Federal Register

Friday,
February 12, 2010

Part II

Department of Labor

Employment and Training Administration
20 CFR Part 655

Wage and Hour Division
29 CFR Part 501

Temporary Agricultural Employment of H–2A Aliens in the United States; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 501

RIN 1205–AB55

Temporary Agricultural Employment of H–2A Aliens in the United States

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

ACTION: Final rule.

SUMMARY: The Department of Labor (the Department or DOL) is amending its regulations governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. The Department is also amending the regulations at 29 CFR part 501 to provide for enhanced enforcement under the H–2A program requirements so that workers are appropriately protected when employers fail to meet their obligations under the H–2A program.

DATES: This Final Rule is effective March 15, 2010.

FOR FURTHER INFORMATION CONTACT: For further information on 20 CFR part 655, contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For further information on 29 CFR part 501 contact James Kessler, Farm Labor Branch Chief, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3510, Washington, DC 20210; Telephone (202) 693–0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR Part 655 Subpart B

A. Statutory and Regulatory Background

The H–2A nonimmigrant worker visa program enables United States (U.S.) agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. 1184(c)(1) and 1188.[1] The INA authorizes the Secretary of the Department of Homeland Security (DHS) to permit employers to import foreign workers to perform temporary agricultural labor or services of a temporary or seasonal nature if the Secretary of the U.S. DOL (Secretary) certifies that:

> (A) There are not sufficient U.S. 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
>
> (B) 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 Secretary has delegated these responsibilities, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA's Office of Foreign Labor Certification (OFLC). The Secretary has delegated responsibility for enforcement of the worker protections to the Administrator of the Wage and Hour Division (WHD). The Department's H–2A regulations remained largely unchanged from the 1987 Rule until 2008. In 2008, the Department significantly revised these regulations at 73 FR 77110, Dec. 18, 2008 (the 2008 Final Rule). Over the past several months, the Department undertook a review of the policy decisions reflected in the 2008 Final Rule, specifically reviewing the worker protections afforded under that rule. This review resulted in a Notice of Proposed Rulemaking (NPRM) published in September 2009, 74 FR 45906, Sep. 4, 2009.

B. Overview of Comments Received

The Department received almost 7,000 comments on the proposed rule. We have determined that 349 of these comments were completely unique, 13 were considered duplicates, and 6,577 were considered a form letter or based on a form letter.

Commenters represented a broad range of constituencies for the H–2A program, including individual farmers, farm workers, farm associations, farm worker advocate groups, agents, law firms, farm labor bureaus, State Workforce Agencies (SWAs), State Government Officials, U.S. Congress Members and Committees, and various interested members of the public. The Department received comments both in support of and in opposition to the proposed regulation, which are discussed in greater detail below. These comments raised a variety of concerns, some general and some pertaining to specific provisions or specific proposals. After reviewing the comments thoughtfully and systematically, the Department has modified several provisions and retained others as originally proposed in the NPRM. In addition, there were several commenters that requested that due to the timing of the regulation falling during harvest time for many farmers and based on the complexity of the issues addressed, the Department should provide additional time to comment on the proposed rule. In response to these comments, the Department provided an additional 15 days for comments on the proposed rule.

The Department received many comments that were deemed to be beyond the scope of the proposed rule. Some of these issues included pending legislation, the H–2B temporary nonagricultural worker program, comprehensive immigration reform, and specific issues related to the control of our nation's borders. These are issues that cannot be resolved or implemented through this regulatory process or are not within the purview of the Department. Additionally, comments submitted in a manner inconsistent with the specific directions of the NPRM or submitted after the comment period closed were not considered.

The Department received many comments challenging the Department's decision to engage in new rulemaking for the H–2A program. The Department has inherent authority to change its regulations in accordance with the Administrative Procedure Act (APA). In this Final Rule we provide an appropriate justification for all of the changes that we are making to the H–2A program.

The Department received requests by several commenters that the proposed rule be published in Spanish since the workers who use the program predominantly speak and write Spanish as their first language. The APA at 5 U.S.C. 552(a)(1) requires agencies to

[1] For ease of reference, all subsequent sections of the INA will be referred to by their corresponding section in the United States Code (U.S.C.).

publish regulations in the **Federal Register.** The Department initiated conversations with the Office of the **Federal Register** on the subject of publishing regulations in a language other than English. However, the Office of the **Federal Register** informed the Department that based on its limited resources and personnel it is unable to publish any documents in a language other than English.

C. 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 the Final Rule that are capable of operating 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 the Final Rule continue to operate, if at all possible in tandem with the reverted provisions.

II. Discussion of Comments Received

The Department has addressed those areas in which it received comments. With regard to specific provisions on which the Department did not receive comments, it has retained the provisions as proposed, except where clarifying edits have been made, which have been explained below.

A. Section 655.103 Overview of This Subpart and Definition of Terms

1. Section 655.103(a) Overview

The overview section in the proposed rule was shortened from the 2008 Final Rule to avoid any possibility that it may contain mandates not contained in the sections following it. The Department received no comments on this change and is leaving the section unchanged in the Final Rule.

2. Section 655.103(b) Definitions

For the purposes of this section, the Department has included a discussion of those definitions that received comments. Any definitions that did not receive comments have been retained as proposed without further changes, unless otherwise noted.

a. Agricultural Association

The NPRM proposed a slight change to the definition of agricultural association. The 2008 Final Rule seemed to imply that an agricultural association could be both an agent of its employer members and an employer at the same time. The NPRM clarified that an agricultural association could either be an agent or an employer (whether a sole employer or joint with its members) but not both. The Department received no comments on this change; therefore, the Final Rule reflects the language proposed in the NPRM without any modification.

b. Area of Intended Employment

The NPRM made no significant changes from the 2008 Final Rule in the definition of area of intended employment. The only changes were in the elimination of the redundancies and the use of etc. in the listing of examples of the factual circumstances that could constitute a normal commuting distance or commuting area. One commenter suggested that the Department add a definite number of miles, such as 75 miles, within which all work locations must be located. The commenter suggested that because of the size of the area of intended employment coupled with the length of the certification period, U.S. workers who only want to do one kind of agricultural job may be dissuaded from applying. Another commenter suggested narrowing the area of intended employment because commuting distances within an area of intended employment could be upwards of 90 miles and it would be unreasonable for the Department to expect U.S. workers to commute such a distance every day without being provided housing.

The Department understands the concerns of both commenters; however, their concerns are misplaced. The term area of intended employment is used in conjunction with recruitment, which should cast a net as wide as possible to inform all potential U.S. workers of an upcoming contract in their area. U.S. workers are entitled to the same housing as the H–2A workers if they are not reasonably able to return to their residence within the same day as discussed under § 655.122(d)(1).

As for the commenter's concern that a worker who only wanted to do one type of agricultural activity would be precluded from applying, changing the definition of an area of intended employment would not alleviate such a situation. The term is used primarily for recruitment purposes to ensure that the designated SWAs receive the job order so that U.S. workers have the opportunity to apply for the job. Therefore, the Final Rule adopts the definition as proposed in the NPRM, with the exception of a minor editorial change.

c. Corresponding Employment

In the definition of corresponding employment, the Department proposed that all workers employed by H–2A employers doing work performed by H–2A workers be considered engaged in corresponding employment. The proposal returns to the requirements of the 1987 Rule, with one difference which is explained below. The Final Rule adopts the language of the NPRM as proposed.

The change from the 1987 Rule is the addition of the phrase or in any agricultural work performed by the H–2A workers. This language was added to address the adverse impact on U.S. workers when an H–2A employer engages H–2A workers in agricultural work outside the scope of work found in the approved job order, including work impermissibly performed outside the area of intended employment. Domestic workers should not be disadvantaged when an employer violates the terms and conditions of the H–2A job order. This does not require that every worker on a farm be paid the H–2A required wage. It does, however, require that workers employed by an H–2A employer who perform the same agricultural work as the employer's H–2A workers be paid at least the H–2A required wage for that work.

A number of commenters opposed the proposal to return to the prior definition of corresponding employment because they agreed with the rationale offered for the change in the 2008 Final Rule (which limited the protections to newly hired workers). These commenters stated that we provided no basis for a return to the prior definition, offered no evidence to support the proposed definition, and did not account for the increased costs. A labor contractor opposed the definition because it would require the payment of the Adverse Effect Wage Rate (AEWR) to non-H–2A workers who performed incidental work that was also performed by H–2A workers.

A worker advocate favored the proposal because it would ensure that U.S. workers would not be adversely affected by H–2A workers. Another advocacy organization supported the proposal because it would not penalize local workers and would contribute to a stable workforce.

The effect of the proposed definition which would require U.S. workers to be paid the same wages and conditions that H–2A workers receive when performing the same work is not new. Hearings were held in 1962 to address the impact on the wages and working conditions of domestic workers due to the use of temporary foreign workers to perform agricultural work. The 1980 Senate Judiciary Report on Temporary Worker Programs discussing the 1962 hearings

stated that U.S. employers were required to offer domestic workers wages equal to foreign workers as a prerequisite for labor certification. See Congressional Research Service: "Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues, 53 (1980)." For many years, the H–2 program has required employers to pay wage rates to domestic workers as determined by DOL. See 32 FR 4571, Mar. 28, 1967.

The preamble to the 1979 H–2 rulemaking provided that employers must offer and provide U.S. workers at least the same level of wages, benefits, and working conditions offered or provided to foreign workers. See 43 FR 10308, Mar. 10, 1979. The 1987 Rule continued the application of this principle and introduced the term corresponding employment, stating that those regulations were applicable to the employment of other workers hired by employers of H–2A workers in the occupations and for the period of time set forth in the job order approved by ETA as a condition for granting the H–2A certification. The regulations made specific reference to workers in corresponding employment hired by H–2A employers as well as to any other worker employed in corresponding employment. See 52 FR 20527–20528, and 20531, Jun. 1, 1987.

Courts have consistently upheld the Department's interpretation that the wages and benefits offered or provided to the H–2A workers must also be provided to domestic workers. See *Farmer* v. *Employment Security Comm'n of N.C.,* 4 F.3d 1274, 1276, n.2, 3 (4th Cir. 1993) (H–2A employers must make certain benefits available to all temporary agricultural laborers); see also *Williams* v. *Usery,* 531 F.2d 305, 306 (5th Cir. 1976) (the Secretary's authority is limited to making an economic determination of what rate must be paid all workers to neutralize any adverse effect resulting from the influx of temporary foreign workers), and *NAACP, Jefferson County* v. *Donovan,* 566 F.Supp. 1202, 1205 (D.D.C. 1983) (the AEWR is the rate at which DOL requires growers to pay all of their farm workers before the Department will allow them to import alien labor; the purpose of requiring payment of the AEWR is to prevent importation of nonimmigrant laborers from having an adverse effect on the prevailing wage rate).

The 2008 Final Rule stripped these protections from longtime employees of H–2A employers, applying H–2A protections only to newly-hired workers and the H–2A workers themselves. The preamble to the 2008 Final Rule reasoned that longtime U.S. workers paid below the AEWR were no worse off for the hiring of H–2A workers at the higher AEWR and therefore were not adversely affected by the hiring of H–2A workers. On further review, this explanation fails to account for the role of the AEWR in protecting against possible wage depression from the introduction of foreign workers. Further, as one commenter observed, since newly-hired employees are entitled to the AEWR, a longtime employee may quit his current employment and re-apply for the same job with the same employer to obtain the new higher AEWR. This anomaly puts too high a premium on longtime employees knowing the AEWR, understanding their rights under the regulations, and having the security, rare in low-wage agricultural employment, to quit a job with the expectation of being immediately rehired. Under this Final Rule, longtime U.S. workers will be entitled to the wage rates paid to H–2A employees without having to quit their jobs and be rehired.

One commenter noted that the proposal ignores market-based principles. Another asserted that supervisors who occasionally did jobs performed by H–2A workers would have to be paid the AEWR. As explained above, the AEWR is intended to supplement wage rates that have been depressed by the presence of H–2A and other foreign workers. In that sense it is not reflective of market forces. Supervisors presumably would be paid more than the AEWR and the Final Rule does not require that their wages be reduced. To the extent that is not the case, the requirement to pay them the AEWR would only apply for the period of time they perform work done by H–2A workers.

One commenter requested that the definition of corresponding employment be expanded to include joint employment, and another requested that U.S. workers of fixed-site employers be included in the definition when their employer contracts with an H–2A Labor Contractor (H–2ALC) to provide H–2A workers. We do not believe it is necessary to include joint employment in the definition of corresponding employment, as the regulatory definition of joint employment makes clear that each employer in a joint employment relationship bears all of the obligations of an employer. Accordingly, U.S. workers employed by a joint employer of H–2A workers would be in corresponding employment, if performing the same work. However, the INA limits the Secretary's enforcement authority to employers (or joint employers) of H–2A workers. See 8 U.S.C. 1188(g)(2).

d. H–2A Labor Contractors (H–2ALCs)

The definition of an H–2ALC in the Final Rule remains unchanged from the NPRM. One commenter questioned whether the Department should grant certification to labor contractors to participate in the program, noting that, for growers, the H–2A program is a means to obtain the labor needed to meet their end, the production of a farm commodity, whereas for the labor contractor, the H–2A workers themselves are the desired end. Some commenters objected to the inclusion of the activities of recruitment and employment in the definition of an H–2ALC, asserting that these activities are only applicable to domestic migrant and seasonal workers already covered by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Because the Department's enforcement experience shows agricultural labor contractors have lower compliance rates than fixed-site agricultural employers, additional obligations are required for them. This requires a definition that distinguishes each type of employer. The fact that some H–2ALCs engage in activities covered by other statutes (such as MSPA) does not mean that the Department should ignore those activities when they relate to H–2A workers.

A representative of the sheep shearing industry objected to the potential classification of sheep shearing contractors as H–2ALCs. The argument presented by this commenter is that Congress specifically exempted employers in this industry from farm labor contractor (FLC) licensing requirements under MSPA; therefore, they should be exempt from being considered H–2ALCs.

The definition of an H–2ALC broadly encompasses employers who seek to participate in the H–2A program, but do not fit the definition of a fixed-site employer. The shearing contractor does not have a fixed site where the agricultural activities are performed; therefore, it cannot be a fixed-site employer and by default is an H–2ALC. The fact that shearing contractors are exempt from MSPA licensing requirements does not affect their status as H–2ALCs.

In addition, this commenter mistakenly believes that the name and location of each ranch where the shearing will take place must be in the advertisement. This was a requirement in the 2008 Final Rule, but was eliminated in the NPRM. The NPRM proposed to require that advertisements

contain the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the labor or services. Therefore, the Department does not believe this to be a significant burden warranting a special definition of employer for the shearing industry.

This commenter also asserted that sheep shearing contractors will have to file separate applications for each area of intended employment and in some cases may have to file two different applications for one area of intended employment, if the contractor must return to the same area of intended employment after moving to a different area of intended employment. This commenter points out that under the 1987 Rule and the 2008 Final Rule there were special procedures for shearing contractors that provided for itinerary work and required only one application. The NPRM did not remove the special procedures at § 655.102. In addition, the "Special Procedures for Employers in the Itinerant Animal Shearing Industry Under the H–2A Program" found in Training and Employment Guidance Letter No. 17–06 are still in effect and would permit a sheep shearing employer to file an itinerary-based application. Therefore, the Department is not persuaded that this is a valid reason to exempt shearing contractors from the definition of an H–2ALC.

e. Job Opportunity

One commenter opined that the new definition of job opportunity offered by the NPRM was not as specific as the 1987 Rule because it does not include the words job opening. The commenter contended that a definition of job opportunity without a reference to a job opening is invalid. The Department disagrees. There is no meaningful distinction between the two concepts and adding the phrase job opening would be redundant.

f. Job Order

The definition of job order has been modified in this Final Rule to add the word material for consistency with the definitions of job offer and work contract.

g. Master Application

The NPRM proposed to include a definition of master application. Although we did not receive comments directly addressing the definition, based on comments received on the treatment of master applications in § 655.131(b), we are clarifying several aspects including that a master application may cover multiple areas of intended employment within a single State but no more than two contiguous States. These clarifications are discussed in more detail in the preamble for that section.

h. Positive Recruitment

The 2008 Final Rule definition included the concept of interviewing qualified and eligible individuals. The NPRM added the language that positive recruitment is performed under the auspices and direction of the OFLC. The Department received no comments on the definition of this term; therefore, the definition is unchanged in the Final Rule.

i. Prevailing Practice

The 2008 Final Rule defined the term prevailing whereas the NPRM defined the term prevailing practice. We have returned to the formulation used in the 1987 Rule which defines prevailing practice. This definition applies to certain terms of employment, *e.g.,* family housing, which must be offered by employers if they reflect prevailing practice, *i.e.,* are offered by a majority of the employers employing a majority of the workers in the area. Since the term prevailing wage is otherwise defined, there is no need for a definition of the term prevailing.

j. Prevailing Wage

The NPRM defined prevailing wage as the wage established under 20 CFR 653.501(d)(4). The Department received no comments on this change. Therefore, the Final Rule adopts the language of the NPRM without change.

k. Successor in Interest

The NPRM proposed no substantive changes to the definition of successor in interest; however, it added one factor to the circumstances that may be considered in determining whether an employer is a successor in interest. The change clarified that whether the former management or persons with an ownership interest in the prior firm retain a management interest in the successor firm may be considered in the successor determination. One commenter opposed the proposed clarification, but did not provide a reason for its opposition. The definition is adopted as proposed.

l. United States

The NPRM included in the definition of United States language regarding the transition program effective date of the application of Federal immigration law to the Commonwealth of the Northern Mariana Islands (CNMI). That transition program effective date having passed, we have accordingly deleted that language as CNMI now is included automatically in the definition of United States under U.S. immigration law.

m. United States Worker

The NPRM included a definition of U.S. workers that referenced, as did the 2008 Final Rule, the INA. Although no comments were received on this definition we have edited the definition for clarity.

3. Section 655.103(c) Definition of Agricultural Labor or Services

The NPRM proposed to modify the definition of agricultural labor or services in several ways. It proposed to retain all three of the statutory definitions set forth in the INA, which include agricultural labor as defined in sec. 3121(g) of the Internal Revenue Code of 1986 (IRC), agriculture as defined in sec. 3(f) of the Fair Labor Standards Act (FLSA), and the pressing of apples for cider on a farm, 8 U.S.C. 1188(a)(15)(H)(ii)(a). The NPRM proposed to remove three provisions from the definition. The first expressly provided that an activity is agriculture, even though it meets only one of the statutory definitions. The second allowed H–2A employees to engage in certain activities that are not included in the statutory definitions, provided that H–2B workers were not performing the same work in the same place. The third allowed H–2A workers to perform work that was not listed on the *Application for Temporary Employment Certification* (Application), so long as it was less than 20 percent of the work and incidental to the agricultural work performed. The Final Rule retains the first provision that had been proposed for removal but removes the latter two provisions. The NPRM also had proposed to retain logging employment in the definition and to add reforestation and pine straw activities. The Final Rule retains logging, but does not add reforestation and pine straw activities.

The IRC and FLSA definitions include work performed by a farmer or on a farm cultivating, raising, or harvesting crops and raising livestock and other animals and bees, including the operation and maintenance of the farm. The IRC definition also includes the packing and processing of agricultural and horticultural commodities so long as more than half of the commodities are produced by the farmer performing the packing and processing.

The FLSA definition has been interpreted to have a primary meaning (*e.g.,* production, cultivation, growing and harvesting of any agricultural or

horticultural commodities) as well as a broader secondary meaning that includes any practices 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, and delivery to carriers for transportation to market.

In 2008, changes to FLSA regulations at 29 CFR part 780 and 29 CFR part 788 addressing Christmas tree production were published simultaneously with the H–2A regulations. These changes to FLSA regulations did not change the applicability of H–2A to Christmas tree production. The H–2A definition of agricultural labor or services includes the IRC definition of this term. The IRC recognizes as agricultural labor those services performed in the employ of any person in connection with the planting, raising, cultivating, and harvesting of Christmas trees when such services are performed on a farm. Therefore, such activities come within the scope of H–2A.

a. An Occupation Included in Either Statutory Definition

The NPRM proposed the removal of a clarifying sentence stating that an occupation included in either the IRC or the FLSA definition is considered agricultural labor or services even though the occupation does not appear in both definitions. This means that if the work is within the scope of either the IRC or the FLSA definition of agriculture, then the work is within the scope of the H–2A program. Although the Department believed that this principle was clear and the provision superfluous, several commenters found it useful. The Final Rule reinstates the deleted sentence, with slight editorial modifications.

b. Removal of Handling, Packing, Processing, and Other Non-Agricultural Activities Where the Farmer Processed Less Than 50 Percent of the Commodity

The NPRM also proposed the removal of the definition of agricultural labor and services that had been added in the 2008 Final Rule that permitted 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 while in the employ of the operator of a farm where no H–2B workers are employed to perform the same work at the same establishment. This provision allowed activities defined as nonagricultural work under the FLSA and the IRC to be performed by H–2A workers, so long as no H–2B workers were employed at the same worksite doing the same work. The Final Rule adopts the proposed deletion, returning to the definition used in the 1987 Rule.

