

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.

§ 655.172

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(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 pro-

vided 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