Area of intended employment (AIE).* The geographic area within normal commuting distance of the place of employment for which the temporary agricultural labor 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 place of employment, or quality of the regional transportation network). If a place of employment is within a Metropolitan Statistical Area (MSA), including a multi-State MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (e.g., near the border of) the MSA.

*Attorney.* Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia (DC). Such a person is also permitted to act as an agent under this part. No attorney who is under suspension, debarment, expulsion, or disbarment 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).* The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H-2A program. The OFLC Administrator is the National CO. Other COs may be designated by the OFLC Administrator to also make the determination required under 20 CFR part 655, subpart B.

*Chief Administrative Law Judge (Chief ALJ).* The chief official of the Department's OALJ or the Chief ALJ's designee.

*Corresponding employment.* The employment of workers who are not H-2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H-

2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.

*Department of Homeland Security (DHS).* The Department of Homeland Security, as established by 6 U.S.C. 111.

*Employee.* A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

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

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

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) Is a person on whose behalf an *Application for Temporary Employment Certification* is filed.

*Employment and Training Administration (ETA).* The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations in 8 CFR chapter I, subchapter B, from the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

*Federal holiday.* Legal public holiday as defined at 5 U.S.C. 6103.

*First date of need.* The first date the employer requires the labor or services of H-2A workers as indicated in the *Application for Temporary Employment Certification*.

*Fixed-site employer.* Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this part; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are

performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part as incident to or in conjunction with the owner's or operator's own agricultural operation.

*H-2A labor contractor (H-2ALC).* Any person who meets the definition of employer under this part and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

*H-2A Petition.* The USCIS Form I-129, Petition for a Nonimmigrant Worker, with H Supplement or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H-2A nonimmigrant workers.

*H-2A worker.* Any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

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

*Job opportunity.* Full-time employment at a place in the United States to which U.S. workers can be referred.

*Job order.* The document containing the material terms and conditions of employment that is posted by the SWA on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA-790/ETA-790A and all appropriate addenda), as submitted to the National Processing Center.

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

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H-2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of



an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H-2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H-2A workers sponsored under the *Application for Temporary Employment Certification*.

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under 20 CFR 655.131(b) are, at all times, joint employers of all H-2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

**Metropolitan Statistical Area (MSA).** A geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan 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).** The offices within OFLC in which the Cos operate and which are charged with the adjudication of *Applications for Temporary Employment Certification*.

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

**OFLC Administrator.** The primary official of OFLC, or the OFLC Administrator's designee.

**Period of employment.** The time during which the employer requires the labor or services of H-2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification*.

**Piece rate.** A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

**Place of employment.** A worksite or physical location where work under the job order actually is performed by the H-2A workers and workers in corresponding employment.

**Secretary of Labor (Secretary).** The chief official of the Department, or the Secretary's designee.

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

**Successor in interest.** (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

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

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

(H) Similarity of products and services; and

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

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

**Temporary agricultural labor certification.** Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification*, job order, and all supporting documentation, with respect to an employer seeking to file an H-2A Petition with DHS to employ one or more foreign nationals as an H-2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188, and 20 CFR part 655, subpart B.

**United States.** The continental United States, 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.

**U.S. Citizenship and Immigration Services (USCIS).** An operational component of DHS.

**U.S. worker.** A worker who is:

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

(ii) An individual who is lawfully admitted for permanent residence in the United States, 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 DHS to be employed in the United States; or

(iii) 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).** The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part.

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

**WHD Administrator.** The primary official of the WHD, or the WHD Administrator's designee.

**Work contract.** All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) **Definition of agricultural labor or services.** For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included

in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (b)(1) through (3) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (b) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (b)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (b)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (b) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Logging employment is operations associated with felling and moving trees and logs from the stump to the point of delivery,

such as, but not limited to, marking danger trees, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites.