A few commenters sought the Department's rationale for the removal of this language. One commenter expressed disappointment regarding the proposed removal, asserting that it was a major change that would impact packing houses that might not be able to obtain workers through the H–2B program due to the annual cap on that program. This commenter further asserted that since such H–2B workers often worked alongside H–2A workers and their jobs are clearly in the stream of agriculture, the language should be re-inserted.

The 2008 Final Rule's definition was problematic because it allowed a farmer to employ both H–2A workers and H–2B workers to perform identical work, so long as the H–2A workers and the H–2B workers were employed in different locations. Congress clearly intended to create two separate programs: H–2A for agricultural work and H–2B for other, nonagricultural work. Compare 8 U.S.C. 1101(a)(15)(H)(ii)(a) and 8 U.S.C. 1101(a)(15)(H)(ii)(b). A regulation that allows H–2A workers and H–2B workers to perform the same activity is inconsistent with this Congressional intent. Furthermore, Congress has already addressed the proper classification of packing and processing work by including the IRC definition, which specifies that these activities are considered agricultural labor only if more than 50 percent of the commodity on which the work is being performed has been produced by the farmer. In other words, work in a packing shed on a farm, packing apples or peaches which are grown on the same farm, falls within the definition and thus within the H–2A program. However, if more than 50 percent of the apples or peaches being packed come from other farms, the work is no longer considered agriculture.

The Department believes that this statutory limitation is meaningful, and that Congress intended it to apply to different types of work. As a result, the Department has determined that it is appropriate to return to the definition of agriculture as set forth in the 1987 Rule and has deleted this provision.

c. Removal of Minor and Incidental Activities

Further, the NPRM proposed the removal of the phrase other work typically performed on a farm that is not specifically listed on the Application and is minor (*i.e.,* less than 20 percent of the total time worked) and incidental to the agricultural labor or services for which the H–2A worker was sought. Several commenters objected to this change, asserting that the removal of this language would unfairly limit their flexibility in assigning H–2A workers to different kinds of work, and/or to work which was not listed on the job order. Commenters also expressed fears that the removal of the 20 percent tolerance for work that is not listed on the Application would subject employers to debarment if H–2A workers perform work that is outside the scope of the job order for even a small fraction of their time.

The comments appear to reflect a misunderstanding of the 2008 Final Rule's use of the terms minor and incidental. For example, commenters complained that they would no longer be able to assign H–2A workers to such nonagricultural work as directing traffic at retail outlets (as opposed to roadside stands selling agricultural goods produced on the farm), and unloading truckloads of purchased merchandise (as opposed to farm products) to be offered for sale to retail customers. These activities are not incidental to the agricultural activities performed by H–2A workers, and they do not appear to relate to agriculture in any way. In light of these comments, it appears that the language added to the definition of agriculture led to confusion rather than clarification.

On further review, the Department believes that the proposed return to the 1987 Rule definition still provides farmers adequate flexibility in the use of H–2A workers, while respecting congressional intent that the work be agricultural in nature. These workers can, for example: Work at a farmer's roadside retail stand; handle, package or sell agricultural or horticultural goods produced on the farm; or perform maintenance work on farm buildings and machinery. These activities are performed by a farmer or on a farm and are incidental to farming operations, and therefore meet the FLSA definition of agriculture. In addition, the IRC definition of agricultural labor or services encompasses a broad range of activities, such as the management of wildlife on a farm, the ginning of cotton, or the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market, of any agricultural or horticultural commodity, as long as more than 50 percent of the goods were produced by the farmer-employer. These definitions provide considerable latitude to the employer as to the type of work for which H–2A

workers may be used. They have been used for decades and are well understood.

Further, the INA is clear that in order for the Secretary to certify a petition, an applicant must demonstrate that there are not sufficient workers to perform the labor or services involved in the petition. It is incongruous to claim that such a broad degree of flexibility is needed to encompass work that has not yet been identified, while representing in the Application for H–2A workers that there are not enough U.S. workers available to perform such work. To approve an Application that would allow a worker to perform a substantial amount of work that was not included in the Application would not be in keeping with the plain statutory language requiring the Department to find that there are not enough workers available to perform the work for which H–2A workers are being sought. The 2008 Final Rule's 20 percent tolerance allowed H–2A workers to work a full day a week, every week for the entire job order, in work other than that listed on the Application. This broad language effectively allowed an employer to apply for 10 workers although the employer had only identified work for which eight workers were needed. This permitted an employer with a substantial number of H–2A workers to routinely assign them unadvertised work that would have been sufficient to support the hiring of additional U.S. workers. Such a tolerance is not minor and is inconsistent with the statutory standard. Therefore, the Final Rule deletes this provision from the definition.

Finally, several commenters expressed concerns that removing the reference to incidental work from the definition of agricultural labor or services, coupled with proposed changes in the provisions addressing revocation and debarment, might lead to an employer being debarred for having assigned a worker outside the scope of the job order for even a small fraction of time. However, the Department does not intend to debar an employer whose H–2A workers perform an insubstantial amount of agricultural work not listed in the Application. In exercising our enforcement discretion when an employer has worked an H–2A worker outside the scope of the activities listed on the job order due to unplanned and uncontrollable events (such as a freeze that prevents planting or heavy rains that prevent harvesting), the Department will consider the employer's explanation, so long as the activities are within the scope of H–2A agriculture, have been occasional or sporadic, and the time spent in total is not substantial. Moreover, the debarment regulations require that the violation be substantial, and that a number of factors must be considered in making that determination, including: An employer's previous history of violations; the number of workers affected; the gravity of the violation; the employer's explanation, if any; its good faith; and its commitment to future compliance. Under these criteria, the good faith assignment of a worker to work not listed in the Application for a small amount of time would not result in debarment. The Final Rule deletes the provision providing a blanket 20 percent tolerance for work outside the scope of the Application, as proposed.

d. Definition of Agricultural Labor or Services—Inclusion of Reforestation and Pine Straw Activities

The Department proposed that the definition of agricultural labor or services include reforestation activities, defined as predominately manual forestry work including but not limited to tree planting, brush clearing, and pre-commercial tree thinning. It also proposed to include pine straw activities, defined as certain activities predominately performed using hand tools, including but not limited to raking, gathering, baling, and loading of pine straw, a product of pine trees that are managed using agricultural or horticultural/silvicultural techniques. Currently, employers engaged in these activities may use the H–2B program. Reforestation, a sub-industry of forestry, is commonly performed by migrant crews who are overseen by labor contractors and share the same characteristics as traditional agricultural crews. The same reasoning was used in proposing to include pine straw activities within the scope of the H–2A program. Overwhelmingly, the comments were opposed to adding reforestation activities and pine straw activities to the H–2A program. We are convinced by these comments and therefore the Final Rule does not include reforestation and pine straw activities.

A number of employer commenters claimed that the way in which contracts are awarded to reforestation companies would preclude applicants from being able to file H–2A applications in realistic timeframes and would make it difficult to comply with H–2A provisions; they asserted that such contracts are often for short duration, making it particularly difficult to provide documentation that housing, typically hotels or motels, had been secured far in advance. Some of the commenters projected their increased costs and predicted the costs could put them out of business or preclude them from using the program to employ an authorized workforce.

Employee advocates indicated they were concerned about moving such workers into the H–2A program, since such a change would mean these workers would lose the protections afforded to them by the MSPA, particularly the right to a Federal cause of action to enforce these rights, replete with statutory liquidated damages for violations. Commenters indicated that the loss of protections under MSPA outweighed whatever additional benefits or protections inclusion in the H–2A program would offer. Several commenters suggested that the better course of action would be for the Department to provide additional protections to these workers through changes in the regulations that govern the H–2B program.

Only a few commenters supported the proposed change. One stated that the activities were agricultural and thus it was unreasonable for forestry contractors to have all the regulatory responsibilities of agricultural employers but be denied access to agricultural labor under the H–2A visa program. Others supported the change based on the reasons the Department had used in making the proposal. A State agency supported the proposal but cautioned there would be increased efforts and costs for their agency to carry out additional housing inspections and prevailing wage and practices surveys. We received only one comment that specifically addressed the proposed inclusion of pine straw activities, and it supported the inclusion based on a circuit court decision that found that these activities fell within the definition of agriculture under MSPA. We note that the court in this decision did not rely on the definitions of agriculture used in either the FLSA or the IRC, which are the statutory definitions included in the H–2A program. See *Morante-Navarro* v. *T & Y Pine Straw, Inc.,* 350 F.3d 1163 (11th Cir. 2003).

Taking into account the lack of support from all sides to the proposed inclusion of reforestation activities and pine straw activities in the H–2A program, the Department has decided not to include these activities in the definition of agricultural labor or services in the Final Rule. We will consider whether it is appropriate to propose additional protections for these workers in any future revision of the H–2B program.

e. Definition of Agricultural Labor or Services—Logging

The NPRM proposed to keep logging in the H–2A program; however, the definition section of the NPRM proposed a more detailed definition of logging employment. The justification for this decision to include logging in the definition was contained in the preamble to the 2008 Final Rule.

The Department received some comments on the inclusion of logging in general and the definition in particular. One commenter indicated no opposition to the inclusion of logging in the definition of agricultural labor or services but noted that the Department offered no justification for inclusion of logging in the NPRM. Another commenter stated that the rationale for including logging in the definition is inconsistent with prior regulations and principles of statutory interpretation. This commenter asserted that the statutory language of 8 U.S.C. 1101(a)(15)(H)(ii)(b) clearly encompasses all temporary service or labor other than agricultural labor or services, and argued that the Department arbitrarily used the phrase agricultural labor or services (defined by several statutory provisions) as authority to expand the scope of the H–2A program to cover virtually all work with renewable natural resources. The commenter argued that the division of 8 U.S.C. 1101(a)(15)(H)(ii) into (a) and (b) (devolving into the H–2A and H–2B programs) was not intended to grant the Department unlimited discretion to make legislative changes, as proposed in § 655.103(b).

The same commenter asserted that the inclusion of logging in the definition as in 2008 would constitute a substantial change from past practice that does not protect U.S. workers. This commenter also contended that moving these workers from a visa program with caps to one without statutory caps would not assist in protecting them from exploitation by labor contractors. Instead the commenter proposed that the more stringent labor protections applicable to H–2ALCs be incorporated into the H–2B regulations for all temporary foreign workers not working at fixed locations.

The Department disagrees with this commenter. Congress clearly gave the Secretary authority to define agricultural labor and services through regulation. 8 U.S.C. 1101(a)(15)(H)(ii)(a). As stated previously, the Department's rationale was discussed in detail in the 2008 Final Rule. Proposed changes to the H–2B regulations are not a part of this rulemaking.

A reforestation contractor noted that logging was included under the H–2A program due to misconceptions about the industry, namely that the companies are mainly labor contractors who hire and move migrant crews. This commenter indicated that several logging employers would be interested in using temporary, seasonal foreign workers to fill labor shortfalls if the program allowed for working conditions and benefits that are common to prevailing logging employer practices. The commenter did not specify the prevailing logging practices being referenced; however, we believe that inclusion of logging activities in the H–2A program appropriately balances the interests of logging employers and workers.

A State agency indicated that the Department's definition of logging operations is consistent with the definition used by the Occupational Safety and Health Administration (OSHA) and commended the Department. However, the commenter was concerned that the definition of logging employment might encompass certain positions such as logging supervisors, mechanics, mechanics' helpers, and operations engineers (who cut and maintain roads for access). The commenter stated that these positions do not meet the standards for H–2A agricultural employment and do not constitute employment on an agricultural employer's farmstead. This commenter requested that the Department clarify that these positions are not included in the H–2A program. The NPRM definition identifies the types of logging activities for which labor certification may be granted. We did not intend to change the scope of logging activities adopted by the 2008 Final Rule and therefore employees who were previously granted logging status may continue to be certified under the definition now contained in the H–2A program. The Final Rule retains the language from the NPRM.

4. Section 655.103(d) Temporary or Seasonal Nature

a. General Comments Regarding Temporary or Seasonal Nature

The NPRM proposed to adopt the definition of temporary or seasonal nature currently used by DHS in its H–2A regulations. The Department received more than a dozen comments on this proposed change in the definition. All of them opposed the change. Many found that there was no rational basis for the change and stated that the preamble explanation was insufficient. Many said that the existing definition had worked effectively for more than 20 years and should be retained. Of those who explained why, the primary reason stated was that the DHS definition is meant to apply to the worker, not the employer, and DOL is tasked with determining the needs of the employer rather than the worker; therefore, the DHS definition used in the NPRM is inappropriate. Many of the commenters pointed out that the existing definition is well-established and is the subject of many years of precedential court decisions. These commenters asserted that departing from this well-established definition would be highly disruptive to the program.

Other commenters believe that the definition of temporary or seasonal nature in the NPRM is too vague and requires further delineation if it is to be kept. Specifically, these commenters point out that adding short to annual growing cycle limits the timeframe, and the requirement for labor levels far above those necessary for ongoing operations during that short timeframe could exclude small farmers who might only need one or two additional employees during the peak of their season.

The Department has decided to retain the language of the NPRM which was not intended to create any substantive change in how the Department administers the program. If additional clarification is needed in the future, we will provide such clarification through the use of guidance memoranda, bulletins, special procedures (as applicable) and other guidance documentation.

b. Treatment of the Dairy Industry Under the Definition of Temporary or Seasonal Nature

The Department received numerous comments requesting the inclusion of the dairy industry in the definition of agricultural labor or services.

All of these commenters expressed a critical need for foreign labor in the dairy industry. Several commenters referenced an internal survey of a national organization of milk producers that indicated that an estimated 62 percent of milk production on these farms was attributed to immigrant labor. One commenter asserted that domestic workers do not want to fill the available jobs in the dairy industry. Another commenter stated that a shortage of domestic labor is particularly acute in this industry, in which employers experience year-round employment needs and must invest significant resources into employee recruitment and retention.

Most of these commenters sought the inclusion of dairy under H–2A special procedures, likening the dairy industry to sheepherders (and also loggers and cider pressers) whose need is not temporary, but who enjoy the benefits of the program. One commenter argued that the industry should be included on an expanded temporary basis of 1 year at a time. This commenter referred to isolated, anecdotal evidence from before the passage of the Immigration Reform and Control Act of 1986 (IRCA) where the Department permitted successive 1-year certifications for an employer that demonstrated a particular need.

The determination of whether a particular dairy activity is eligible for an H–2A certification rests on a finding that the duration of the activity and the need for that activity is temporary or seasonal. The majority of activities encompassed by the dairy industry, and milk production in particular, are year-round activities and therefore cannot be classified as temporary. The Department has no legal authority, nor is there legislative precedent, that would allow for the inclusion of the entire dairy industry in the H–2A program.

Sheepherders, which many of the commenters cited as an example of an exception to the definition of temporary, owe their inclusion in the program to a statutory provision dating back to the 1950s. That legislative inclusion was implicitly ratified in IRCA. No such legislative inclusion of the dairy industry as a whole has yet to be provided by Congress.

Prefiling Procedures

5. Section 655.120 Offered Wage Rate

In response to comments, the Final Rule adds the agreed-upon collectively bargained wage to the list of required wage rates. The rationale for this change is explained below, after the discussion of the AEWR.

a. The Department's Execution of the Offered Wage Rate

(i) The Provision of an AEWR in the H–2A Program

The Department has decided to retain the concept of an AEWR as part of the H–2A program and that the basis for computing the H–2A AEWR shall be the annual average of combined crop and livestock workers' wages applicable for each state as reported by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) reports. This section discusses the Department's rationale for retaining the AEWR and then discusses the Department's rationale for changing the methodology used to calculate the AEWR.

(ii) The Need for an AEWR

The admission of temporary foreign workers under the H–2A program is predicated on a certification by the Secretary that

> 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)(B)). Accordingly, under § 655.120(a) of this Final Rule, an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the collectively bargained wage rate, or the Federal or State minimum wage, except where a special procedure is approved.

This requirement reflects a longstanding concern that there is a potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers. The AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant foreign workers must offer to and pay their U.S. and foreign workers if the prevailing wage rate, the collectively bargained wage rate, and any Federal or State minimum wage rates are below the AEWR. The AEWR is designed to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce. The AEWR is a wage floor, and its existence does not prevent the worker from seeking, or the employer from paying, a higher wage.

From the outset of the Federal Government's involvement in the admission of temporary foreign agricultural workers, the Government has sought to protect similarly employed U.S. workers from the potential adverse effect such employment would have on their wages. Since 1953, the Department has computed and published AEWRs for the temporary employment of nonimmigrant foreign workers for agricultural employment under various admission programs. See H.N. Dellon, "Foreign Agricultural Workers and the Prevention of Adverse Effect", 17 Labor Law Journal 739 (1966) for a detailed history of the early decades of publication of AEWRs by the Department. Mr. Dellon's article notes that, as far back as 1953, employers seeking to employ foreign nationals to work in various crop activities (in that case, under the Bracero Program) were required to pay not less than a wage established by DOL. AEWRs began to be set periodically on a statewide basis, first for a subset of States based on applications for temporary foreign workers and subsequently for all States (except Alaska).

As time passed, the establishment of AEWRs became more formalized, and AEWRs were computed and set for the H–2 program as well, after public notice and comment. See, *e.g.,* 29 FR 19101–19102, Dec. 30, 1964; 32 FR 4569, 4571, Mar. 28, 1967; and 35 FR 12394–12395, Aug. 4, 1970.

Economic theory provides the initial justification for the use of an AEWR. Economic theory holds that, other things being constant, any increase in the supply of labor available in a labor market segment would result in a decrease in the equilibrium wage. This theory-based observation of the effect of increased labor supply is the basis for the concern that currently employed, or incumbent, farm workers would be adversely affected by lowered wages as a result of an influx of temporary foreign farm workers.

Similarly, economic theory holds that, under conditions of an emerging labor shortage, the previously observed wage (prevailing local wage) may not reflect the equilibrium wage.[2] Instead, adjustments would occur over time[3] and the observed wage would increase by an amount sufficient to attract more workers until supply and demand were met in equilibrium. Absent an increase of workers under the H–2A program, wages would rise above the currently observed wage in order to dispel the labor shortage until sufficient additional domestic labor was attracted into the market from neighboring geographic areas or other occupations. By computing an AEWR to approximate the equilibrium wage that would result absent an influx of temporary foreign workers, the AEWR serves to put incumbent farm workers in the position they would have been in but for the H–2A program. In this sense, the AEWR avoids adverse effects on currently employed workers by preventing wages from stagnating at the local prevailing

[2] The notion that a single point wage would be observed for a market in equilibrium is a simplification. In the abstract, an equilibrium wage is the wage at which the quantity of labor supplied by workers matches the quantity of labor demanded by employers. In practical reality a range of individual wage contract amounts may be observed reflecting individual labor productivity differences, relative bargaining strengths of contracting parties, timing of employment contracts, imperfect knowledge of market conditions by one or both parties, location factors and a myriad of other influences, but this array of individual wage contract values yields a particular average as a measure of the distribution's central tendency, and this average is conveniently referenced as the equilibrium wage.

[3] Including, given enough time, the possibility of substitution of capital for labor.

wage rate when they would have otherwise risen to a higher equilibrium level over time.

In practical application, there are a number of obstacles and limitations that hinder the market adjustment process to an equilibrium wage as indicated by the theoretical labor market analysis. Foremost of these is the limitation imposed by inefficiency in the transmission of information about labor market conditions (job openings, revised wage offers, conditions of employment, etc.) across both physical and social distances. Information transmission inefficiencies affect all labor markets. Most jobs in the U.S. are filled through informal information and referral processes. It has been estimated that fewer than 20 percent of job openings are listed on public labor exchange information systems or advertised in public media.[4]

Farm workers are especially likely to be disadvantaged in terms of access to information about new or changing labor market conditions or job opportunities. The physical distances and relative social isolation typical of many rural environments slows the transmission of information by word-of-mouth. Even though seasonal migrant workers may move great distances from one crop area to another over the course of the planting, tending and harvesting seasons, their knowledge is often limited to a familiar circuit of employment opportunities, and they often lack rapid access to information that would enable them to alter routine migration patterns to take advantage of new opportunities. The low educational attainment of farm workers is a major barrier to efficient access and rapid response to changing labor market conditions. Over 45 percent of U.S. citizens who are employed as hired farm workers do not have a high school diploma, and 21 percent of U.S. citizens employed as hired farm labor have less than a 10th grade education.[5] These farm workers with low educational attainment, numbering over 246,000 U.S. citizens, and many more if permanent resident non-citizens are included, often have limited reading ability and limited access to newspapers and other media in which job opportunities and wage offers might be advertised. They are also disproportionately poor, and their economic status may limit their physical access to public labor market information and assistance resources.

