

## § 655.167

## 20 CFR Ch. V (4-1-23)

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 re-

tained 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or from the date of determination if the *Application for Temporary Employment Certification* is denied or withdrawn.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 em-

ployer 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