(5) *Employment as defined and specified in 20 CFR 655.300 through 655.304.* For the purpose of paragraph (b) of this section, agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in 20 CFR 655.300 through 655.304.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

#### § 501.4 Discrimination prohibited.

(a) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188 or this part;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(5) Exercised or asserted on behalf of himself or others any right or protection afforded by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by WHD. Where WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the worker whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any

such violator's current temporary agricultural labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by WHD to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

**§ 501.5 Waiver of rights prohibited.**

A person may not seek to have an H-2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Any agreement by a worker purporting to waive or modify any rights given to said person under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part shall be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part in favor of the Secretary shall be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

**§ 501.6 Investigation authority of the Secretary.**

(a) *General.* The Secretary, through WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, either pursuant to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, housing, vehicles, and records (and make transcriptions thereof), question any person, and gather any information as may be appropriate.

(b) *Confidential investigation.* WHD shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(c) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

**§ 501.7 Cooperation with Federal officials.**

All persons must cooperate with any Federal officials assigned to perform an

investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and this part during the performance of such duties. WHD will take such action as it deems appropriate, including initiating debarment proceedings, seeking an injunction to bar any failure to cooperate with an investigation, and/or assessing a civil money penalty therefor. In addition, WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing temporary agricultural labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 114.

**§ 501.8 Accuracy of information, statements, and data.**

Information, statements, and data submitted in compliance with 8 U.S.C. 1188 or this part 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 United States, 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, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both.

**§ 501.9 Enforcement of surety bond.**

Every H-2A labor contractor (H-2ALC) must obtain a surety bond demonstrating its ability to discharge financial obligations as set forth in 20 CFR 655.132(c).

(a) Notwithstanding the required bond amounts set forth in 20 CFR 655.132(c), the WHD Administrator may require that an H-2ALC obtain a bond with a higher face value amount after notice and opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(b) Upon a final decision reached pursuant to the administrative proceedings of subpart C of this part, including any timely appeal, or resulting from an enforcement action brought directly in a District Court of the United States finding a violation or violations of 20 CFR part 655, subpart B, or this part, the WHD Administrator may make a written demand on the surety for payment of any wages and benefits, including the assessment of

interest, owed to an H-2A worker, a worker engaged in corresponding employment, or a U.S. worker improperly rejected or improperly laid off or displaced. The WHD Administrator shall have 3 years from the expiration of the labor certification, including any extension thereof, to make such written demand for payment on the surety. This 3-year period for making a demand on the surety is tolled by commencement of any enforcement action of the WHD Administrator pursuant to § 501.6, § 501.15, or § 501.16 or the commencement of any enforcement action in a District Court of the United States.

**Subpart B—Enforcement**

**§ 501.15 Enforcement.**

The investigation, inspection, and law enforcement functions to carry out the provisions of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, as provided in this part for enforcement by WHD, pertain to the employment of any H-2A worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. Such enforcement includes the work contract provisions as defined in § 501.3(a).

**§ 501.16 Sanctions and remedies—general.**

Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including, but not limited to, the following:

(a)(1) Institute appropriate administrative proceedings, including: the recovery of unpaid wages (including recovery of recruitment fees paid in the absence of required contract clauses (*see* 20 CFR 655.135(k))); the enforcement of provisions of the work contract, 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; 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, or improperly laid off or displaced; or debarment for up to 3 years.

(2) The remedies referenced in paragraph (a)(1) of this section will be sought either directly from the employer, agent, or attorney, or from its successor in interest, as appropriate. In the case of an H-2ALC, the remedies will be sought from the H-2ALC directly and/or monetary relief (other than civil money penalties) from the insurer who issued the surety bond to

the H-2ALC, as required by 20 CFR part 655, subpart B, and § 501.9.

(b) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief, including to prohibit the withholding of unpaid wages and/or for reinstatement, or to restrain violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, by any person.

(c) Petition any appropriate District Court of the United States for an order directing specific performance of covered contractual obligations.

#### § 501.17 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in 20 CFR part 655, subpart B, and § 501.1(b). WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c). The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. OFLC and WHD have concurrent jurisdiction to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

#### § 501.18 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, shall represent the WHD Administrator and the Secretary in all administrative hearings under 8 U.S.C. 1188 and this part.

#### § 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part constitutes a separate violation.

(b) In determining the amount of penalty to be assessed for each violation, the WHD Administrator shall consider the type of violation committed and other relevant factors. The factors that the WHD Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(2) The number of H-2A 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) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part;

(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 whether the person has previously violated 8 U.S.C. 1188; and

(7) 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).