The resulting limitations in the flow of labor market information hinder the rapid adjustment of wages to a market equilibrium level. This situation can lead to localized short-run critical shortages of farm labor and result in spikes in farm labor wages that are much greater in magnitude than would be the case if information flowed more readily and markets adjusted more rapidly to a final equilibrium. Wide fluctuations in local wages may create a hardship for farmers who need to plan financially for expected labor costs. Unexpectedly large increases in labor costs may reduce profits. Shortages of labor at critical times may cause tangible waste if crops cannot be harvested at the appropriate time. It was in part to alleviate such difficulties facing farmers, as well as to discourage the unauthorized employment of workers, that Congress enacted legislation to facilitate the temporary importation of foreign labor to meet short-term gaps in the domestic supply of labor in critical locales. However, Congress also recognized the need to protect the wages and access to jobs of citizens and other permanent residents employed in the farm labor sector, and Congress placed with the Secretary the responsibility to ensure that the process of importation of foreign labor to aid farmers did not cause damage to the economic condition of domestic farm workers.

The apparent existence of a shortage of domestic workers, at least temporarily, is the basis on which employers apply to import temporary foreign H–2A workers. The requirement that employers first attempt to recruit domestic labor by listing job openings and wage offers with SWAs which are part of the public labor exchange system and to advertise openings in appropriate media is an essential part of the process of protecting domestic workers. However, as a result of the known limitations faced by farm workers in obtaining information from these sources, there may not be enough time for additional domestic workers to enter the local farm labor market. In such cases, because there is a long history of temporary migrant work in the U.S. and because the potential supply of foreign low-wage agricultural workers is great, the importation of foreign workers might more expediently address the labor shortage. However, because such an influx of labor would imply that the wages of incumbent domestic workers would not adjust upward, the use of an AEWR circumvents this adverse affect on incumbent workers.

(iii) The Use of the Prevailing Wage Does Not Provide Sufficient Protection

A farm association commented that there is no valid economic justification for a separate AEWR standard in addition to the prevailing and statutory minimum wage. Another comment suggested that the concept of an AEWR is an outdated notion. They stated that the AEWR was created at a time when there was no Federal minimum wage for agricultural employees. The purpose of the AEWR, therefore, was to create a floor on the prevailing wage rate. Subsequently, the Government has established a Federal minimum wage for agricultural employees. The commenter asserted that once the agricultural minimum wage was established, the AEWR was retained simply as a matter of economic theory. The commenter further contended that keeping an AEWR that is higher than the prevailing wage actually has an adverse effect on employment of U.S. workers because it precludes access to jobs that would otherwise be available if there were a competitive wage. The commenter stated that he has moved to less labor-intensive farm practices as a direct result of the higher than market wage rate he has to pay based on the AEWR.

The commenter concluded that there is no current reason to have an AEWR. The commenter proposed that the Department refrain from further efforts to determine which of several flawed surveys are appropriate for the AEWR. Instead the Department should eliminate the AEWR and use the prevailing wage as the baseline for the H–2A program.

An AEWR distinct from a prevailing wage concept[6] is most relevant in cases in which the local prevailing wage is

[4] See Bayer, Patrick, Ross, Stephen, and Topa, Giorgio, "Place of Work and Place of Residence: Informal Hiring Networks and Labor Market Outcomes." National Bureau of Economic Research Working Paper No. 11019, 2005 for a review of research regarding the impact of differences in access to labor market information and social networks in shaping the different wage and employment outcomes of different groups of workers. See Ozga, S.A., "Imperfect Markets Through Lack of Information." Quarterly Journal of Economics, February 1960, 74(1), pp. 29–52, for a theoretical discussion of the effects of imperfect information flows on labor market dynamics. See Holzer, Harry J., "Informal Job Search and Black Youth Unemployment." American Economic Review, June 1987, 77(3), pp. 446–452 for a discussion of how minorities, and especially youth, are disadvantaged by the relative inefficiency of their informal job search and labor market information networks.

[5] Based on analysis of 2005–2009 data from the Current Population Survey (CPS), Annual Social and Economic Conditions Supplement. The analysis of CPS data was restricted to U.S. citizens because non-citizens in the sample could not be identified as legally documented residents or not.

[6] Under the 2008 Final Rule, which also retained the concept of an AEWR, the methodology used to calculate the AEWR was such that the AEWR was essentially the same as the prevailing wage.

lower than the wage considered over a larger geographic area (within which movement of domestic labor is feasible) or over a broader occupation/crop/activity definition (within which reasonably ready transfer of skills is feasible). In such cases, the introduction of foreign workers paid at the local prevailing wage fails to account for the fact that the labor shortage would have otherwise resulted in higher local wages. The use of the observed local prevailing wage would adversely affect domestic workers by filling job vacancies with foreign workers before wages were allowed to adjust upward to alleviate the labor shortage in the imperfectly functioning labor market information system.

Thus, to more fully protect domestic workers from the adverse effects of temporary foreign workers, it is appropriate to compute wages based on a broader geographic area or broader occupation definition than the more specific prevailing wage computation when the local prevailing wage is below the average found in the broader market area. In this case, application of the AEWR is an attempt to approximate the equilibrium wage that would have resulted but for the introduction of foreign workers. The AEWR is, in essence, a prevailing wage concept defined over a broader geographic or occupational field, recognizing the relevant parameters over which wages could have adjusted to an equilibrium level in the absence of additional temporary workers under the H–2A program.

In cases in which the AEWR is not higher than the prevailing wage, minimum wage, or collectively bargained wage, incumbent domestic workers would be disadvantaged by the use of the AEWR instead of the higher alternative.[7] In these cases, the local shortage of labor exists despite a wage rate prevailing at a local level (or a mandated minimum wage or a collectively bargained wage) that is generally higher than wage average over a broader area, suggesting that wages have not fully adjusted to an equilibrium level. Therefore, in these cases, the AEWR is not binding on employers because use of a higher alternative wage would afford greater protection to incumbent workers. The difference between the local prevailing wage (which would be paid to temporary foreign workers) and the lower wage in the broader geographic or occupational definition area (represented by the AEWR) provides an incentive for domestic resident workers to shift their labor supply into the affected market and to benefit from additional employment opportunities and potentially higher wages than are available to them elsewhere. Because employers would otherwise be compelled to pay the minimum wage (by law), the collectively bargained wage (by contract) or the prevailing wage (by market forces), the Final Rule only codifies what the employers would otherwise do. The requirement that imported foreign temporary workers be paid no less than the highest of the AEWR, the local prevailing wage, the collectively bargained wage, or the applicable legal minimum wage ensures that domestic workers receive the greatest potential protection from adverse effects on their wages and working conditions, including the adverse effect of being denied access to the opportunity to earn a higher equilibrium wage that would have resulted as the market (perhaps slowly) adjusted in the absence of the guest workers.

(iv) Evidence of Current Wage Depression Is Not Needed

Citing various sources of evidence, some comments have suggested that the use of an AEWR is not justified because there is no evidence of wage depression in agriculture. One farm organization noted that, in the proposed rule, the Department justified the use of an AEWR despite the fact that the Department readily acknowledges that evidence is not conclusive on the existence of past adverse effect. Similarly, another association of agricultural employers asserted that there is no longer a rationale for an AEWR because wages in the agricultural industry have increased over time.

First and foremost, regardless of any past adverse effect that the use of low-skilled foreign labor may or may not have had on the wages paid to authorized agricultural workers, the Department considers the forward-looking need to protect U.S. workers whose low skills make them particularly vulnerable to even relatively mild—and thus very difficult to capture empirically—wage stagnation or deflation that has the potential to result from the hiring of immigrant labor. The lack of evidence of wage depression at present is not evidence that an AEWR is unnecessary; rather, it may be evidence that the imposition of the AEWR heretofore has been successful in shielding domestic farm workers from the potentially wage depressing effects of overly large numbers of temporary foreign workers. The fact, discussed below, that the localized wage adopted as the AEWR in the 2008 Final Rule has led to significant decreases in farm worker wage in many cases suggests that an AEWR linked to a wider geographic area and a wider spectrum of occupations has provided the protection it was intended to provide.

Furthermore, the Department recognizes that the empirical evidence is inconclusive about the past impact of immigration on wages and believes that the provision of an AEWR in the face of such uncertainty will serve to ensure that wages and working conditions are not adversely affected. The 2008 Final Rule reviewed evidence on the depressive effects of immigration on wages and explicitly reiterated the conclusion stated in the 1989 Rule that evidence of wage depression in the agricultural sector was inconclusive. 73 FR 77168, Dec. 18, 2008. In the 1989 Rule, the Department noted that some studies had identified wage depression in specific agricultural labor markets, but labeled that evidence anecdotal. The Department further noted that even this anecdotal evidence of wage depression was highly localized and concentrated in specific areas and crop activities. 54 FR 28043, Jul. 5, 1989.

According to the 2008 Final Rule preamble, evidence developed during the 20 years after the 1989 Rule did not provide additional clarity on the issue of wage depression. The 2008 Final Rule cited experts who continued to claim that unauthorized workers cause wage depression (*e.g.,* Michael J. Wishnie, "Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails", 2007 U. Chic. Leg. For. 193, 215 (2007) (asserting that unauthorized workers certainly contributed to the depression of wages and working conditions for U.S. workers). However, the rule also cited experts who suggested that the evidence was mixed. Thus, the 2008 Final Rule, after considering the comments received on the subject of wage depression, and after reviewing relevant literature in an attempt to identify empirical support for the assertions made in those comments, reaffirmed the Department's conclusion in the 1989 rulemaking that evidence of wage depression in the agricultural sector is inconclusive. Furthermore, the 2008 Final Rule also stated that: there is no conclusive evidence one way or the other regarding the existence of wage depression in localized agricultural labor markets. 73 FR 77168–77169, Dec. 18, 2008.

[7] Evidence suggests that the AEWR would be the highest of the computed wage alternatives, and therefore binding on employers, in the vast majority of cases. In Fiscal Year (FY) 2009, the AEWR was not applicable in only 10 percent of the cases certified under the Rule before the 2008 Final Rule.

Additional research not previously considered suggests that any adverse wage effects would be more likely to affect lower-skill workers. See Pia M. Orrenius, Michael Nicholson, "Immigrants in the U.S. Economy: A Host-Country Perspective," Journal of Business Strategies, vol. 26, 2009, which concludes that those who suffer the most severe negative wage impacts are prior immigrants, who are the most substitutable for new immigrants. See also Vernon M. Briggs Jr., "Illegal Immigration: The Impact on Wages and Employment of Black Workers," U.S. Civil Rights Commission, April 4, 2008, Washington, DC, which suggests that low skilled workers, many of whom are black, have been more dramatically affected by immigration over time.

Most contemporary research on the economic impacts of immigration deals with the effects of permanent immigration (whether authorized or not) on wages of incumbent workers across the economy generally, and not specifically in agriculture. To some extent it is not surprising that the results are unclear, because the effects of increased labor supply in particular labor markets from immigration are at least partially (and perhaps more than) offset in general economic equilibrium terms by the increase in aggregate demand from the formation of new households. The specific labor market impacts of permanent immigrants are also attenuated by the fact that immigrants are not limited by law to particular industries, occupations or places of residence. They may adapt to current economic conditions and seek opportunities in relatively fast growing economic areas where their potentially negative impact on wages is subsumed under a strong upward trend.

For several reasons, temporary authorized importation of foreign farm labor may differ from permanent immigration in its impact on labor markets. The guest workers are by definition admitted for only a temporary time, and their shelter and sometimes food are provided by the employer. They do not bring family; they do not set up permanent households; most of their earnings return to their home countries so that they add relatively little to the domestic economy; and their labor is not transferable to other industries where wages and jobs may be growing faster. The Department is concerned that the potential adverse impact on domestic workers of large numbers of authorized temporary foreign workers admitted under the H–2A program may be greater than the negative impact (if any) of similar numbers of permanent immigrants who contribute positively to aggregate economic demand through household formation and whose impact on agricultural wages may be reduced by their potential mobility to move into other industries.

Thus, in light of the uncertainty about the wage effects of immigration and the likelihood that any impact would be felt more severely by low-skill workers, the Department believes that the risk of wage depression must be recognized and therefore that there is a rational basis for the use of an AEWR.

The Department also recognizes the potential for the presence of unauthorized workers to exert a stagnating influence on agricultural wages. Evidence from the National Agricultural Workers Survey (NAWS) suggests that about 60 percent of hired farm workers may not have legal authorization to work. This large presence of unauthorized workers in the agricultural workforce heightens the concern about stagnating agricultural wages for authorized workers.[8]

(v) The AEWR Is Unique to the H–2A Program

One commenter focused on an apparent inconsistency between the H–2A program and other temporary worker programs, none of which requires an AEWR in addition to a prevailing wage, suggesting that, because there is no provision for an AEWR in other guest worker programs, there is no justification for providing for an AEWR in the H–2A program.

For other programs, the Department currently applies the assumption that U.S. workers in the same occupation will be adequately protected from having their wages adversely affected by the hiring of foreign workers so long as the workers are paid prevailing wage rates. Congress itself has applied this assumption by statute with respect to admitting foreign workers under the H–1B program. 8 U.S.C. 1182(n)(1)(A), 1182(p).

However, the Department established special adverse effect wage rates for the H–2A program. The very existence of a separate program for temporary guest workers in agriculture demonstrates that the agricultural industry is unique and that temporary foreign agricultural workers, and domestic resident agricultural workers in general, may be quite different than workers in other industries subject to the H–1B and H–2B programs. Workers in agricultural labor or services often perform work in remote locations for short periods of time and therefore may have little or no access to community or government resources, decreasing their ability to obtain information about alternative employment opportunities that could enable them to bargain more effectively. In addition, the concentration of foreign temporary workers in a single industry sector amplifies the impact of the employment of guest workers on domestic workers. Therefore, the Department believes that the fact that an AEWR is not used in other programs is not indicative of its appropriateness for the H–2A program.

There is ample evidence that agricultural workers are a particularly vulnerable population. They are often hired on a seasonal basis and are required to move from place to place. In part as a consequence of their low educational attainment, low skills, low rates of unionization and high rates of unemployment, agricultural workers have limited ability to negotiate wages and working conditions with farm operators or agricultural services employers. The Department believes that the limited bargaining power of agricultural workers exacerbates the problem of stagnating prevailing wages and slow adjustment to higher equilibrium wages in the face of labor shortages, justifying the use of an AEWR separate and distinct from local prevailing wages.

The vulnerable condition of U.S. agricultural workers is described in a report by the USDA's Economic Research Service (ERS), available at *http://www.ers.usda.gov/Briefing/LaborAndEducation/FarmLabor.htm.* The report found that in 2006 the average annual unemployment rate for hired farm workers (8.5 percent) was nearly twice the unemployment rate for U.S. workers across all occupations (4.5 percent). High unemployment is in part attributable to the seasonality of farm work. Total employment levels for hired farm workers vary significantly depending on the time of year. As an example of seasonal employment fluctuations, the ERS report pointed to National Agricultural Statistics Service (NASS) data in 2006 which indicated that 1,195,000 hired farm workers were employed in mid-July, compared with only 796,000 in mid-January.

The ERS report also noted the concentration of hired farm workers in the Southwest. According to data from the Current Population Survey (CPS), roughly 40 percent of all hired farm

[8] The ability of unauthorized workers to move readily between agricultural jobs and jobs in other industries such as construction may account for the lack of evidence of wage depression. In contrast, workers admitted under the H–2A program are restricted to working only in the agricultural sector, and therefore the wage-depressive effects of the influx of such workers are concentrated.

workers live in the Southwest, and 20 percent live in each of the South and Midwest regions. Almost half of all hired farm workers live in just five States: California, Texas, North Carolina, Washington, and Oregon. The geographic concentration of farm workers suggests that exclusive reliance on the traditional notion of the prevailing wage (*i.e.,* the wage paid for that occupation in area of intended employment) is inappropriate to the unique circumstances of the H–2A program. Moreover, many of the other temporary foreign labor programs administered by the Department are subject to statutory visa caps. Historically, those programs have never involved the influx of large numbers of foreign workers into a particular labor market because the influx of workers is spread throughout several industries. In these other programs, it is realistic to conclude that payment of a prevailing wage to the foreign workers will have no adverse effect on U.S. workers. This assumption is not valid in the H–2A context. The program is uncapped and experience indicates that it can involve large numbers of foreign workers entering a specific labor market. Under these circumstances, there is a heightened risk that the employment of foreign workers may produce wage stagnation in the local labor market. Access to an unlimited number of foreign workers in a particular labor market at the current prevailing wage would inevitably keep the prevailing wage lower than it would have been had it adjusted to an equilibrium wage to dispel the shortage through normal market processes involving domestic labor supply flows in response to equilibrium wage changes. The most effective way to remedy this adverse effect on domestic agricultural workers is to impose a wage floor that approximates the equilibrium wage that would have resulted, and the most effective way to approximate such a wage is to consider a broader geographic area than the local area considered for prevailing wages.[9]

One commenter suggested that the current 66,000 visa cap on the H–2B program would be sufficient to flood any particular labor market anyway, assuming all the positions in that labor market were certified by the DOL. Rather than arguing against the use of an AEWR to prevent localized wage depression, this comment simply suggests that localized wage depression is theoretically possible under a prevailing wage concept as provided for under the H–2B program. The Department has not found that entry of workers using H–2B visas has adversely affected local labor markets, because in fact, these workers are employed in a wide variety of industry sectors, including landscaping, hospitality, construction, reforestation, and retail trade. Nevertheless, the Department has noted the concentration of agricultural workers in localized areas and therefore the greater likelihood of adverse effects on local agricultural labor markets. Thus, the Department recognizes the usefulness of an AEWR in the context of the H–2A program.

The Department continues to consider valid the justification cited in the 1989 Rule, stating that even though the evidence is not conclusive on the existence of past adverse effect, DOL still believes that its statutory responsibility to U.S. workers will be discharged best by the adoption of an AEWR in order to protect against the possibility that the anticipated expansion of the H–2A program will itself create wage depression or stagnation. See 54 FR 28037, July 5, 1989.

The Department continues to believe that the use of an AEWR is necessary in order to effectuate its statutory mandate of protecting domestic agricultural workers from the possibility of adverse effects on their wages or working conditions. In drawing this conclusion, the Department follows the approach in the 2008 Final Rule. The Department is firmly committed to the principle that the wage rates required by the H–2A program should ensure that the wages of U.S. workers will not be adversely affected by the hiring of H–2A workers, and therefore declines to jettison the AEWR concept. 73 FR 77110, Dec. 18, 2008.

b. Determining the AEWR

The Department has chosen to calculate the AEWR for each State within a given region as the annual average combined hourly wage for field and livestock workers derived from the USDA's NASS quarterly FLS. Hourly wage rates are calculated based on employers' reports of total wages paid and total hours worked for all hired workers during the survey reference week each quarter.

The FLS is conducted each year in January, April, July and October, and results are published the following month. Annual average estimates for the number of all hired workers, hours worked by hired workers and wage rates are included in the October FLS report, which is published in November. Information about the methodology of the FLS is publicly available at: *http://usda.mannlib.cornell.edu/usda/current/FarmLabo/FarmLabo-11–20–2009.pdf.*

The FLS defines work as work done on a farm or ranch in connection with the production of agricultural products, including nursery and greenhouse products and animal specialties such as fur farms or apiaries. It also includes work done off the farm to handle farm-related business, such as trips to buy feed or deliver products to local markets.

The FLS defines hired workers as anyone, other than workers supplied by a services contractor, who was paid for at least 1 hour of agricultural work on a farm or a ranch. Worker type is determined by what the employee was primarily hired to do, not necessarily what work was done during the survey week. The survey seeks data on four types of hired workers: Field workers, livestock workers, supervisors (hired managers, range foremen, and crew leaders) and other workers engaged in agricultural work not included in the other three categories.

The FLS report is based on farmers' gross wages paid to workers grouped into two broad categories: Field workers and livestock workers. Wage rates are not calculated and published for supervisors or other workers, but are for field workers, livestock workers, field and livestock workers combined, and total hired workers. Field workers include employees engaged in planting, tending and harvesting crops, including operation of farm machinery on crop farms. Livestock workers include employees tending livestock, milking cows or caring for poultry, including operation of farm machinery on livestock or poultry operations.[10]

The FLS also collects data on the number of workers and wages of workers performing agricultural services on farms (*i.e.,* workers supplied by services contractors) in California and Florida. California and Florida account for the preponderance of agricultural service contract labor provided to farms.

The target population for the establishment portion of the FLS is all farms that sell, or would normally sell, at least $1,000 worth of agricultural

[9] As mentioned previously, in cases in which the AEWR is not the highest of the prevailing wage, Federal or State minimum wage or collectively bargained wage, use of the AEWR would be a disadvantage to incumbent workers, and the highest wage rate among the listed choices is a closer approximation of the position the workers would have been in, absent the H–2A program.

[10] To the extent workers receive incentive pay, the average wage rate would exceed the workers' actual wage rate. Because the ratio of gross pay to hours worked may be greater than a workers' actual wage rate, some statistics agencies refer to the ratio as average hourly earnings, and not as hourly wages or wage rate.

products during the year. The target population for the agricultural services survey covering California and Florida is all operations that provide agricultural services to farmers.

