

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 non-immigrant 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 wage rate published by the OFLC Administrator in the FEDERAL REGISTER for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c).

Adverse effect wage rate (AEWR). The wage rate published by the OFLC Administrator in the FEDERAL REGISTER for non-range occupations as set forth in § 655.120(b) and range occupations as set forth in § 655.211(c).

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 non-profit 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 bee-

keeping, 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.

[87 FR 61791, Oct. 12, 2022, as amended at 88 FR 12801, Feb. 28, 2023]

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 AEWR;
- (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) Except for occupations governed by the procedures in §§ 655.200 through 655.235, the OFLC Administrator will determine the AEWRs as follows:

(i) For occupations included in the Department of Agriculture's (USDA) Farm Labor Survey (FLS) field and livestock workers (combined) category:

(A) If an annual average hourly gross wage in the State or region is reported by the FLS, that wage shall be the AEWR for the State; or

(B) If an annual average hourly gross wage in the State or region is not reported by the FLS, the AEWR for the