(c) A civil money penalty for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part will not exceed \$1,898 per violation, with the following exceptions:

(1) A civil money penalty for each willful violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, or for each act of discrimination prohibited by § 501.4 shall not exceed \$6,386;

(2) A civil money penalty for a violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, that proximately causes the death or serious injury of any worker shall not exceed \$63,232 per worker; and

(3) A civil money penalty for a repeat or willful violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, that proximately causes the death or serious injury of any worker, shall not exceed \$126,463 per worker.

(4) For purposes of paragraphs (c)(2) and (3) this section, the term *serious injury* includes, but is not limited to:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty, including the loss of all or part of an arm, leg, foot, hand, or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand, or other body part.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed \$6,386 per investigation.

(e) A civil money penalty for laying off or displacing any U.S. worker employed in work or activities that are encompassed by the approved

*Application for Temporary Employment Certification* for H-2A workers in the area of intended employment either within 60 calendar days preceding the first date of need or during the validity period of the job order, including any approved extension thereof, other than for a lawful, job-related reason, shall not exceed \$18,970 per violation per worker.

(f) A civil money penalty for improperly rejecting a U.S. worker who is an applicant for employment, in violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, shall not exceed \$18,970 per violation per worker.

#### § 501.20 Debarment and revocation.

(a) *Debarment of an employer, agent, or attorney.* The WHD Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, subject to the time limits set forth in paragraph (c) of this section, if the WHD Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Effect on future applications.* No application for H-2A workers may be filed by a debarred employer, or any successor in interest to a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Statute of limitations and period of debarment.* (1) The WHD Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney, or their successors in interest, may be debarred under this part for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

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

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H-2A

workers and/or workers in corresponding employment;

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

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

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

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or this part, or an audit under 20 CFR part 655, subpart B;

(vii) Employing an H-2A worker outside the area of intended employment, or 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;

(viii) A violation of the requirements of 20 CFR 655.135(j) or (k);

(ix) A violation of any of the provisions listed in § 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(2) In determining whether a violation is so substantial as to merit debarment, the factors set forth in § 501.19(b) shall be considered.

(e) *Procedural requirements.* The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, must identify appeal opportunities under § 501.33 and a timeframe under which such rights must be exercised and must comply with § 501.32. The debarment will take effect 30 calendar days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 calendar days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 501.33(d).

(f) *Debarment of associations, employer-members of associations, and joint employers.* If, after investigation, the WHD Administrator determines that an individual employer-member of an agricultural association, or a joint

employer under 20 CFR 655.131(b), has committed a substantial violation, the debarment determination will apply only to that employer-member unless the WHD Administrator determines that the agricultural association or another agricultural association member or joint employer under 20 CFR 655.131(b), participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) or joint employer under 20 CFR 655.131(b) as well.

(g) *Debarment involving agricultural associations acting as sole employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

(h) *Debarment involving agricultural associations acting as joint employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a joint employer with its employer-members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the WHD Administrator determines that the employer-member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its employer-members during the period of the debarment.

(i) *Revocation.* WHD may recommend to the OFLC Administrator the revocation of a temporary agricultural labor certification if WHD finds that the employer:

(1) Substantially violated a material term or condition of the approved temporary agricultural labor certification;

(2) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(3) Failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

#### **§ 501.21 Failure to cooperate with investigations.**

(a) No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority.

(b) Where an employer (or employer's agent or attorney) does not cooperate with an investigation concerning the employment of an H-2A worker, 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-2A workers giving rise to the investigation. In addition, WHD may take such action as appropriate, including initiating proceedings for the debarment of the employer, agent, or attorney from future certification for up to 3 years, seeking an injunction, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action shall not bar the taking of any additional action.

#### **§ 501.22 Civil money penalties—payment and collection.**

Where a civil money penalty is assessed in a final order by the WHD Administrator, by an ALJ, or by the Administrative Review Board (ARB), the amount of the penalty must be received by the WHD Administrator within 30 days of the date of the final order. The person assessed such penalty shall remit the amount thereof, as finally determined, to the Secretary. Payment shall be made by certified check or money order made payable and delivered or mailed according to the instructions provided by the Department; through the electronic pay portal located at [www.pay.gov](http://www.pay.gov) or any successor system; or by any additional payment method deemed acceptable by the Department.