The USDA survey is designed to produce statistically reliable estimates of overall hired labor use and costs for California, Florida and Hawaii, and provide data for other States except Alaska under 15 multistate groupings. For California, Florida and Hawaii, the AEWR each year will be set as the annual average of the previous calendar year's four quarterly FLS hourly wage estimates for field and livestock workers (combined) in each of these States. For the other States the AEWR will be set as the annual average of the previous calendar year's four quarterly FLS hourly wage estimates for field and livestock workers (combined) of the FLS multistate crop region to which the State belongs. Every State in the same region will be assigned the same AEWR amount. The State groupings are as follows.

Northeast I	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont.
Northeast II	Delaware, Maryland, New Jersey and Pennsylvania.
Appalachian I	Virginia and North Carolina.
Appalachian II	Kentucky, Tennessee and West Virginia.
Southeast	Alabama, Georgia and South Carolina.
Delta	Arkansas, Louisiana and Mississippi.
Cornbelt I	Illinois, Indiana and Ohio.
Cornbelt II	Iowa and Missouri.
Lake	Michigan, Minnesota and Wisconsin.
Northern Plains.	Kansas, Nebraska, North Dakota and South Dakota.
Southern Plains.	Oklahoma and Texas.
Mountain I	Idaho, Montana and Wyoming.
Mountain II	Colorado, Utah and Nevada.
Mountain III	Arizona and New Mexico.
Pacific	Oregon and Washington.

The selection of the Bureau of Labor Statistics (BLS) Occupational Employment Survey (OES) in the 2008 Final Rule was based on an underestimation of its inadequacies. The OES agricultural wage data has a number of significant shortcomings with respect to its accuracy as a measure of the wages of hired farm labor suitable to be used as the AEWR. Perhaps its most substantial shortcoming in this context is that the OES data do not include wages paid by farm employers. Data is not gathered directly from farmers but from non-farm establishments whose operations support farm production, rather than engage in farm production. Therefore, the OES results for the farm workers and laborers, crop, nursery and greenhouse occupation category reflects only the subset of farm workers and laborers employed by agricultural support services employers—companies that provide agricultural labor supply to farmers on a contract basis. The survey does not include data on farm workers who are directly hired by farm operators and represent the majority of hired farm labor. According to the latest OES data, the covered agricultural establishments represent employment of 451,770 hired agricultural workers of all types—about one-third of the 1.2 million total number of all hired farm workers of all types identified by the USDA FLS. Given that the employees of non-farm establishments constitute a minority of the overall agricultural labor force, the Department has concluded that these data are therefore not representative of the farm labor supply and do not provide an appropriately representative sample for the labor engaged by H–2A employers.

The adoption of the BLS OES methodology in the 2008 Final Rule was intended to simplify the wage determination process for the H–2A program while maintaining adverse effect wage protection similar to that previously provided by the FLS. It was never the Department's intention to produce a substantial and across-the-board reduction in the level of wage protection provided by the AEWR. The 2008 Final Rule explicitly stated that the decision to adopt the OES method for computing the AEWR does not reflect any belief on the part of the Department that all AEWRs are currently artificially high and that they therefore should all be lowered. Nonetheless, average wage levels certified under the H–2A program have declined by over 10 percent nationwide: On a State-by-State basis, only seven States did not experience a decline (See Table 1; Data based on the full set of H–2A application records received in fiscal years (FY) 2008 and 2009).

Several commenters representing employers and grower associations questioned the conclusion expressed in the NPRM that the change in the AEWR computation method had negatively impacted wage floors set under the H–2A program and asked for more specific data. Accordingly, the Department has analyzed the records for FY 2008 and FY 2009 H–2A certifications. The FY 2008 certifications included records for 5,392 applications that were fully or partially approved in the last full year of AEWR computation under the procedure specified in the 1989 Rule (relying on the NASS averages for crop and livestock workers). The FY 2009 certifications included 4,857 applications that were fully or partially approved, of which about 40 percent were received before the January 2009 effective date of the 2008 Final Rule and were processed under the 1989 computation method. The fact that in FY 2009 some applications were certified under different methods provides a very useful basis for comparison of the relative impact of the computation method change from the FLS data source to the OES data source. The analysis focused on the applications for hourly paid farm and livestock workers for which the AEWR is most likely to be the wage floor determinant. The analysis excluded 906 applications in FY 2008 and 610 applications in FY 2009 that were applications for custom combine and other specialized equipment operators or cattle or sheep range workers paid on a monthly or weekly basis (the wages for these jobs are determined predominantly by local, crop or livestock specific prevailing wage surveys). The excluded applications had de minimis effect on the comparative averages for FY 2008 and FY 2009 wage comparisons shown below since the excluded observations included approximately equal numbers of applications involving relatively high-paid custom combine operators and relatively low-paid sheepherders. Table 1 shows the National and State average wage certifications for FY 2008, for the applications certified under the 1989 Rule in FY 2009 and for the applications certified under the 2008 Final Rule in FY 2009.

The average wage amounts are the average of the certified minimum wages of the approved applications weighted by the number of workers approved for each application. The average wages reflect the combined effects of the AEWR, the applicable local prevailing wage and the applicable legal Federal or State minimum wage, whichever was highest for each application. In some cases the AEWR was the determining parameter for the wage certified and in other cases a local prevailing wage or a legal minimum wage was the determining parameter. The change in the method of calculating the AEWR is reflected in the changes in the share of applications in which the applicable prevailing wage or legal minimum wage was higher than the applicable AEWR and in the average certified wages for applications processed before and after the change.

The change to the OES method of computing the AEWR resulted in the

average certified wage for H–2A workers decreasing nationwide to $8.02 per hour, an 11.2 percent decrease compared to the $9.04 per hour average for FY 2009 applications that were received before January 19, 2009 and processed under the prior rules, and a 10.8 percent decrease compared to the $9.00 per hour average wage rate for FY 2008 applications, for all of which the wage determination was made under the prior rule. The only States that did not see a fall in the average H–2A wage amount following the implementation of the 2008 Final Rule were Alaska, Delaware, Hawaii, Minnesota, Montana, North Dakota, and South Dakota. These States accounted for 1,252 H–2A workers, less than 2.4 percent of the 52,420 total number of H–2A workers certified under the 2008 Final Rule in FY 2009. It is noteworthy that the decline in average wage certification amounts would have been greater were it not for the significant increase following the implementation of the OES AEWR computation method in the proportion of applications in which the wage floor determination reflects a legal minimum wage or a local prevailing wage greater than the applicable AEWR level. In FY 2009, for applications processed under the 2008 Final Rule (*i.e.,* applications received after January 19, 2009), 60 percent of the applications were approved at a wage higher than the applicable AEWR because the applicable prevailing or legal minimum wage was higher. This is in contrast to only 10 percent in which the AEWR was not applicable among applications processed in FY 2009 under the prior rule.

TABLE 1—STATE AND NATIONAL AVERAGE CERTIFIED H–2A WAGE RATES FY 2008 AND FY 2009

State	FY 08 average wage level	Pre Jan. 19, 2009 wage level	Post Jan. 19, 2009 wage level	08–09 Change (FY 2008 vs post Jan. 19) chg	09 Change (pre Jan 19 vs post Jan. 19)
AK	$8.00	$8.00	$8.25	$0.25	$0.25
AL	8.52	8.53	7.39	−1.12	−1.13
AR	8.25	8.44	7.42	−0.83	−1.03
AZ	8.55	8.73	8.09	−0.46	−0.64
CA	9.44	9.29	8.65	−0.80	−0.64
CO	8.93	9.45	8.15	−0.78	−1.30
CT	9.63	9.60	9.22	−0.40	−0.38
DE	12.67	9.70	13.78	1.11	4.08
FL	8.62	8.82	7.45	−1.17	−1.37
GA	8.52	8.53	7.31	−1.22	−1.23
HI	10.83	10.86	10.90	0.08	0.04
IA	10.42	10.39	7.46	−2.96	−2.93
ID	8.76	8.77	7.95	−0.81	−0.83
IL	10.09	9.90	7.76	−2.33	−2.14
IN	9.90	9.90	8.53	−1.37	−1.37
KS	9.64	9.85	9.78	0.14	−0.07
KY	8.87	9.13	7.38	−1.49	−1.75
LA	8.19	8.47	8.14	−0.05	−0.33
MA	9.66	9.63	8.30	−1.36	−1.33
MD	9.42	9.70	9.07	−0.34	−0.63
ME	9.68	9.70	9.48	−0.20	−0.22
MI	9.90	10.02	8.24	−1.66	−1.78
MN	9.85	10.03	10.03	0.18	0.00
MO	10.14	10.44	9.56	−0.58	−0.89
MS	8.16	8.45	7.51	−0.64	−0.94
MT	8.78	8.75	9.29	0.51	0.54
NC	8.91	8.88	7.40	−1.51	−1.48
ND	9.66	10.89	11.61	1.96	0.73
NE	9.66	9.90	9.54	−0.11	−0.36
NH	9.67	9.70	8.39	−1.28	−1.31
NJ	9.34	9.76	8.48	−0.86	−1.28
NM	8.59	9.00	8.74	0.15	−0.26
NV	9.28	9.42	8.98	−0.30	−0.44
NY	9.64	9.72	9.13	−0.51	−0.59
OH	9.92	9.96	9.26	−0.66	−0.70
OK	9.06	9.13	8.94	−0.12	−0.19
OR	9.93	.....	9.89	−0.04	.....
PA	9.49	9.70	8.72	−0.77	−0.98
RI	9.63	10.00	.....	.....	.....
SC	8.51	8.53	7.26	−1.25	−1.27
SD	9.68	9.94	10.11	0.43	0.17
TN	8.89	9.10	7.44	−1.45	−1.65
TX	8.83	9.03	8.75	−0.08	−0.28
UT	9.04	9.45	8.85	−0.19	−0.60
VA	8.95	8.87	7.55	−1.41	−1.32
VT	9.66	.....	9.62	−0.04	.....
WA	9.93	9.94	8.74	−1.19	−1.20
WI	9.78	10.04	8.44	−1.34	−1.60
WV	8.65	9.13	7.39	−1.26	−1.74
WY	8.73	9.01	8.45	−0.28	−0.56
Nationwide	9.00	9.04	8.02	−0.98	−1.01

Note: Empty cells indicate no applications.

Because of the proportionate size of the decrease and the widespread extent of the decreases, the Department has concluded that the continued use of the OES method to calculate the H–2A AEWR entails a significant risk that U.S. workers may in the future experience wage depression as a result of unchecked expansion of the demand for foreign workers.

Some employers and employer association commenters suggested that the AEWR computed on the basis of OES data is a better reflection of actual agricultural labor market conditions than the average wage based on the FLS. This view is incorrect and reflects a misunderstanding of the role of the AEWR. As already noted, the AEWR is most relevant in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area or over a broader definition of occupation, crop, and/or activity. In this regard, the OES data are inadequate. The OES data does not include any survey observations of wages paid to workers who are employed directly by farm operators. It only includes data from employers who operate farm support operations, including contract suppliers of temporary farm labor. Workers in agricultural crop and livestock occupations who are employed by support services establishments account for about one-third of total hired agricultural crop and livestock employment. The predominant majority are directly hired by farmers.

In the 2008 Final Rule, the Department recognized this deficiency in the OES data, but assumed that earnings in the support services sector reported in the OES data would be equivalent to, and a reasonable proxy for, wages paid by farm employers. Subsequent analysis of empirical data by the Department has shown that this assumption was seriously flawed. The agricultural occupations of workers employed in the agricultural support services sector (the only sector directly represented in the OES survey results) differ significantly from the vast majority of the agricultural occupations performed by workers who are employed directly by farm establishments. These differences range across characteristics that significantly affect potential productivity and earnings. Based on data from the Annual Social and Economic Supplement (also known as the March supplement) of the U.S. Census Bureau's CPS describing annual earnings, weeks worked, and weekly hours worked for persons with any work experience during calendar years 2004 through 2008, hired agricultural laborers employed by agriculture support services establishments were comprised of 59 percent non-citizens and 41 percent U.S. citizens. In contrast, just 37 percent of similar workers directly employed by farm establishments were non-citizens and 63 percent were U.S. citizens. While the legal status of non-citizen workers in the sample is unknown, it has been generally observed across a wide range of industries and occupations that non-citizens tend to earn lower wages than do U.S. citizens. For example, the CPS data we analyzed showed that across all occupations and industries, mean hourly earnings of non-citizens in the 2004–2008 period were 28 percent less than mean hourly earnings of citizens.

Educational attainment is also an important determinant of earnings. Hired agricultural workers tend to have lower-than-average educational attainment compared to the general workforce, but the differences between hired agricultural workers employed by agriculture service sector establishments compared to those employed directly by farm establishments are striking and reflect in part the higher share of non-citizens found in the agriculture service establishment compared to the farm establishments. For agriculture service establishments, 60 percent of workers had completed no more than the 9th grade, compared to 41 percent of hired agriculture workers employed directly by farm establishments. Over 26 percent of workers employed directly by farm establishments had a high school diploma, compared to 19 percent of those employed by agriculture service establishments, and 15 percent of hired farm laborers employed directly by farm establishments had some post-secondary education, compared to only 6 percent for employees of agriculture support service establishments. These differences in characteristics of hired agricultural workers employed by agricultural support service establishments (the only category of agriculture establishments reflected in the OES wage data) compared to workers employed directly by farm establishments helps to explain the large differences in wages between the two sectors. On average over the 2004–2008 period, persons who were employed directly by farm establishments earned on average $10.87 per hour (median $8.33 per hour), compared to a mean of $9.32 per hour (median $7.15 per hour) for those employed by support service establishments. Whether in terms of mean or median, workers employed in the support services sector earned 14 percent less. All data are in real 2009 dollar equivalent terms.

The Department's error in the 2008 Final Rule of assuming that the OES data for workers employed by agricultural support services establishments would be a reasonable proxy for wages paid by farm establishments was compounded by a second erroneous assumption. In the 2008 Final Rule, the Department added the option for applicants for H–2A workers to specify a skill level for the job opportunity. These skill levels correspond to points on the percentile distributions of wages below and above the OES median for each occupation. The Department assumed that employers would seek a variety of skill levels in occupations for which workers were sought—some higher and some lower than the occupational median, but that the overall result would likely be balanced and average to the median. The FY 2009 implementation experience revealed a significantly different outcome: 73 percent of applicants for H–2A workers specified the lowest available skill level—corresponding to the wage earned by the lowest paid 16 percent of observations in the OES data. Only 8 percent of applicants specified a skill level that translated into a wage above the OES median. This bias toward low skill job specifications compounded the downward wage bias created by the omission of farm establishment observations from the OES data. Both the shift to the OES data source and the use of skill levels contributed to the downward bias in the AEWR-based wage determinations for the applications in which the wage determination was made using the rule for applications received on or after January 17, 2009.

The FLS is the only annually available data source that actually uses information sourced directly from farmers. This is a strong advantage of the FLS as the AEWR data source compared to all other alternatives. The OES data do not include observations of wages paid by farm establishments. Other potential data sources that do include earnings information for hired farm workers employed by farming establishments include the annual CPS work experience supplement (the Annual Social and Economic Conditions (ASEC) supplement), the CPS monthly (outgoing rotation) earner study supplement and the Census Bureau's American Community Survey (ACS). However, the CPS data (both the ASEC supplement and the monthly earner supplement) contain too few

observations for disaggregation of estimates to State or significant multistate regions; the analysis of CPS work experience data for this rulemaking entailed pooling of 5 years of data to obtain sufficient observations. The sample of the CPS is designed to reliably produce total annual labor force characteristics on a State-by-State basis. State (and, to a greater extent, substate) sub-samples of the CPS generally cannot support reliable estimation on a monthly basis for the relatively small category of agricultural employment. Because of a concern about the statistical significance for tabulations covering less than a full calendar year, the BLS does not regard CPS statewide tabulations covering less than a full calendar year as fit for publication and cannot account for seasonal fluctuations in the sub-national monthly CPS tabulations. Furthermore, the ACS data entail an unacceptable time lag of over a year and do not readily allow for calculation of hourly earnings. On balance, the USDA FLS is the best source available.

Many comments by farm organizations, individual farmers, and elected officials expressed concerns that wages vary across the U.S. by geographic location, by specific agricultural occupation, and by level of skill. Therefore, these commenters argued that an AEWR that does not take into account these variables will adversely affect U.S. workers. Accordingly, a farm association proposed that DOL continue using the BLS data to determine the AEWR because it gives a more accurate picture of market-based wages actually being paid for agricultural jobs being performed at various skill levels.

The Department does not agree with the assertion that the OES data provide a more accurate picture of market-based wages. In addition to the fact that the FLS and not the OES includes data about what farm establishments actually pay for hired labor (as discussed previously), the commenters' focus on localized labor market conditions overlooks the important role of the FLS's broader geographic and occupational coverage in protecting domestic workers from wage depression or stagnation resulting from an influx of foreign workers into the context of small, isolated geographic areas or niche crop markets. The FLS sample is distributed across the entire country, with the geographic detail covering 15 multistate regions and 3 stand-alone States. This broader geographic scope makes the FLS more consistent with both the nature of agricultural employment and the statutory intent of the H–2A program. Because of the seasonal nature of agricultural work, much of the labor force continues to follow a migratory pattern of employment that often encompasses large regions of the country. Congress recognized this unique characteristic of the agricultural labor market with its statutory requirement that employers recruit for labor in multistate regions as part of their labor market before receiving a labor certification for employing H–2A workers.

A related consideration is the potential inefficiency of labor market information transmission systems. By providing a prevailing wage defined over a broader geographic area and over a broader occupational span (all field and livestock workers, rather than a narrow crop or job description), use of the FLS provides a check on the expansion of foreign labor importation to prevent undermining job opportunities and wages for domestic farm workers. Using the FLS average wage derived from data across a relatively broad geographic and occupational span reflects the view that farm labor is mobile across relatively wide areas and farm laborers' skills are adaptable across a relatively wide range of crop or livestock activities and occupations. The use of the FLS wage average as an AEWR appropriately limits the importation of foreign labor to cases where the value of the labor need is more than marginal; the relatively higher willingness to pay signaled by farmers who do import foreign workers temporarily under these circumstances (because domestic labor was not immediately forthcoming) may serve to mobilize domestic farm labor in neighboring counties and States to enter the subject labor market over the longer term and obviate the need to rely on importation of foreign labor on an ongoing basis. In this way, the AEWR based on the FLS data source balances the needs of both farmers and domestic farm workers. The 2008 Final Rule did not sufficiently account for these labor market attributes and the Department believes that, by returning to an AEWR based on the FLS' regionally-based methodology, that inconsistency will be remedied.

The employer and employer association commenters that argued that precise tailoring of H–2A wages to local labor market conditions is critical to preventing an adverse effect on wages of U.S. workers may not fully understand the dynamics of farm worker labor markets and labor market information flows described above. Furthermore, those who argue that it is essential that the AEWR have as great a degree of geographic refinement as possible, reflecting market conditions for each locality across the country, miss the essential point that the importation of foreign labor should not serve as an obstacle to normal market adjustment processes and labor mobility in the broader regional market perspective. We have carefully considered the arguments of some commenters that the aggregation of a widely diverse national agricultural landscape into just 15 regions (and 3 stand-alone States) results in extremely broad generalizations that fail to account for specific market conditions at the local level. After due consideration, we conclude that a broadly-based AEWR protects the long-term well-being of domestic workers in terms of wages and access to job opportunities and it also benefits farmers in the long-run by preserving market adjustment processes that encourage efficient allocation of resources, innovation, and adaptation to changing competitive circumstances.

DOL consistently has set statewide AEWRs rather than substate or crop-specific AEWRs because of the absence of data from which to measure wage depression at the local level. To the extent that wage depression does exist on a concentrated local basis, the USDA's aggregation of wage data at broad regional levels immunizes the survey from the effects of any localized wage depression that might exist.

Many employer and association commenters expressed concern that an appropriate AEWR that reflects market realities and labor costs should include wage data relating to the specific occupation and level of skill or experience required for a position.

Several farm organizations and individual farmers expressed concerns that the FLS produces an artificially high wage rate, in part because it includes many occupations which are not related to the jobs H–2A workers are hired to perform. Commenters also argued that the Department's reliance on USDA FLS data does not provide refined data by skill level or experience, occupations, or geographic locales of workers typically sought by agricultural employers in the H–2A program. Commenters also pointed out that the USDA FLS population includes not only the lower-skilled crop field workers typically sought by agricultural employers who turn to the H–2A program for labor, but also inspectors, animal breeding technicians, and trained animal handlers—all occupations that provide a poor basis for determining H–2A wages because they are rarely, if ever, filled by H–2A workers. In response to these comments,

we examined the records of FY 2008 and FY 2009 H–2A applications and found numerous examples of requests for foreign workers to fill jobs as inspectors, animal breeding technicians (inseminators), and other specialized occupations. For example, the FY 2009 applications included requests for 12 equine trainers and breeding specialists, 38 agricultural product inspectors and graders, 5 non-equine animal trainers, 43 operating engineers, 312 beekeepers, 25 artificial inseminators, 23 logging crane operators, 18 farm equipment mechanics and 14 reptile specialists. Therefore, this objection to the use of FLS data is unfounded.

The OES occupational detail is a unique feature of the survey. One State agriculture department noted that this approach allows local farmers and ranchers to reimburse immigrant workers with fair, market-based wages specific to the location of employment. It is also in part the reason that the survey is used in other foreign worker programs administered by the Department, including the H–1B and H–2B programs.

The Department believes that the BLS OES wage survey suffers from higher error rates than the USDA FLS, and is a less reliable source of data about farm workers' wage rates. One study of OES data found that employment in some of the metro and non-metro areas is very small, increasing relative standards errors. For example, for the occupation of farm workers and laborers, crop, nursery, and greenhouse employment numbers may be very small for some States—see Kentucky (200) or West Virginia (190) as compared to California (146,220). As expected, the subsequent relative standard errors for States with few observations is relatively high—meaning that the reliability of the wage statistics is relatively low, which result in data that are not precisely measured. For example, the 90 percent confidence interval for the $8.28 hourly mean wage for California is from $8.20 to $8.36 as compared to the 90 percent confidence interval for the $11.52 hourly mean wage for Montana which is from $10.24 to $12.80. Furthermore, a SWA noted that the OES survey program used in the 2008 Final Rule is a complex, confusing system resulting in multiple H–2A wage rates for various geographical areas within a State.

Several farmers pointed out that another unique feature of OES is that it offers the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty variations within each occupation. The four skill levels for each occupation afford the employer and the Department the opportunity to more closely associate the level of skill required for the job opportunity to the relevant OES job category and, in turn, the appropriate AEWR.

The Department has carefully considered these comments and does not find the notion of meaningful skill differences among most agricultural workers to be generally credible. The perception expressed by some commenters that the OES data actually differentiates workers by skill is simply false. The OES wage levels are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula. These are arbitrary percent cut-offs of the distribution of earnings within the occupations. Therefore, the associated occupational skill levels are not well defined, and H–2A wage differences do not accurately reflect meaningful differences in skills or job complexity.

Moreover, the Department finds that the notion of meaningful skill differences among agricultural workers is unfounded. Most of the occupations and activities relevant to the H–2A program involve skills that are readily learned in a very short time on the job,[11] skills peak quickly, rather than increasing with long-term experience, and skills related to one crop or activity are readily transferred to other crops or activities.

The preamble to the 2008 Final Rule states that the Department is statutorily obligated to use the four-tier wage system. Although the relevant statute is not clear on its face, the Department has now concluded that this statement is an incorrect reading of the statute. The legislation establishing the four-tier system was part of the Consolidated Appropriations Act 2005, Pub. L. 108–447 and is contained in a section titled the L–1 Visa and H–1B Visa Reform Act. The specific part of that Act describing the four-tier system, sec. 423, is titled H–1B Prevailing Wage Level. In addition, the legislation specifically identifies the visa categories to which it applies and H–2A visas are not included in the list. While the Department had the discretion to use the four-tier system in the H–2A program if the facts supported that outcome, it is simply wrong to state that the Department is statutorily required to use it. Moreover, for the reasons stated above, the Department has concluded that the OES four-tier wage system is inappropriate for use in the H–2A program.

(i) Survey Frequency and Data Availability

The FLS and publication schedule provide timely data for purposes of calculating the relevant State AEWRs. Specifically, the FLS is routinely available and published within 1 month of the survey date. The quarterly gathering of data ensures that the annual averages are more accurately reflective of the fluctuations of farm labor patterns, which are by definition seasonal and thus more subject to fluctuation than other occupations. The scope and frequency of the survey means that all crops and activities now covered by the H–2A program will be included in the survey data and that peak work periods also will be covered. This is in contrast to the OES data, which are published 1 year after collection of the most recent data panel. Furthermore, OES data are only collected in May and November, which are not times of peak work for many crops and activities covered by H–2A.

(ii) Accuracy of Data

The Department also weighed concerns over the accuracy of AEWRs based on the USDA FLS because the FLS is not based on reported hourly wage rates. Instead, the USDA's FLS asks employers to report total gross wages and total hours worked for all hired workers for the two reference weeks of the survey. Based on this information, the survey constructs annual average earnings for the broad general categories of field workers and livestock workers as the ratio of gross wages to hours worked. The hourly AEWR thus is not based on reported hourly wages, but rather on the basis of the numerator (total gross wages for the combined occupations) and denominator (total hours for the combined occupations) derived from the information supplied by employers.

The USDA FLS asks employers about their workers' total earnings and total hours worked to derive average hourly rates. In OES, establishments report the number of workers in a certain occupation earning within each of 12 wage intervals. To calculate the mean hourly wage of each occupation, total weighted hourly wages are summed across all wage intervals and divided by the occupation's weighted survey employment. Furthermore, the mean hourly wage rate for all workers in any given wage interval is not computed using grouped data collected by the OES survey. Rather, the mean wage for each interval is based on occupational wage

[11] According to the Employment Projection Program at BLS, for crop, nursery, and greenhouse farm workers and laborers, the most significant source of post-secondary education or training is short-term on-the-job training. See *http://www.bls.gov/opub/mlr/2007/11/art5full.pdf.*

data collected by the BLS Office of Compensation and Working Conditions for the National Compensation Survey (NCS). Although smaller than the OES in terms of sample size, the NCS program, unlike OES, collects individual wage data. However, agriculture establishments are excluded from the scope of the NCS. Farm worker data is derived from workers employed through companies listing themselves as nonagricultural establishments. Therefore, the Department believes that the FLS is superior to the OES for purposes of computing the H–2A AEWR.

(iii) The Department's Decision To Return to the NASS FLS Methodology

Even if one accepted the argument that the geography, occupational, and other attributes of data available from the OES are desirable features, the Department finds that none of these individually or together would offset the disadvantage that the OES does not gather data directly from farmers but from non-farm establishments whose operations support farmer production, rather than engage in farm production. For example, the OES results for the farm workers and laborers, crop, nursery and greenhouse occupation category reflects only the subset of farm workers and laborers employed by agricultural support services employers—companies who provide agricultural labor supply to farmers on a contract basis. The survey does not include data on the majority of farm workers who are directly hired by farm operators. Because the data demonstrate that workers employed by support services establishments are less educated and less likely to be U.S. citizens than employees of farm establishments, and therefore typically have substantially lower wage rates, the OES survey is not an appropriate data source for ensuring that the importation of guest workers does not adversely affect U.S. workers.

For this and all of the other reasons discussed, the Department will return to its 1987 Rule methodology for the formulation of the AEWR. The Department will annually publish for each State within a given geographical region the AEWR based on the average combined hourly wage for field and livestock workers for the four quarters of the prior calendar year from the USDA's NASS FLS.

c. Collective Bargaining Wage

The Department did not propose adding the term collective bargaining wage in the provision regarding the required wage to be offered. Several commenters, however, suggested that the Department address the use of collective bargaining wages in required wages. Some commenters suggested that the collective bargaining wage rate be cited as the first wage to be imposed, looking to the highest of the AEWR, prevailing, or minimum wages only in the absence of a collective bargaining wage rate, in order to recognize that wages paid under collective bargaining agreements between a union and an employer do not adversely affect the wages of workers similarly employed. Others suggested the Department recognize wages set by collective bargaining agreements as prevailing, in the alternative or as an exception to the AEWR.

After consideration, the Department has decided to amend the provision to add the term an agreed-upon collective bargaining wage to the required wage rate options for employers. This amendment requires employers to use a collective bargaining wage if it is the highest wage, thus avoiding the potential payment of a collective bargaining wage that is less than the other wages. At the same time, it acknowledges the role of the collectively bargained wage as a potential legitimate wage.

d. Increase in Prevailing Wage During the Contract Period

In the NPRM, the Department proposed that 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 employer must pay that higher wage upon notification by the Department. We are retaining this requirement with modifications based on (a) above.

The Department received several comments in favor of this proposal. One commenter expressed support for the proposed increase but suggested the Department further amend the requirement to include within the list of applicable wages the hourly wage or piece rate paid to the employer's non-H–2A workers in the current or immediately preceding season for comparable employment. The Department declines to adopt this recommended change as not necessary to fulfill the statutory requirement to ensure that U.S. workers are not adversely affected.

Some commenters opposed the proposed adjustment, contending in one case that the proposal is contrary to current practice in other temporary programs, and that the Department provided inadequate justification for the change. These commenters also indicated that the application in mid-season of any increase would be detrimental to employers who have already budgeted for the season based on wages in effect at the time of recruitment.

Employers participating in the H–2A program have historically 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. The wage adjustment under this provision is intended to ensure that the workers in the program are consistently receiving at least the highest of the applicable wages. As explained above, the wage adjustment also ensures that the wages reflect the wage in the area of intended employment in those relatively rare cases when that wage exceeds the AEWR. Accordingly, this adjustment, as stated in the Final Rule, will only affect a limited number of employers whose OFLC-approved offered wage rate falls below the permissible floor once the new wage rates are issued.

The Department recognizes that these wage adjustments may alter employer budgets for the season. However, the change is intended to ensure workers are paid throughout the life of their contracts at an appropriate wage. Therefore, employers are encouraged to include into their contingency planning certain flexibility to account for any possible wage adjustments.

6. Section 655.121 Job Orders

a. Area of Intended Employment

(i). Submission of the Job Order to the SWA

The Department proposed to continue the longstanding practice of requiring employers to submit job orders to the SWA serving the area of intended employment for intrastate clearance in order to test the local labor market and determine the availability of U.S. workers before filing an Application. The Department further proposed that if the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites to place the job order. The Final Rule also requires that the SWA must forward the job order to the companion SWAs to have it placed in all locations simultaneously.

The Department received several comments on this proposal. A farm worker advocacy association commented that the filing of the job order alone and the elimination of the contemporaneous filing of the Application inappropriately reduces the oversight by the OFLC during the early

stages of the H–2A process. This commenter was concerned about the sufficiency of OFLC oversight during the pre-certification period when OFLC staff previously used this period to address serious deficiencies in the Application that affected material terms of employment and recruitment, including job terms and conditions as publicized to both U.S. and foreign workers.

Several commenters supported the Department's proposed regulation. One noted that it would reintroduce much-needed checks and balances into the process. Others indicated that the submission of the job order and initiation of recruitment prior to certification would increase the potential for hiring local workers. They also suggested that recruitment of U.S. workers may satisfy the need for agricultural labor and eliminate the need for a labor certification. As noted in the NPRM, the INA requires employers to engage in recruitment through the 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. Accordingly, the Final Rule retains the language of the NPRM.

(ii). Submission 75–60 Days Prior to Date of Need

The Department proposed to retain the 2008 Final Rule requirement that the employer submit the job order to the SWA no more than 75 calendar days and no fewer than 60 calendar days before the date of need. The Department received several comments about this proposal. The Department received two comments from State agencies supporting the longer recruitment timeframe, one noting that the timeframe will permit the SWA to review the proposed terms and conditions, assure that the wages offered meet the required wage, and commence required recruitment by placing the job order into intrastate clearance.

Most commenters, however, opposed the 75 to 60 day recruitment period. Many of them advocated a return to the 45-day posting of the job order, reasoning that it provides a more appropriate timeframe for employers to assess the local job market as well as to anticipate labor demands of the coming crop. Other commenters explained that growers, particularly small and mid-sized growers, must account for a variety of factors in order to decide what crops to plant and the amount of acreage, and that they do not make those decisions 75 to 60 days in advance. These commenters also expressed the concern that very few local agricultural workers commit to a job 75 to 60 days in advance and many of those who do commit often do not report for work on the date of need. One of these commenters expressed concern that the longer recruitment period would penalize employers because early hires may no longer be available at the time the work begins, leaving the employer with a labor shortage.

A few commenters echoed the same concerns and argued for a shorter timeframe. These commenters criticized the Department's rationale for extending the recruitment period. The same commenters referenced the Department's statements in the NPRM indicating that the use of the H–2A program since the implementation of the 2008 Final Rule has decreased, arguing that there should be less need for a longer timeframe due to fewer demands on the Department's resources.

Many commenters advocated for the return to the 45-day timeframe because the shorter recruitment period would be counterbalanced by the 50 percent rule that tends to provide longer exposure to H–2A job opportunities for U.S. workers. One commenter argued that the longer recruitment period was more acceptable when it was combined with a shorter 30-day referral period. Another commenter, a State farm bureau, also opposed the proposal, noting that the 15 to 30 days' increase in pre-employment recruiting was initially implemented by the Department in exchange for the elimination of the 50 percent rule and reduction in the referral period to 30 days after the start date.

One commenter noted that the Department presented no evidence indicating that referrals made further from the date of need are more numerous than those closer to the date of need. Another referred to Congressional testimony from a former association executive asserting that in his experience recruiting closer to the date of need produces more applicants and that prospective job applicants in these industries do not look for work 120 or even 45 days in advance.

A law firm representing growers urged the Department to allow growers to file their proposed job orders on the shortest, most administratively feasible timeframe. It also noted that the Department's policies should be designed to allow flexibility and entrepreneurial expansion and development of agricultural production and work opportunities, and not restrict the growth of job opportunities or agricultural products.

Some commenters cited the statement in the NPRM that the Department approves most applications by the 27th to 29th day before the date of need as evidence that the current system of filing on the 45th day before the date of need and certifying by the 30th day before the date of need is working and need not be changed. The Department is bound by the statute to make a final determination on each temporary agricultural labor certification by the 30th day before the date of need. The fact that the Department is generally able to meet the statutory deadline does not mean that the Department is able to certify based on a robust record of the employer's recruitment efforts. As discussed above, the extension of the recruitment period will enable the Department to make its certification with better information on recruitment.

Based on its long program experience, the Department believes that beginning recruitment 45 days before the date of need is insufficient because it provides the Department with only 15 days to assess the availability of U.S. workers in the relevant job market and to permit them sufficient time to seek and be hired for these jobs. (In fact, since it must first accept the Application and authorize recruitment, the Department has traditionally had only about a week to review recruitment efforts.) The Department has determined that the 75 to 60 day timeframe most adequately balances the Department's statutory duty to ensure that U.S. workers have access to meaningful employment opportunities (and are not adversely affected by the employment of foreign workers), with the agricultural employers' legitimate need to meet labor demands. In response to the commenter's argument that unpredictable factors often affect an employer's labor needs, the Department notes that its Final Rule retains a provision that permits an employer to amend its Application prior to certification to increase the number of workers needed. Giving growers the ability to request additional workers is intended to provide flexibility and account for the contingencies affecting agricultural production. Furthermore, the Department recognizes that some local job applicants who accept an offer of employment in agriculture, as in all other industries, on occasion fail to report for work as agreed. Employers in those circumstances must temporarily re-distribute the workload while seeking to hire a replacement. We reemphasize that while the Final Rule permits the submission of the job order as much as 75 days before the start date, employers are only required to submit their job orders 60 days prior to the start date. The Department believes that this

timeframe enhances the ability of domestic workers to access these employment opportunities.

As discussed throughout this Final Rule, the Department's primary concern with respect to its statutory mandate is restoring necessary protections to U.S. and foreign workers while maintaining a fair and reliable process for addressing legitimate employer needs. As adopted, the 75 to 60 day timeframe is necessary to ensure the orderly and timely administration of the program and provides the necessary flexibility for the Department, the SWAs and employers to meet the program's statutory requirements and objectives. The demand on Departmental resources, although relevant, is not a decisive factor in implementing a workable timeframe.

The Department has determined that in addition to providing U.S. workers with longer exposure to H–2A job opportunities through the reinstatement of the 50 percent rule, the longer pre-filing timeframe will ensure that the job order meets all applicable programmatic requirements. The Department has determined that both a longer recruitment period and a longer referral period are necessary to meet the statutory and policy objectives of the H–2A program. While there had been some discussion about balancing the initiation of recruitment with the termination of the employer's obligation to hire domestic applicants, the two issues are unrelated and deal with different aspects of recruitment. The need to start the recruitment process slightly earlier will also assist the Department to more effectively meet our obligation to make a certification decision 30 days before the start date. This is unrelated to the need to ensure the continued availability of these positions to U.S. workers through post-certification hiring requirements. We have discussed above why recruitment needs to start at least 60 days before the start date. We discuss later in this preamble why the Department has determined that the post-certification hiring is best met through the 50 percent rule.

Having considered the issues raised by commenters, the Department has decided to keep the provision in the Final Rule. Therefore, the Department has determined that the 75 to 60 day timeframe provides adequate time to resolve any pre-filing issues in a way that will not negatively impact the employer's ability to timely meet its labor needs.

b. SWA Review

In the NPRM the Department proposed that SWAs review the contents of the job order and address any noted deficiencies. As noted above, it also provided for the involvement of the Certifying Officer (CO) to resolve any issues regarding the placement of job orders in the intrastate clearance system. The Department received a number of comments addressing this provision. Many of the commenters expressed concern over the broad discretion granted to the SWAs to determine the sufficiency of the job order, and the lack of CO involvement to resolve outstanding issues prior to the filing of the Application. These commenters proposed to limit the SWA review to a specified timeframe.

A few expressed support for the retention by the OFLC of ultimate decision-making authority regarding the sufficiency of job orders but expressed concern over what they deemed an inordinate level of decision-making authority in the hands of the SWAs. These commenters were primarily concerned with the resulting lack of uniformity in adjudication and enforcement due to differences between the SWAs in rule interpretation and the likelihood that disparate adjudications will result in confusion for both employers and workers.

One commenter stated that having multiple points of acceptance will cause confusion and disruption in program use for large and small growers because States may differ from one another in their interpretations of the statutory and regulatory requirements and some are not even consistent internally. In addition, the commenter was concerned about the potential for inconsistency between what the SWA accepts at the pre-filing stage and the later determination by the CO regarding the sufficiency of the job order.

Another commenter indicated support for the reduced role of the SWAs in the H–2A labor certification process under the 2008 Final Rule. This commenter contended that most of the delay in processing of H–2A visas has been caused by SWA staff, who it asserted have been slow to perform their duties under the program. This commenter proposed that the Department limit the role of the SWAs to the inspection of worker housing and workplace conditions after approval.

A large growers' association expressed dissatisfaction with the process for placing job orders with the SWA. It asserted that since the filing of the Application is predicated on the acceptance by the SWA, the Department failed to provide a meaningful relief mechanism for employers to address issues with the SWAs imposing unwarranted requirements.

The Department expressed above its belief that SWAs remain, as they have always been, the arbiters of the acceptability of job orders. The Department also recognizes the need for employers to have an acceptable and timely process by which orders are fully evaluated and issues addressed with each SWA. Therefore, the Department has decided to amend its procedures for SWA acceptance of the H–2A job order to allow for a timely process of the acceptance or rejection of job orders.

Under the INA, the Department has the ultimate responsibility for all labor certification determinations. The Final Rule does not abrogate that authority. However, the Department has determined that the involvement of the SWAs at the outset of mandatory recruitment will benefit the process because, as discussed above, SWAs have unique expertise in assisting employers in preparing job orders and making initial determinations regarding their sufficiency. In addition, SWAs are experienced in providing services to farm workers and helping them navigate the employment process. In order to balance our obligations under the INA with involvement of the SWAs in the process, the Final Rule creates a process so that disagreements between the employer and the SWA about the contents of the job order can be expeditiously resolved. This provision also ensures uniformity of determinations and places the ultimate decision regarding the sufficiency of a job order with the CO.

The Department's Final Rule therefore adopts a process in which the SWA must either accept or reject the job order. After considering comments advocating that the Final Rule include a timeline, the Department has determined that 7 calendar days, rather than the 5 days proposed by some commenters, provides the SWA with adequate time to make a determination on even the most substantial job orders. In the event the SWA and the employer cannot reach a mutually agreeable solution regarding the job order in the timeframe outlined in the revised regulation, the SWA must reject the job order by written notice specifying the reasons for rejection, *i.e.* the deficiencies in the job order, to the employer, and the employer must respond. The Final Rule adds the requirement that once the employer responds to the SWA notification of deficiencies, the SWA must respond to the employer's response within 3

calendar days. If the job order deficiencies still remain unresolved, the Department's regulations permit the employer to use the emergency filing procedures to file its Application (and the job order) directly with the National Processing Center (NPC); such circumstances will constitute the good cause contemplated by that provision. The CO will then follow the procedures for accepting or rejecting the job order as outlined in this revised provision.

The Department's regulations provide for the involvement of the CO in instances where issues with the job order are not resolved between the employer and the SWA. As explained above, the Department's Final Rule adopts a timeframe under which the SWA must either accept or reject the job order within 7 calendar days and respond within 3 calendar days where the employer responds to the notification of deficiencies. If the deficiencies remain unresolved, the Final Rule provides for the filing of Applications on an emergency basis where the employer and the SWA cannot reach a timely resolution regarding the placement of the job order.