#### **Subpart C—Administrative Proceedings**

##### **§ 501.30 Applicability of procedures and rules in this subpart.**

The procedures and rules contained in this subpart prescribe the administrative process that will be applied with respect to a determination to assess civil money penalties, debar, or increase the amount of a surety bond and which may be applied to the enforcement of provisions of the work contract, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this

part, or to the collection of monetary relief due as a result of any violation. Except with respect to the imposition of civil money penalties, debarment, or an increase in the amount of a surety bond, the Secretary may, in the Secretary's discretion, seek enforcement action in a District Court of the United States without resort to any administrative proceedings.

### Procedures Relating to Hearing

#### § 501.31 Written notice of determination required.

Whenever the WHD Administrator decides to assess a civil money penalty, debar, increase a surety bond, or proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, including for the recovery of the monetary relief, the person against whom such action is taken shall be notified in writing of such determination.

#### § 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the WHD Administrator including the amount of any monetary relief due or actions necessary to fulfill a contractual obligation or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; the amount of any civil money penalty assessment; whether debarment is sought and if so its term; and any change in the amount of the surety bond, and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the WHD Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

#### § 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 calendar days after the date of issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

(d) The determination shall 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, provided that any surety bond remains in effect until the conclusion of any such proceedings.

### Rules of Practice

#### § 501.34 General.

(a) Except as specifically provided in 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 shall 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 29 CFR part 18, subpart B, will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitive.

#### § 501.35 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1188 and the regulations in this part shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

#### § 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1188 and the regulations in this part shall be captioned in the name of the person requesting such hearing, and shall be

styled as follows: In the Matter of \_\_\_\_, Respondent.

(b) For the purposes of such administrative proceedings, the WHD Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

### Referral for Hearing

#### § 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the WHD Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or the Regional Solicitor for the Region in which the action arose, will, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or the authorized representative of such person, to the Chief ALJ, for a determination in an administrative proceeding as provided in this subpart. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under 29 CFR part 18 or this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the WHD Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

#### § 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief ALJ shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 calendar days from the date on which the Order of Reference was filed.

#### § 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided in this subpart shall be served on the attorneys for DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, and one copy on

the attorney representing the Department in the proceeding.

### Procedures Before Administrative Law Judge

#### § 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the ALJ, within 30 calendar days thereafter, shall, if satisfied with its form and substance,

accept such agreement by issuing a decision based upon the agreed findings.

### Post-Hearing Procedures

#### § 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 calendar days after completion of the hearing and closing of the record, a decision on the issues referred by the WHD Administrator.

(b) The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the ARB.

(d) The decision concerning civil money penalties, debarment, monetary relief, and/or enforcement of other contractual obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and/or this part, when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

### Review of Administrative Law Judge's Decision

#### § 501.42 Procedures for initiating and undertaking review.

(a) A respondent, WHD, or any other party wishing review, including judicial 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. If the ARB does not issue a notice accepting a petition for review of the decision within 30 calendar days after receipt of a timely filing of the petition, or within 30 calendar 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.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of

a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding.

#### § 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the ARB's notice to accept the petition, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

#### § 501.44 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify each party of:

- (a) The issue or issues raised;
- (b) The form in which submissions must be made (*e.g.*, briefs or oral argument); and
- (c) The time within which such presentation must be submitted.

#### § 501.45 Decision of the Administrative Review Board.

The ARB's decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

### Record

#### § 501.46 Retention of official record.

The official record of every completed administrative hearing provided by the regulations in this part shall 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.

#### § 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a District Court of the United States, after the administrative remedies have been exhausted, the Chief ALJ or, where the case has been the subject of administrative review, the ARB shall promptly index, certify, and file with the appropriate District Court of the United States, a full, true, and correct copy of the entire record, including the transcript of proceedings.

**Martin J. Walsh,**

*Secretary of Labor.*

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