The Department does not anticipate significant discrepancies between SWA determinations in various States. In our experience, differences in SWA processing of job orders are often attributable to the differences in experience with the local industries and labor markets, and the resulting distinctions in treatment are legitimate outgrowths of those differences. The Department is relying 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. SWAs process job orders as part of their essential functions and have processed H–2 and H–2A job orders since the inception of the program. Employers are encouraged to work with the SWAs early in the process, including on crafting the requirements of job orders, to ensure that their job orders meet all requirements, and are timely accepted for intrastate clearance. In addition, the Department anticipates that CO determinations about job orders will in most instances agree with those of the SWA. The Department will provide training and on-going guidance for the SWAs and program users, in order to foster a clear understanding of program and other regulatory requirements and ensure uniformity in determinations.

c. Intrastate Clearance

The Department proposed to continue the requirement of having the employer whose job opportunity is in more than one State file with only one SWA serving the area of intended employment.

A commenter suggested that each work site be evaluated to determine whether there is more than one area of intended employment for a particular job opportunity. This commenter proposed a change to require that the employer simultaneously submit a job order to each SWA serving an area of intended employment where the job opportunity is located in more than one State.

An individual commenter proposed that the SWA placing the job order in intrastate clearance share the listing with other SWAs in States bordering the State containing the area of intended employment. This commenter argued that State lines should not stand in the way of recruitment of local residents where the area of commuting distance encompasses more than one State. This commenter further argued that permitting the forwarding of job orders to neighboring States would save the employer the costs of applying for an H–2A labor certification if the employer is able to fill the job openings with local workers.

The Department agrees with the intent of these comments and has modified the rule to require the SWA to forward the job order to the other SWAs having jurisdiction over the area of intended employment. However, we believe the requirement for filing with multiple States would be confusing to employers and place an undue burden on them. Since SWAs have existing mechanisms to accomplish this task, this is a more appropriate activity for the SWA, rather than the employer, to undertake.

d. Duration of Job Order Posting

The Department is clarifying that Form ETA–790, the *Agricultural and Food Processing Clearance Order,* is to be used for the submission of the job order to the SWA. The Department received one comment opposing duplication in filing and processing arguing that the most substantive and voluminous portion of an application is the Form ETA–790. The Form ETA–790 must be used by all employers seeking to recruit agricultural labor in the U.S., pursuant to the Wagner-Peyser regulations at 20 CFR 653.401. Those regulations were not part of this rulemaking so this comment was not considered.

e. Modifications to the Job Order

The Department proposed a process for the modification of job orders. Several commenters expressed concern regarding the proposed provision permitting the CO to direct modification of a job order after SWA acceptance and before the issuance of a labor certification. Some of the commenters argued that there should be finality in the process, including one point of acceptance for a job order. Some commenters further argued that since the employer is held to the terms and conditions offered in the job order, the SWA and the CO should be bound by the acceptance of those terms and conditions. A couple of commenters expressed concern that corrections to the job order after SWA acceptance and placement in intrastate clearance may result in different groups of potential workers being recruited under differing terms, and noted that workers recruited under a particular job order need to be able to rely on the terms and conditions offered. One of these commenters proposed that the Department limit all modifications after acceptance to significant emergency situations such as Acts of God. Another commenter opposed the provision permitting the CO to direct an employer to modify the job order after a finding that the previously accepted terms and conditions fail to fully comply with program requirements. This commenter indicated that this provision violates 8 U.S.C. 1188(c)(2), which requires DOL to state any deficiencies that it finds in a labor certification application within 7 days.

The INA requires the Department to note any deficiencies in the employer's Application within 7 days from receipt. We do not interpret the provision requiring the Department to accept or reject an Application within 7 days to limit the Department from requiring modifications after acceptance. The INA cannot mean that the SWA's acceptance of the Application forces the CO to overlook any apparent violations. To interpret the statute in that way would require the Department to either accept Applications which contain apparent violations or to reject the Applications without giving the employer the opportunity to correct the apparent violation of program requirements. With respect to concerns about worker reliance on a job order that subsequently has been modified, employers will now be required to notify all workers recruited pursuant to that job order of any material change in the terms and conditions of employment, particularly to the extent that the terms of the job

order constitute part of the work contract as described in § 655.122(q).

Another commenter argued that the Final Rule needs to address changes by employers when changes are necessary because of unforeseen business necessities that arise during the time between the beginning of the recruitment period and certification.

The Final Rule retains a provision from the NPRM permitting the employer to request modification of a job order before filing the Application. As discussed above, many commenters noted that at this point, 45 days from the date of need, most employers would have a better idea regarding their plans for the season, including their labor needs. Therefore, the Department's Final Rule retains the limitation on employer modification of job orders.

f. Elimination of Requirement That SWAs Must Verify Employment Eligibility (Form I–9, E-Verify)

As explained in the NPRM, the Department proposed to eliminate the requirement that SWAs must complete the employment eligibility verification process (Form I–9 or Form I–9 plus E-Verify) for all workers referred to the employer by the SWA under a job order. The Final Rule follows the NPRM and no longer requires SWAs to verify employment eligibility. This approach is logical and consistent with employers' discretion and duties concerning all new hires—including the checking of references, qualifications, etc. Nothing in the INA or these regulations precludes the States from performing employment verification voluntarily or pursuant to State law, nor do they prevent the employer from relying on verification performed by the SWA so long as it meets certain verification standards as set out in applicable DHS regulations.

In their traditional role, the SWAs are only required to refer candidates whose qualifications match the terms and conditions of the job order to an employer's job opportunity. Requiring one small subset of applicants who apply for H–2A positions to be subject to employment eligibility verification raises the possibility of disparate impact.

A SWA referral does not in itself constitute an offer of employment because the referred individual may be rejected for lawful, employment-related reasons. In addition, the Department believes that SWA resources are most effectively directed to the core functions of the public workforce system, such as clearing job orders. For all the reasons discussed above, the Department has retained the language from the NPRM and eliminated the requirement that SWAs verify employment eligibility of potential employees referred in connection with an H–2A job order.

The Department received comments both for and against the elimination of employment eligibility verification by the SWAs. Several commenters expressed support for the Department's decision to return to the previous practice of permitting the SWAs to determine for themselves the method by which they would ensure workers were eligible for referral.

Several commenters offered strong support for the Department's proposal to remove the requirement that the SWA verify the employment eligibility of job seekers before referral. Most of these commenters explained that placing the burden of verification on the SWAs in the 2008 Final Rule was inappropriate and that it required States to impose a greater barrier for people seeking H–2A job openings than on others, resulting in disparate treatment of protected classes. One SWA further indicated that people not authorized to work in the U.S. are unlikely to seek work through government-run One-Stop Career Centers. Another SWA noted that the Department simply lacks statutory authority to require SWAs to conduct employment eligibility verification because 8 U.S.C. 1324a permits, but does not require, SWAs to complete I–9 forms with regard to individuals they refer to jobs. One of these SWAs also noted that it will continue to refer eligible job seekers using its current right-to-work verification process, codified in its State law. Another SWA voiced support for the elimination of the requirement and pointed out that States are not funded to provide I–9 verification. Another commenter indicated that freeing the SWAs of verification responsibilities was a positive development given that the proposed regulations call for greater SWA involvement in recruitment.

A few employer organizations objected to the elimination of the verification requirement on the grounds that employers are required to hire referred workers and that the SWAs should not refer workers who are not eligible to be employed.

Other commenters discussed what they characterized as an impermissible shifting of the financial and administrative burden of employment verification back to employers who are already facing difficult times and rising production costs. One commenter, a farm bureau, noted that the resource issue for SWAs is no different than the resource issues that family farmers regularly face but who verify employment eligibility nonetheless. Another farm bureau described the proposal of reverting to employer verification as contrary to the Administration's commitment to eliminating illegal immigration.

Other commenters opposed the change in the requirement, noting that the elimination of the requirement would burden the employers whose Applications were only partially certified based on the number of referred local workers who later turn out to be ineligible for employment. Another commenter contended that, in the absence of SWA verification, the Department should not count the SWA referrals against the number of workers requested by an employer on an Application.

Other commenters accused the Department of compromising its obligation to protect the jobs of domestic workers by eliminating the employment eligibility verification requirement. One of these commenters further asserted that the Department should take responsibility for the referral activities of its State partners and that the elimination of the employment eligibility verification signifies that the Department condones the employment of illegal aliens, which contributes to low wages, inadequate housing and a shortage of viable job opportunities for U.S. workers. Another commenter noted that the elimination of the verification requirement undercuts the role of the SWA to determine the availability of U.S. workers for employment before the filing of an Application. This commenter asserted that the SWA's inability to determine the work authorization of workers recruited and referred under the job order fails to meet the SWA's legal obligation to determine that sufficient able, willing, and qualified U.S. workers are available.

Several commenters expressed concerns that without SWA verification, at least 75 percent of referred workers will later prove ineligible for employment, with one commenter citing examples from its experience. Most of these commenters further argued that the referral of ineligible workers will place a burden on employers either to continue to employ ineligible workers and run the risk of employer sanctions, or dismiss these workers and find replacement workers in time.

Several commenters opposed the change in the requirement, pointing to the 2008 Final Rule's interpretation that 8 U.S.C. 1324a and DHS regulations at 8 CFR 274a.2 and 274a.6 require the SWA to verify employment eligibility

before referring applicants to the employer. Another commenter challenged the Department's distinction between a referral and an offer of employment, asserting that the distinction is meaningless since the employer has no option to refuse to hire the worker referred by the SWA if that person is willing, able, and qualified for employment. Another commenter argued that the SWA is statutorily required to verify employment eligibility of referrals because 8 U.S.C. 1188(c)(3) lists as one condition for certification a requirement that the employer does not actually have or has not been provided with referrals of qualified, eligible individuals, and 8 U.S.C. 1188(i) defines an eligible individual as being one who with respect to employment, is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3). This commenter further argued that the Department or the SWA must determine if applicants from the pool of local workers are authorized to work in the U.S. because, without this determination, DOL cannot deny any application for labor certification on the basis of there being qualified, eligible individuals.

Another commenter challenged the Department's rationale regarding the disparate impact of employment verification on workers, referring to the 2008 Final Rule rationale that the requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. As explained further below, the Department believes that this position in its 2008 Final Rule was erroneous, and that disparate impact can result from the segregation of H–2A referrals to comply with the verification requirement.

After thorough consideration of these comments, the Department has concluded that it will retain the language of the NPRM. The Department believes that its mandate to protect job opportunities for U.S. workers and ensure that they are not adversely affected by the employment of foreign workers will be best served by a requirement that reflects the intent of Congress that the employer, and not the SWA, is responsible for the ultimate verification that its labor force is comprised of workers legally present and authorized to work in the U.S. Employers are the group that is charged with this function under the statutory verification process and have been since the imposition of employment verification. The previous rule did not in any way relieve employers of ensuring the employment eligibility of their workforce. Similarly, removing the employment eligibility verification requirement from SWAs also does not relieve employers of that duty.

The statute makes the plain statement that the employer may not hire an unauthorized worker. 8 U.S.C. 1324a(a)(1). The same statute enables employers to rely upon a referral by a State agency with the proper employment verification documentation, but imposes no burden on States to actually do so, in contrast to the burden it affirmatively imposes on employers. 8 U.S.C. 1324a(a)(5).

The SWAs must administer a number of programs and functions, including those related to foreign labor certification. Certain SWA job service functions are funded by formula under the Wagner-Peyser Act and the Workforce Investment Act. Other funding is received directly from the OFLC for services the SWAs provide in connection with the Department's labor certification programs. The Department has decided that imposing the additional requirement of employment eligibility verification of H–2A referrals denies the SWA the flexibility to decide how best to allocate its resources.

Additionally, the Department continues to believe that requiring the SWAs to conduct employment verification of applicants for H–2A job opportunities prior to referral creates the potential for complaints of disparate impact. By requiring this verification of referrals only in job orders in which employers are seeking nonimmigrant workers, some referrals to job orders that are identical with the sole exception of the H–2A component are treated differently. The Department's concern that this could in turn lead to differential treatment of H–2A job orders generally and of referrals to those job orders specifically, provides further cause for concern about continuing the obligation on SWAs.

The suggestion by the commenters that this return to the pre-2008 requirements is unduly burdensome ignores the statutory requirement, with which they have presumably always comported, to undertake verification. The return to employer verification returns H–2A employers to the same position as virtually all employers, including non-H–2A agricultural employers. Thus, H–2A employers are subjected to no greater burden than any other employers, with respect to employment verification.

Traditionally employers are not required to hire each person referred by the SWA, because they may reject potential hires for any lawful, job-related reason. Furthermore, each employer has an obligation to terminate any worker who upon acceptance of the job offer proves ineligible to work in the U.S.; such grounds are, moreover, a legitimate basis for rejecting the worker for purposes of the recruitment report.

The Department declines to accept the commenters' interpretation of the SWAs' obligations with respect to the verification of SWA referrals. Because SWAs do not perform any activities that would classify them as subject to 8 U.S.C. 1324a(a)(1)(B), the INA does not require SWAs to engage in employment eligibility verification. In addition, 8 U.S.C. 1188(3)(A) does not identify the referring entity that would provide employers with eligible individuals within the meaning of 8 U.S.C. 1188(i). The role of the SWA in the referral of U.S. workers under the H–2A program is solely governed by the Department's regulations, as 8 U.S.C. 1188 does not define the methodology for the recruitment of U.S. workers, nor does it include any references to the SWAs or other State actors. Section 655.155 of this Final Rule directs the SWA to refer to employers only those applicants who have been apprised of all material terms and conditions of employment and have agreed that they are able, willing, qualified, and available by agreeing to be referred to the job opportunity. This provision makes it clear that the SWA is only required to perform its traditional job service functions uniformly across all classes of applicants and employers.

7. Section 655.122 Contents of Job Offers

The job offer sets out the terms and conditions of employment contained within the job order. The employer can give this information to the workers by providing a copy of the job order or a separate work contract. A written job offer is critical to inform potential workers of the material terms and conditions of employment and to demonstrate compliance with all of the obligations of the H–2A program. For H–2A program purposes, the job offer must contain, at a minimum, all of the worker protections that apply to both domestic and foreign workers pursuant to these regulations. The Department considers the job offer essential for providing the workers sufficient information to make informed employment decisions. The work contract, or where there is no written work contract, the job order, which is the document representing the material terms and conditions of the job offer, must be provided with its pertinent terms in a language the worker understands.

The Department proposed to retain much of the 2008 Final Rule requirements on job offers with some minor clarifications. The Department's responses to comments are discussed in more detail below.

a. Prohibition Against Preferential Treatment

The NPRM proposed to return to the language in the 1987 Rule about the requirement for the minimum wages and working conditions that must be offered to foreign and U.S. workers.

One commenter proposed that the Department permit employers to require experience for U.S. workers applying for H–2A job openings, to increase the chance that the worker will complete the contract after being reimbursed for transportation and any other allowable costs incurred in the course of recruitment. This commenter justified the proposed revision by stating that no similar mechanism is necessary to keep the H–2A workers tied to the contract as their very status depends on their continued performance under the work contract.

Another commenter noted its experience with employers who prefer an H–2A workforce and therefore subject U.S. workers to conditions intended to displace them, such as coercion, in-person interviews, and production standards that they do not impose on their foreign workers. This commenter indicated that strong protections are needed to protect agricultural job opportunities for the domestic workforce, including regulations that prevent different standards from being applied to foreign and domestic applicants. Furthermore, this commenter urged the Department not to allow an experience requirement proposed by other commenters unless the same requirement applies to foreign workers. Another commenter noted that many employers pay higher wages and provide better benefits to year-round or long-term employees but that those benefits should not result in the preferential treatment of U.S. workers. Another commenter, an H–2A agent, asserted that this proposed provision may have the opposite of the intended effect, particularly with respect to wages, due to a requirement to offer H–2A workers the same minimum level of benefits, wages, and working conditions being offered to U.S. workers.

While the regulatory text did not prohibit employers from paying U.S. workers more than H–2A workers, inartful preamble language caused confusion as to whether U.S. workers can be provided benefits and/or wages exceeding those offered and provided to H–2A workers. The requirement is that the employer's job offer to U.S. workers be no less than what the employer is offering, intends to offer, or will provide to the employer's H–2A workers. Further, the contents of any job offer under H–2A must contain—at a minimum—the wages and working conditions found in this Final Rule. If a job offer to H–2A workers offers or provides a wage or benefit greater than what is required, then the same must be offered and provided to U.S. workers. Similarly, if the job offer imposes a restriction or obligation (*e.g.,* a productivity standard or experience requirement), then that restriction or obligation is applicable to all workers—both U.S. and H–2A—and no additional or further restriction can be placed on only U.S. workers. (Any such restriction or obligation must be stated in the job offer for it to be applicable to any worker, whether U.S. or H–2A.) This does not, however, preclude an employer from providing additional wages and benefits to U.S. workers that are not being provided to H–2A workers. There is no intention, for example, to require an employer to lower the wages of a long-term or year-round U.S. employee to an H–2A-required wage simply because such U.S. worker is engaged in corresponding employment. Additionally, these regulations are not intended to require an employer to raise the wage rate of all H–2A workers—and then by extension, all other workers in corresponding employment—if a long-term U.S. worker being paid a higher wage is engaged in corresponding employment. The Department, therefore, retains the proposal with clarifying edits.

b. Job Qualifications and Requirements

The Department proposed in the NPRM to retain the same requirements with respect to the job qualifications and requirements as in the 2008 Final Rule. In addition, the Department made explicit that the CO or the SWA has the discretion to require that the employer submit documentation to justify the qualifications specified in the job order. Having considered the comments received in response to this proposal, the Department has decided to retain the provision, as proposed.

The Department received several comments in response to this provision. One commenter, a farm worker advocacy association, referred to reports of persistent violations by employers who recruit foreign workers under qualifications and job requirements that are inconsistent with the Application and job order. This organization proposed a revision to require qualifications and requirements comparable with the employer's non-H–2A workers in the current or immediately preceding season for similar employment.

Several commenters opposed the requirement that the SWA or the CO may require the employer to provide documentation justifying job qualifications or requirements. One asserted that the qualifications or requirements of a job opening are within the purview of the employer's business purposes and that neither the CO nor the SWA have an understanding regarding what is or is not a reasonable qualification. Another commenter indicated that the job requirements and qualifications or other factors making a particular Application unique must be acceptable if they are justified by business necessity. According to this commenter, nothing in the INA requires an employer to perform any job in the same manner as another employer in order to obtain a labor certification. Another employer opposed the imposition of the requirement, arguing that the provision is vague and unjustified and that it contains no guidance on what types of documentation the SWA or the CO would find sufficient, nor does it provide for an appeal process for the employer. Further, the commenter argued, the Department is giving no assurance that the requirement would be applied in a consistent or objective manner.

The Department appreciates the proposal to require qualifications from previous seasons but after careful consideration has determined that it would be difficult to enforce this requirement on both employers who did and those who did not participate in the program during a prior season. Additionally, this requirement would unduly intrude on the employer's discretion to make business decisions, while not enhancing worker protections.

With respect to comments opposing the documentation requirement, 8 U.S.C. 1188(c)(3) provides that in determining questions of whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops. For decades, the Department's regulations have applied this principle to both job requirements and job qualifications. The Final Rule continues that approach.

c. Minimum Benefits, Wages, Working Conditions

The NPRM proposed this section as an introduction to the section on the contents of the job offer. The Department received comments expressing support for these provisions that strengthen labor protections for temporary foreign agricultural workers, such as wages, housing, and employer-provided transportation.

The regulatory text has been edited to correct an inadvertent error in paragraph designations and to make a minor editorial clarification.

d. Housing

Because the employer's obligation to provide housing is intertwined with the requirement for housing inspections, issues related to the employer's obligation to provide housing are addressed in this section. Under the NPRM, an employer seeking to use the H–2A program would be required to submit a job order to the SWA in the area of intended employment for intrastate clearance. Concurrent with the filing of the job order, the employer must request a housing inspection and, consistent with the Wagner-Peyser Act regulations, the housing inspection must be completed before issuance of the H–2A certification. This proposal marked a change from the 2008 Final Rule which allowed the NPC, under certain circumstances, to make a certification determination on an Application 30 days before the employer's date of need, even if the housing referenced in the Application had not yet been physically inspected by the SWA

In addition, the NPRM proposed to clarify that the employer's obligation to provide housing extends both to H–2A workers and to workers in corresponding employment who are not reasonably able to return to their residence within the same day. The Department proposed minor modification to the provision on certified housing that becomes unavailable. While most of the 2008 Final Rule provision remains, the Department proposed that the SWA be required to promptly notify the employer of its obligation to correct deficiencies if the substituted housing is or becomes out of compliance with applicable safety and health standards after inspection. The Department also sought to clarify available remedies for housing safety and health violations to include denial of a pending Application or revocation of a future Application. No changes were proposed to the 2008 Final Rule provisions concerning housing safety and health standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and provision of family housing. After full consideration of the comments, the Department is adopting all the housing-related provisions as set out in the proposed rule, with minor editorial modifications.

The Department received a number of comments on this proposal from employers, grower associations, SWAs and worker advocates. One employer association commented that the return to the 1987 Rule housing inspection rules would cause delays in certifications, and as evidence of this statement provided certification statistics from 2008 for its members. This commenter asserted that between December 15, 2007 and April 20, 2008, 89 certifications were issued for its members, of which 40 certifications were issued and received within 4 days of due date (40 percent); 37 were received between the 5th day and the 10th day (37 percent); another eight were received between the 11th and 15th days (8 percent); and the rest were received between the 16th and 24th days (13 percent). According to this commenter, the certifications issued in 2008 under the 1987 Rule were on average late by 8.27 days. This commenter also took issue with the Department's assumptions for the time associated with processing and receipt of petition approval from United States Citizenship and Immigration Services (USCIS), the worker obtaining a visa from the Consulate, and transportation from Mexico to the area of intended employment. It concluded that the proposed change to the timing of the housing inspections would have a very significant impact on the association's members. Another employer association similarly stated that its members had seen improvements in processing times as a result of the 2008 Final Rule and predicted certification delays as a result of this provision. The association also criticized the Department for ignoring its own detailed rationale in the preamble of the 2008 Final Rule explaining why it was inappropriate to delay certification determinations because of the SWA's delay in completing housing inspections.

Other employers noted that the proposed change would result in less time to make necessary repairs and improvements to housing, which in one grower's view would ultimately work to the detriment of the workers housed there. Other employers commented that requiring that the housing inspection be completed before worker occupancy creates unnecessary financial burdens by essentially requiring employers to ensure housing is available prior to the actual need. An agricultural employer and H–2A program user stated that inspecting occupied housing can be very difficult for the inspector and has the potential to add huge liabilities for employers; it asked whether the WHD intends to train SWA staff on differentiating between compliance issues connected with occupied housing and those connected with unoccupied housing. This commenter further suggested that employers be given a specific and reasonable time period to correct violations found in inspections of occupied housing, and that penalties only be assessed if the employer fails to correct the violations. Similarly, an association commented that SWAs are not allowed to inspect occupied housing, which creates difficulties if the employer is seeking to augment his or her existing workforce or another grower is utilizing the housing during the H–2A employer's off-season. This commenter also remarked that the Department does not mandate pre-occupancy inspections of farm worker housing outside of the H–2A program and suggested that this is an indication that temporary housing is not a priority for the Department except in the H–2A program.

Several commenters representing employers and employer interests offered that the cost and availability of housing is one of the most serious impediments to the use and expansion of the H–2A program, and many suggested implementation of a system where employers could provide workers a housing voucher instead of the employer directly providing housing. These commenters also noted that the H–2A program is the only employment-based immigrant or nonimmigrant worker program that requires the employer to provide free housing to its workforce and suggested that imposing the housing requirement only on agricultural employers is unwarranted. One employer association stated that until Congress eliminates this requirement on employers, the Department should limit the practice and not expand employers' responsibility to serve as unpaid landlords to their workforce.

In contrast to comments from employers and employer associations, comments received from SWAs and employee advocates were generally supportive of the proposed change. State agencies commenting in favor of the provision represented States in which a significant number of H–2A workers are employed and/or States where agriculture contributes

substantially to the State's economy. One SWA agreed with the proposed change on the basis that it would protect growers by helping them fulfill their housing obligations and ensure protections for workers. Another SWA commented that requiring housing inspections to be completed prior to H–2A certification will confirm that adequate housing is being provided to the temporary foreign workers. Another State agency found the provision consistent with its goal of assuring safe and healthy living for migrant farm workers and stated that one way they accomplish this is through their housing inspection program, stating that eliminating the attestation process and requiring that farm worker housing be inspected prior to occupancy is consistent with their Department of Health's licensing and inspection program.

An employee advocate organization commented that while the proposed provision is an important step in assuring compliance with housing requirements, the proposed regulations still do not adequately address the problem of ghosthousing, wherein employers list housing that is never actually intended to be used to house workers. This commenter explained that when there is no post-certification inspection requirement, the potential exists for abuse by unscrupulous employers who would purposefully arrange for the inspection of housing they have no intention of using. It suggested adding a post-certification inspection requirement for the SWA to inspect housing midway through the certification period. In this commenter's view, such a requirement would discourage the practice of an employer listing housing that either does not exist, or exists but is not used. This commenter also suggested the strengthening of the protections afforded to workers with respect to housing, including an additional requirement for inspection of substitute housing during occupancy; the elimination of references in the regulations to conditional access to the interstate clearance system based on the employer's assurance that housing will be in compliance by a specified date; and the clarification that the strictest standard applies to housing subject to multiple housing standards (*e.g.,* local, State and Federal).

The Department also received a few comments not directly related to its proposed housing provisions. One commenter, a worker-led nonprofit organization that recruits, trains and places H–2A workers, explained that in the border region (*e.g.,* Yuma County, AZ), many H–2A workers have the option of returning to their homes and families at night, and many prefer to do so rather than stay in employer-provided housing. This commenter suggested establishment of a commission to develop an alternative border-based housing policy for the H–2A program. Although no changes were proposed to the provision of range housing or the standards applicable to range housing, comments from an association representing the sheep and livestock industries and a Federal Lands Council urged the Department to continue to provide special procedures for housing provided to sheepherders and workers engaged in the range production of livestock. A SWA and an employee advocate provided comment on the employer's obligation to provide family housing to workers with families who request family housing when it is the prevailing practice in the area of intended employment and occupation (§ 655.122(d)(5)). Both commenters requested that the Department clarify that if a State statute or court decision applicable to the jurisdiction requires an employer to provide family housing, then the State statute or court decision is to be considered the prevailing practice with respect to the provision of family housing.

The INA requires employers to provide housing in accordance with regulations issued by the Secretary. The employer may meet this obligation by providing housing meeting the applicable regulations. The Department recognizes that this requirement is unique to the H–2A program, but statutory requirements prohibit the Department from providing the flexibility suggested by some employers to authorize a housing voucher in lieu of employer-furnished housing, to limit the practice of H–2A employers providing housing to their workers, or to relieve employers in border regions from this requirement. Likewise, the Department is statutorily prohibited from requiring compliance with the stricter of applicable local, State or Federal standards if multiple standards apply to rental and/or public accommodations or other substantially similar class of habitation.

Instead, the Department is returning to its position contained in the 1987 Rule that employers must provide housing to their H–2A workers and to their workers in corresponding employment who are not reasonably able to return to their residence within the same day. As explained in the section discussing the definition of corresponding employment, the requirement on employers to provide housing to workers in corresponding employment helps ensure that those workers receive the same level of wages, benefits, and working conditions as the H–2A workers, and therefore that the employment of the H–2A workers does not adversely affect the employment of workers similarly employed.

With regard to the timing of housing inspections, from the 1987 Rule until January 2009, ETA's regulations required that employer-furnished housing be inspected and certified as meeting applicable standards as a condition of the Secretary granting H–2A certification to the employer. This requirement was based on the Department's reading that the INA requires that the Secretary make a certification determination no later than 30 days before the date of need (8 U.S.C. 1188(c)(3)(A)) and that the determination of whether housing furnished by the employer meets the applicable safety and health standards be made no later than the date by which the Secretary is required to make the certification determination (8 U.S.C. 1188(c)(4)). For more than 20 years, the Department read these two provisions in concert and concluded that the certification determination could not be made unless the employer-furnished housing had been inspected and found to meet applicable safety and health standards. The 2008 Final Rule changed the regulation to eliminate the requirement that housing be inspected and approved before certification in all cases.

The INA establishes both the date by which the Secretary must make the certification determination and the date by which the determination of whether employer-furnished housing meets applicable standards must be made. The Department believes the 1987 Rule reading, which is also implemented in this Final Rule, is the more appropriate reading of these statutory requirements and, notwithstanding the Department's earlier statements, is more consistent with congressional intent to ensure that U.S. workers are not adversely affected by the employment of H–2A workers. Reinstatement of this process also benefits employers by reconciling the Department's H–2A certification process with applicable State laws requiring pre-occupancy inspection and certification of worker housing. Contrary to the suggestion of one commenter, the fact that the Department does not require pre-occupancy inspection of housing provided to farm workers outside of the H–2A program is not a reflection of the Department's priorities, but a function of the

underlying statutory requirements and Departmental resources.

The Department also notes that reinstating the provision at § 655.122(d)(1) concerning conditional access to the interstate clearance system under the Wagner-Peyser regulations obviates the need for the conditional certification determinations included in the 2008 Final Rule. Employers whose housing has not yet been inspected may request conditional access to the interstate clearance system under the procedures set forth in 20 CFR 654.403. Likewise, employers whose housing has been inspected and found not to meet the required standards may seek conditional access to the interstate clearance system, thereby allowing the employer an opportunity to make the necessary repairs or improvements without penalizing the employer through denial of access to the interstate clearance system. In either situation, if the employer seeks and is granted conditional access to the interstate clearance system, the continued review and processing of its H–2A Application need not be held up. The Department believes this process appropriately balances the requirement that workers are provided safe and healthy housing while not unduly delaying H–2A certification determinations. In response to the suggestion that the Department eliminate all references to conditional access to the interstate clearance system, this provision exists in the Department's regulations implementing the Wagner-Peyser Act with respect to farm workers, which the Department has not proposed amending at this time.

The Department understands that any delay in H–2A certification determinations is of concern; however, based on the Department's examination of program activity for FY 2007 and 2008, we do not anticipate the inordinate delays assumed by employers and associations. As explained in the proposed rule, certification determinations for FY 2007 and 2008 were made, on average, approximately 27 calendar days before the employer's certified start date of need. That analysis does not reveal the reason for the delay in certification determinations—whether the delay was the result of a delayed housing inspection, the failure of an employer to provide information requested by OFLC and necessary for OFLC to make the certification determination, or for some other reason. See discussion at 74 FR 45932, Sep. 4, 2009. The Department appreciates that an individual H–2A program user or association may have experienced certification determinations made closer to their date of need than the average cited by the Department, but believes that requiring that the housing be certified as meeting applicable safety and health standards as a prerequisite to making the certification determination is both required by the most reasonable reading of the statute and is proper given the Department's responsibility to protect U.S. and H–2A workers. As noted in the proposed rule, the Department is not responsible for any downstream delays in processing at either USCIS or the U.S. Consulate.

The Department recognizes that there are situations beyond an employer's control which impact the availability of certified housing the employer intended to use for housing workers and therefore has retained the provision in § 655.122(d)(6) for the substitution of rental or public accommodation housing with a clarification that substitute housing must meet applicable standards. Concerns raised by employers that SWA staff may not be authorized to conduct, or may not be sufficiently trained in the conduct of, inspections of occupied housing will be addressed through the Department's current process for providing guidance to SWAs on implementation of Departmental programs. As explained in the discussion of 29 CFR part 501 in this preamble, the Department will continue to exercise its discretion with respect to allowing employers a reasonable opportunity to correct housing safety and health violations before imposition of sanctions, such as revocation and debarment.

Comments suggesting that the Department impose a requirement for post-occupancy inspection of housing midway through the certification period and post-occupancy inspection of substitute housing are outside the scope of this rulemaking. However, the WHD does conduct inspections of occupied housing during all H–2A investigations and during agricultural investigations outside of the H–2A program when housing is owned or controlled by the employer. Post-certification audits also provide the Department with a tool for ensuring H–2A employers provide housing meeting applicable standards to their workers.

The Department will continue to provide guidance to the SWAs with respect to determining whether the prevailing practice in the area of intended employment and occupation includes the provision of family housing. The Department agrees with commenters that where agricultural employers are required by State statute or applicable court decisions to provide family housing to workers with families, the prevailing practice is to provide family housing.

The Department does not believe that requiring completion of the housing inspection before the certification determination is made will result in negative economic consequences for employers. Some agricultural employers commented that their financial burdens would increase under this provision; however, these commenters provided no evidence of increased financial burden for the Department's consideration.

e. Workers' Compensation

The Department proposed to retain the 2008 Final Rule requirements regarding an employer's statutory obligation to provide workers' compensation insurance coverage in compliance with (or equivalent to) State law. However, the Department also proposed to return to requiring employers to provide the CO with proof of workers' compensation insurance coverage, including the name of the insurance carrier, the insurance policy number, and proof that the coverage is in effect during the dates of need. The Final Rule adopts this requirement as proposed.

Several commenters supported the proposed change, while others asserted that the change was unnecessary. They contended that the Department should simply accept the employer's attestation that it had obtained adequate insurance coverage, without any proof. The Department disagrees with that position. In an industry as dangerous as farming, the availability of workers' compensation coverage is absolutely critical. It is essential that the Department be satisfied that the appropriate coverage is in place. Requiring employers to prove the existence of such coverage creates no meaningful additional burden for employers since they would have to retain that documentation in any event.

f. Employer-Provided Items

The NPRM proposed to amend the 2008 Final Rule by requiring employers to provide to the worker, without charge, all tools, supplies and equipment necessary to complete the job. The Final Rule adopts this provision without change.

The Department received few specific comments addressing this provision. One commenter expressed general support for the provision. Another commenter suggested the addition of language providing that if any of these items are provided by the worker, the employer will reimburse the worker for the cost of the items. It is not necessary to adopt the additional language

suggested by the commenter, because the rule plainly and unequivocally states that the employer must provide these items without charge. Moreover, as discussed in more detail in the section regarding deductions, employees must receive the required wage rate free and clear. Therefore, unless specifically authorized by these regulations, employees may not provide or have their pay docked for any item that is an employer business expense where doing so would reduce their wages below the required wage rate.

g. Meals

The Department proposed a meals provision identical to the 2008 Final Rule requiring the employer to provide three meals a day (which the employer may provide for a charge in accordance with § 655.173) or free and convenient kitchen facilities to the workers enabling them to prepare their own meals. The Department decided to retain this provision without change in the Final Rule.

A few commenters addressed the proposed provision governing meals. One commenter supported the mandatory provision of meals and other benefits provided to workers. This commenter noted that entitlements, such as meals, protect U.S. workers by creating a disincentive to use foreign temporary labor solely because of lower cost.

Another commenter suggested that workers should be provided with food preparation expenses if kitchens are not available. The Department notes that the Final Rule requires that the employer either provide workers with meals or furnish free and convenient cooking facilities and that this is adequate to secure the benefit that was intended by Congress.

h. Transportation; Daily Subsistence

The NPRM proposed to require an employer to pay the worker for the reasonable costs incurred for transportation and subsistence from the place from which the worker has come to the place of employment if the worker completes 50 percent of the work contract period and the employer has not previously advanced or provided transportation to the place of employment and subsistence costs. If it is the prevailing practice of non-H–2A agricultural employers to advance such costs, or if the employer extends such benefits to similarly situated H–2A workers, the employer must advance or provide such costs to workers in corresponding employment who are traveling to the worksite. The transportation reimbursement must be no less than the most economical and reasonable common carrier transportation charges, and the daily subsistence payment must be at least what the employer would charge the worker for providing three meals a day (if applicable), but no less than the amount permitted under § 655.173(a). The NPRM, thus, proposed to return to the language of the 1987 Rule that the transportation reimbursement be for the cost from the place from which the worker has departed. The NPRM also proposed to remind employers that the FLSA applies independently of the H–2A requirements.

Section 655.122(h)(2) of the NPRM proposed to require employers to 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 completes the work contract period or is terminated without cause (deleting the 2008 Final Rule's definition of the U.S. consulate or port of entry as the place from which the worker departed). Consistent with the 1987 Rule, the NPRM proposed that if the worker has subsequent H–2A employment, the current employer must pay for transportation to that worksite unless the subsequent employer has agreed in the work contract to pay for transportation and daily subsistence. The NPRM added that an employer is not relieved of its obligation if an H–2A worker is displaced as a result of the employer's compliance with the requirement to hire U.S. workers who are referred within the first 50 percent of the contract period.

Section 655.122(h)(3) of the NPRM proposed to continue to require employers to provide transportation between the workers' employer-provided housing and the employer's worksite at no cost to the workers.

Finally, § 655.122(h)(4) of the NPRM also proposed to require that all employer-provided transportation comply with all applicable laws and provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.105, and 29 CFR 500.120 to 500.128. The NPRM thus proposed to extend the 2008 Final Rule's similar requirements, which were applicable only to transportation between the living quarters and the worksite, because such safety requirements already exist elsewhere in other Federal, State or local transportation laws.

The Final Rule adopts § 655.122(h) of the NPRM as proposed, with a technical correction to an internal cross reference.

The vast majority of the comments pertained to § 655.122(h)(1). Numerous employers and their representatives objected to the proposed change regarding the requirement to pay for transportation from the place from which the worker has come, rather than transportation from the consulate or port of entry. They stated that it makes more sense to pay for transportation from the consulate, because that allows an employer to know in advance or to estimate more precisely what its costs will be. Some commenters expressed concern about how an employer will know with certainty where a worker's home is and how much the transportation from there to the consulate costs, and they wondered whether they would be liable for whatever an employee claims his travel costs were. Others stated that their first contact with the worker is at the consulate, where the workers must go through government screening to ensure that they meet the requirements for entry into the U.S., and that there is not an employer-employee relationship until an H–2A visa is issued at the consular office because that establishes the worker's entitlement to enter the country. Several other employer representatives emphasized that their disagreement was not with the proposed regulation, but with the NPRM's inconsistent preamble language, which described the requirement as to pay for the cost to and from the worker's home. These commenters gave an example of an employee whose home is in Hawaii, but who was recruited in New Haven, CT by the Connecticut SWA, and they emphasized that it would be unreasonable to require a Connecticut employer to return the worker to Hawaii. These commenters noted that historically the requirement was to pay for transportation to and from the point of recruitment, which may or may not be the worker's home. They suggested that the Final Rule should eliminate the inconsistency by clarifying that the requirement is the same as it was in the 1987 Rule, which would eliminate the confusion caused by the preamble and bring the costs within the control of the eventual employer. Finally, as discussed in much more detail with regard to § 655.122(p), a number of employers encouraged the Department to follow the FLSA interpretation that had been set forth in the preamble to the 2008 Final Rule, which repudiated the decision in *Arriaga* v. *Florida Pacific Farms,* 305 F.3d 1228 (11th Cir. 2002).

These commenters objected to any requirement to reimburse an employee's transportation costs in the first workweek, rather than when the worker has completed 50 percent of the work contract period. They emphasized that the employee benefits from getting a job in the U.S., and so the employer should not be viewed as the primary beneficiary of the transportation.

In contrast, employee representatives approved of the proposed change back to the requirements of the 1987 Rule. Employee commenters noted that employees have suffered economically from the reduced reimbursement only for costs from the consulate and, therefore, welcomed the return to the prior rule. They also stated that U.S. workers will no longer be at a competitive disadvantage regarding this benefit. Other employee representatives stated that the reinstatement of the former requirement is appropriate because the transportation costs impose an undue burden on workers when the expense benefits employers, and they emphasized that employers should be required to bear the full cost of their decision to import foreign workers in order to ensure that they do not prefer H–2A workers over U.S. workers. One employee advocate specifically emphasized that it is important to make clear that the FLSA applies independently of the H–2A requirements with regard to transportation.

The Final Rule adopts § 655.122(h)(1) as proposed. The Department believes that it is appropriate to return to the language of the 1987 Rule requiring employers to reimburse employees for their inbound transportation from the place from which the worker has come to work for the employer. The Department did not intend for the inartful language in the preamble to the NPRM, referring to the worker's home, to indicate a different standard that would be problematic for employers to implement. The Department believes that employers will not have difficulty returning to the standard that they used for more than 20 years. As a number of employer representatives acknowledged, whether with regard to workers in the U.S. or workers recruited in a foreign country, employers will know where they recruited the workers and, thus, can predict and control their ultimate transportation costs. Finally, with regard to the reference to the FLSA, an issue discussed in detail with regard to § 655.122(p), the Department believes that it is important to remind employers of their obligations under other statutes to enable them to ensure that they are in compliance with all applicable laws.

In addition, a few employers or their representatives commented on the proposal to incorporate the standards used under the MSPA governing vehicle safety, licensure and insurance requirements for all employer-provided transportation, rather than just for transportation between the living quarters and the worksite (as did the 2008 Final Rule). They objected to this requirement, stating that it was inappropriate to apply MSPA standards to H–2A workers, who are statutorily excluded from MSPA. However, the transportation of H–2A workers is an essential part of the H–2A program. Transportation safety standards have been set for H–2A workers in the Department's regulations from the outset of the program, through the incorporation of existing standards. The 1987 Rule, for example, incorporated existing Federal, State, and local transportation laws and regulations. As noted in the preamble to the 2008 Final Rule, the Department does not seek to apply MSPA to H–2A workers and has no authority to do so. Rather, the regulation simply adopts these established safety standards under the Department's H–2A regulatory authority, in order to better assure the safety of H–2A workers.

Finally, one employee representative stated that the current subsistence allowance does not allow workers to purchase nutritionally adequate meals during their journey to the workplace or their return home. The commenter stated that the Department should determine an appropriate dollar figure, such as by surveying meal prices in the types of establishments frequented by charter bus companies and readily available to passengers on common carriers or some other method, and then indexing the amount for inflation. The Department did not propose any changes to the subsistence amount or the methodology for setting it; therefore, it believes that it would be outside the scope of this rulemaking to adopt the suggested change. However, the Department notes that it does update the subsistence amount each year to account for inflation, based on the CPI.

i. Three-Fourths Guarantee

The NPRM proposed to retain the three-fourths guarantee from the 2008 Final Rule, which had clarified that the guarantee must offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the contract period, beginning with the first workday after the worker arrives at the place of employment. The NPRM clarified the three-fourths guarantee requirement to ensure that the guarantee will not have been met if the employer merely offered some work to employees on three-fourths of the days in the contract, if the workday did not consist of the full number of work hours disclosed in the job order (*e.g.,* hours offered on a day in which fewer than the full number of hours stated in the job order have been offered). The Department also proposed to retain the provision addressing displaced H–2A workers, with a clarification that the provision now refers to the reinstated 50 percent requirement. The Final Rule generally adopts the proposal, with a minor clarifying edit.

The Department received several comments on the proposed three-fourths guarantee requirement. Some commenters opposed the requirement by stating that the three-fourths guarantee only benefits workers and is therefore one-sided. Several commenters, including members of Congress, supported the continuation of the three-fourths guarantee. A few commenters noted that the three-fourths guarantee, as proposed in the NPRM, does not go far enough to protect workers, and they offered suggestions to make the requirement more meaningful.

Several commenters asserted that some employers manipulate the period of employment and number of promised work hours in an attempt to minimize the amount of the three-fourths guarantee. One commenter stated its belief that employers purposefully evade the requirement by overstating the hours of work in the job order and artificially prolonging the season beyond the end of available work so that idle workers voluntarily depart before the end of the stated contract period and are no longer entitled to the three-fourths guarantee protection, provided that the employer made the proper required notifications. The commenter suggested that the Department impose on H–2A employment contracts the first week guarantee already available to U.S. workers under the interstate clearance order regulations (20 CFR 653.501(d)(2)(v)(A)), as well as an analogous last week guarantee. As an alternative, this commenter suggested that the three-fourths guarantee be applied to each successive 4-week period rather than once to the entire contract period. Another commenter suggested that if it became clear that the three-fourths guarantee could not be met, the workers should have the option of demanding their three-fourths guarantee and returning home at the expense of the employer. This

commenter also asserted that because job orders that include multiple crops and/or multiple locations often do not have consecutive work periods, workers experience days and sometimes weeks of down time with no way of knowing whether they will be offered enough work to earn the three-fourths guarantee. To address this uncertainty, the commenter suggested that the monetary amount of the minimum three-fourths guarantee be stated in the job order and job offer. The commenter urged that if a job order exceeds a 3-month period and includes work to be performed for consecutive periods in more than one type of crop or for more than one fixed-site agricultural business, the three-fourths guarantee should be calculated for the work period corresponding to each crop and each area of intended employment. Lastly, this commenter suggested that the proposed three-fourths guarantee requirement be included in each contract for which an H–2ALC is providing workers and that anticipated delays between jobs be disclosed so that potential employees, both U.S. and foreign, have a clear idea of the amount of work that will actually be offered.

Several commenters advocated requiring that all offered days of work be at least 8 hours. Another commenter agreed, stating that the three-fourths guarantee could be made a meaningful protection for farm workers by requiring employers to guarantee each worker at least 8 hours of work per day over the course of the season. The commenter asserted that such a requirement would prevent employers from overestimating the number of workers needed to perform the job. This commenter also suggested that the Department reinforce that job orders must accurately reflect the applicant's true labor needs and that the requirement for full-time employment means that the employer must offer at least 35 hours per week to all workers under the job order throughout the entire contract period. Additionally, several employer commenters noted that the inclusion of a 35-hour full-time employment requirement in the proposed definition of job offer would have an impact on the amount of hours required to meet the three-fourths guarantee.

The Department is aware that certain circumstances or events beyond the control of the employer may make the fulfillment of the contract impossible, and the Final Rule includes a provision that, upon a finding of contract impossibility by the CO, the employer is relieved of the full three-fourths guarantee obligation and is instead permitted to reduce the guarantee to the time period from the start of the work until the time of the contract's termination. The Department has determined that the contract impossibility provision strikes an appropriate balance between ensuring fairness to workers and flexibility to employers.

Although many of these suggestions would further strengthen the three-fourths guarantee requirement, the Department believes that it would be inappropriate to implement such significant changes to a fundamental and longstanding requirement of the program, without affording the regulated community the opportunity to formally comment on such proposals. Nevertheless, WHD will continue to carefully evaluate the facts when it conducts investigations to evaluate whether there has been any fraud with regard to dates of need specified in the job order and will pay close attention to evidence of fraud or other issues that may emerge over time. Moreover, the WHD plans to do increased outreach to workers to ensure that they understand their rights with regard to the three-fourths guarantee. Therefore, the Department retains the requirement as proposed with a minor editorial clarification.

j. Earnings Records

The NPRM proposed to require employers to retain payroll records for not less than 5 years. Numerous comments objected to this extension of the 2008 Final Rule's 3-year record retention requirement. The Department has decided to return to the 3-year requirement. Discussion of the comments can be found in the preamble section regarding document retention requirements at § 655.167.

k. Hours and Earnings Statements

Employers are required to provide earnings statements to workers each pay period. The Department proposed that these statements include the beginning and ending dates of the pay period, and the employer's name, address and Federal Employment Identification Number. The Final Rule retains these requirements as proposed. Several commenters objected to this addition, stating that it would apply the requirements of the MSPA to H–2A workers. The commenters noted that MSPA does not include H–2A workers within its protections. See 29 U.S.C. 1802(8)(B)(ii) and (10)(B)(iii). The Department has determined that this information, which is easily ascertainable by the employer, and may be added to the existing earnings statement, is essential to the employee's understanding as to whether he or she has been paid correctly, as well as the identity of the employer. Employees will also need this information if they are to report violations of the H–2A provisions to the Department. Accordingly, this information is important to assuring that the wages and working conditions of H–2A workers do not adversely affect U.S. workers. While it is true that this information is also required by MSPA regulations, that requirement is not a reason to exclude it from earnings statements where it is necessary to fulfill the H–2A statutory purpose.

l. Rates of Pay

The Department proposed to return to the approach taken in the 1987 Rule with respect to employer productivity standards. This Final Rule retains the proposed language although the provision has been modified to reflect the additional agreed-upon collective bargaining wage rate factor discussed above. Under that provision employers must apply the productivity standard that was normally required the year they first used H–2A workers unless they entered the system prior to 1977. For those employers who entered the system before that time, the 1977 standard applies. In either case, the OFLC Administrator may approve a higher minimum. A number of employer associations objected to the proposal on a number of grounds including questioning the need for any regulation of productivity standards, expressing concerns about the use of a 1977 baseline and noting the need to consider how technological changes might impact productivity. We have carefully evaluated these comments and believe that they do not reflect an appreciation of the history surrounding this requirement or acknowledge the flexibility built into the proposal.

The Department's regulations have reflected a concern about productivity standards for more than 30 years. 43 FR 10313, Mar. 10, 1978. The concerns arose from program experience in which employers that paid on a piece rate basis when facing rising hourly guarantees would increase productivity standards rather than raise piece rates. Initial efforts to address this issue by regulating piece rates were unsatisfactory and the 1987 Rule took the alternative approach of simply freezing productivity standards, subject to the employer making a showing that technological developments justify higher standards. That approach served the program well for 20 years and the comments offer no compelling reasons to adopt a different approach. Nothing

negates our historic concern that rising hourly guarantees will encourage employers to raise productivity standards rather than piece rates. Likewise, the regulation has proven flexible enough to address legitimate productivity increases. For example, apple growers were allowed to raise productivity standards to reflect the introduction of dwarf trees.

In addition, the Final Rule adds references to a collectively bargained wage as one of the potential highest required wage rates, for the reasons discussed above.

m. Frequency of Pay

The Department proposed to return to the 1987 Rule with regard to the frequency of pay. The Final Rule provides that workers shall be paid at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. In addition to stating the frequency of pay in the job order, the rule adds a clarification that employees must actually be paid at the time specified in the job order (*i.e.,* when wages are due).

Commenters objected to the requirement that employees be paid when the wages are due, stating that this is an MSPA requirement, and therefore inapplicable to H–2A workers. The idea that an employer must pay its workers based on its statement in the job order is not novel. Courts have recognized that a prompt payment requirement is inherent in the FLSA, and that employers must pay employees their wages on the day their paycheck is ordinarily due. See, *e.g., Biggs* v. *Wilson,* 1 F.3d 1537 (9th Cir. 1993), *cert. denied,* 510 U.S. 1081 (1994). The promise to pay a required wage is worth little if there is no requirement as to when the wage should be paid.

n. Abandonment of Employment or Termination for Cause

The Department proposed to retain the requirements of the 2008 Final Rule on the abandonment of employment or termination for cause. The Department has decided to adopt this provision as proposed, with clarifying edits. Under the Final Rule, a worker is deemed to have abandoned employment after he or she fails to report for work for 5 consecutive working days.

The Department received a few comments addressing this provision. One commenter argued that this provision is one-sided because it permits the employer, but not the employee, to be relieved of the contract requirements in case of a material breach. The commenter proposed a revision to the regulations to exclude circumstances where the worker abandons employment because of the employer's material breach of a term or condition of the contract.

The Department has decided against including this suggested revision. The issue of an abandonment based on a material breach by the employer is a fact-based scenario that is subject to inconsistent interpretation and one over whose consequences (status of the H–2A worker) the Department has no control. The issue of workers who justifiably abandon employment can be best addressed through normal Department enforcement processes against the offending employer. WHD and/or ETA will address matters within each agency's purview, and make appropriate referrals to other agencies, including DHS.

A few commenters argued that the requirement to report to DOL and DHS within 2 days after discovering that a worker has abandoned employment is not reasonable. The commenter proposed a change in the requirement to permit the employer to wait until 2 days after the end of the pay period during which the worker failed to report for work for 5 consecutive working days. The Department is not making this recommended change because the Department believes it is important for its regulations to mirror the DHS regulations on this point.

The NPRM clarified that notice for both H–2A workers and workers in corresponding employment needs to be made to the NPC and notice concerning an H–2A worker needs to be made to DHS. We note that the regulatory language is specific to a worker voluntarily having abandoned employment or having been terminated for cause. The factual basis underlying any notification provided is subject to review during an audit or investigation. If an audit or investigation finds that fraud, misrepresentation or other violations were present, the employer would not be relieved from the three-fourths guarantee requirement nor from the obligation to provide outbound transportation.

The Department also made minor clarifications in the Final Rule to reflect that the notification requirement relieving the employer of its obligation for the three-fourths guarantee and outbound transportation applies to both H–2A workers and workers in corresponding employment as it had in previous rules.

o. Contract Impossibility

In the NPRM, the Department proposed to retain the 2008 Final Rule requirements regarding contract impossibility and included an additional obligation from the 1987 Rule that requires employers to make efforts to transfer the worker to other comparable employment acceptable to the worker in the event the employer is prevented from fulfilling the requirements of the work contract. One commenter stated that it believed that any transfer of a worker to other comparable employment due to contract impossibility should be mutually acceptable to the employer and the worker since both have a vital interest in the worker's future employment and neither should be allowed unreasonably to impede the other from future employment opportunities. The Department believes, however, that if it were to require that such transfers be mutually acceptable, the employer could object to any comparable employment opportunity. The purpose of this section is to protect the worker and maximize the worker's employment opportunities—and not to create a means for an employer to protect its labor supply for future seasons. Accordingly, the Department has retained the same requirement in the Final Rule as proposed in the NPRM.

In addition, the Department has edited the section to eliminate the requirement that the employer receive documentation of the new assignment from the worker. This was removed to clarify that the first employer is not the arbiter of the worker's status beyond employment with the first employer.

p. Deductions

Section 655.122(p) of the NPRM proposed to require employers to make all deductions required by law and to specify all other deductions in the job offer. Further, it proposed that if an employer paid the employee's transportation and daily subsistence expenses to the place of employment, the employer could deduct those expenses from the worker's paycheck, but the job offer had to state that the worker would be reimbursed the full amount of the deduction upon the worker's completion of 50 percent of the work contract period. Additionally, an employer subject to the FLSA may not make deductions that would violate the FLSA. The Final Rule generally adopts the rule as proposed, with a new paragraph to more fully describe what is meant by the term reasonable.

A large number of commenters addressed this provision. Numerous employee advocates emphasized that farm workers' wages have been reduced by inappropriate wage deductions. Some employee advocates and

Congressional representatives suggested that the Department should do more to protect employees' wages from deductions for employer business expenses, and to ensure that workers receive the full required wage rate, by forbidding all deductions not required by law. Other employee advocates stated that the regulation should clearly delineate which deductions are permissible and which are not, rather than just requiring that deductions be reasonable. Some also suggested that the Department should strengthen the regulation by adding language incorporating the free and clear principle found in the FLSA and Service Contract Act regulations, thereby prohibiting any deductions or de facto deductions for expenses that primarily benefit the employer if the deductions would bring the employees' wages below the required wage. These commenters noted that the higher wage rates guaranteed by the requirements of the H–2A program can be subverted by unreasonable or unauthorized deductions, just as the FLSA minimum wage can be subverted. One farm worker advocacy organization specifically emphasized that H–2A workers are among the poorest and most vulnerable workers and should not be required to wait until they have completed 50 percent of the contract period to be reimbursed for their transportation and transit meal expenses. Others stated that the regulations should expressly forbid employers from recouping these expenses in any later workweek.

In contrast, numerous employers and their representatives stated that the requirement to reimburse employees for their inbound transportation and subsistence at the 50 percent point is appropriate, asserting that these costs are not for the primary benefit of the employer. They commented that employers, therefore, should not be required to reimburse these expenses in the first workweek under the FLSA. Specifically, several employer associations stated that the Department should return to the FLSA interpretation set forth in the preamble to the 2008 Final Rule, repudiate the decision in *Arriaga* v. *Florida Pacific Farms,* 305 F.3d 1228 (11th Cir. 2002), and conclude that transportation and subsistence are not for the primary benefit of the employer. Under that analysis, refusing to reimburse such costs would not be a de facto deduction from the first week's wages that could constitute a minimum wage violation under the FLSA. These commenters emphasized that employers should not have to reimburse such costs in the first workweek under the FLSA, since the H–2A regulations provide that they must be reimbursed after the employee completes 50 percent of the job period. They also commented that the balance struck by requiring reimbursement at the 50 percent point works well, because both parties have an investment in the employment. A few of these commenters predicted that the rate at which workers leave their H–2A employment and stay in the U.S. out of visa status will increase if the FLSA requires reimbursement in the first workweek. One employer representative stated that while there may be some concern that withholding reimbursement until the middle of the contract period may go to the other extreme, the Department's final policy choice should reflect the mutual benefits to both the employer and the employee.

The Department concludes that the Final Rule should mirror the proposed rule, with additional clarifying language. The Department believes that, in order to avoid confusion, it is important for this regulation to continue to remind both employers and employees that, where an employer is covered by the FLSA, the requirements of that statute also will apply. As the WHD explained in Field Assistance Bulletin 2009–2 (Aug. 21, 2009), which addressed the application of the FLSA to employers utilizing the H–2B visa program, employers that are covered by more than one law must always determine their wage requirements under each applicable statute and then apply the highest requirement in order to satisfy all laws. See *Powell* v. *United States Cartridge Co.,* 399 U.S. 497, 519 (1950). That Bulletin noted that an employer may participate in the H–2B visa program only when it demonstrates both that there are not sufficient U.S. workers available and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employers who want to bring in H–2B guestworkers must first comply with numerous requirements related to the recruitment of U.S. workers in order to satisfy the Department that there are not sufficient U.S. workers available. Any foreign workers who ultimately are brought in under the program are permitted to work only on a temporary basis, with no possibility of the job becoming permanent no matter how well the employees perform or what skills they acquire. Moreover, the employees may work only for the employer who received the labor certification for the H–2B visa program. At the conclusion of the specified work period, the workers must leave the country and they are not permitted to seek subsequent work from another U.S. employer, unless that subsequent employer also is certified under the H–2B program. In that context, the WHD concluded in the Bulletin that, under the FLSA, the transportation expenses and visa fees of H–2B employees are for the primary benefit of the H–2B employers.

As the Bulletin noted, the H–2A visa program is similar to the H–2B program, because it also provides for the temporary employment of nonimmigrants only when there are not sufficient U.S. workers available for the jobs and the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The H–2A program also involves special recruiting requirements directed at locating any available U.S. workers, and the H–2A workers who enter the country are similarly limited to temporary employment for the qualifying employer, and must leave the country at the end of the work contract period unless they go to another qualifying employer. Because of the similar statutory requirements and similar structure of the H–2A and H–2B programs, the same FLSA analysis applies to the H–2A program as was set forth in the Field Assistance Bulletin. Therefore, an H–2A employer covered by the FLSA is responsible for paying inbound transportation costs in the first workweek of employment to the extent that shifting such costs to employees (either directly or indirectly) would effectively bring their wages below the FLSA minimum wage.

The Bulletin also noted that, under the FLSA, there is no legal difference between deducting a cost from a worker's wages and shifting a cost to the employee to bear directly. Thus, employers may not make deductions from employees' wages for employer expenses or require employees to pay for such costs out of pocket, if that would bring them below the minimum wage, because the minimum wage is received only when wages are paid free and clear. The Department concludes that it is appropriate to continue to remind employers and employees in the H–2A regulations of the simultaneous applicability of the FLSA; otherwise, the H–2A requirement that an employer reimburse transportation only after the employee completes 50 percent of the contract period could result in confusion regarding the FLSA requirement to ensure payment of at

least the minimum wage in the first workweek.

Furthermore, in order to provide additional clarity, the Final Rule describes what is meant by the statement that deductions must be reasonable. The Department's regulations implementing the FLSA provide that the reasonable cost of an item may not include a profit to the employer or any affiliated person, 29 CFR 531.3(b), and that the cost of furnishing any facility found to be primarily for the benefit or convenience of the employer is not reasonable and cannot be counted in computing wages. See 29 CFR 531.3(d)(1). This is so even if the employer asserts that the employee has voluntarily agreed to bear such costs. Moreover, wages cannot be considered to have been received unless they are paid finally and unconditionally or free and clear, without any kickback, directly or indirectly. See 29 CFR 531.35. Thus, for example, if an employee must purchase a uniform with the employer's logo, there would be a violation of the FLSA in any workweek when the cost of such a uniform purchased by the employee cuts into the required minimum or overtime wages. The same principles also apply under the SCA. See 29 CFR 4.168. The Department believes that the same principles also must apply to the H–2A required wage rate, in order to ensure that the employee receives the legally required wage free and clear without any inappropriate, unauthorized deductions. Therefore, the Final Rule adds language similar to that found in the FLSA and SCA regulations, with a cross-reference to the FLSA regulations.

However, the FLSA regulations recognize that an employer may make a deduction from wages where the employee has voluntarily assigned a sum to another, such as a creditor, donee, or other third party (*e.g.,* for insurance, union dues, or charitable donations), provided that neither the employer nor any person acting in his behalf or interest derives any benefit or profit from the transaction. See 29 CFR 531.40. Therefore, the Final Rule does not prohibit all deductions or identify the specific deductions that are permissible. Of course, § 655.122(f) of this Final Rule requires employers to provide all tools, supplies and equipment required to perform the job, without charge to the worker, so no deductions for those items are permitted.

Finally, because the NPRM proposed to allow an employer to deduct any inbound transportation and subsistence costs that the employer paid directly, and to retain the longstanding requirement that an employer must reimburse an employee for such expenses only when the employee has completed 50 percent of the work contract period, the Final Rule does not require an employer to reimburse an employee in the first workweek up to the level of the H–2A required wage. The Department does not believe that requiring reimbursement of inbound transportation and subsistence expenses up to the H–2A required wage in the first workweek would be appropriate, because the NPRM did not propose to modify the longstanding requirement to reimburse these expenses only after an employee completes 50 percent of the work contract period. Rather, the Final Rule provides with regard to inbound transportation and subsistence expenses that employers must comply with the FLSA, where applicable, which means that their reimbursement obligation in the first workweek for these expenses is limited to the FLSA minimum wage level. However, all other deductions must be reasonable, as discussed above, and other deductions are tested against the required H–2A wage rate, not just the FLSA minimum wage. The requirement that all deductions must be disclosed is retained as proposed; therefore, deductions that are not disclosed are not permissible. The Department understands the concerns expressed by the commenters regarding the requirements of this regulation and will carefully monitor the experiences of workers and growers under the new rule to determine whether it is appropriate to revisit this issue in the future.

q. Disclosure of Work Contract

The 2008 Final Rule and earlier rules have required that a copy of the work contract be provided to the worker and that the copy be provided no later than on the day work commences. The NPRM proposed that this disclosure be made, as necessary and reasonable, in a language understood by the worker. This provision has been retained. Some comments asserted that this requirement would require translations into regional and village-specific dialects. The Department intends for employers to make translations into major languages, and not every dialect. The Department believes that employers should provide the terms and conditions of employment to a prospective worker in a manner that permits the worker to understand the nature of the employment being offered, as well as the worker's commitment and rights under that employment.

In addition, we received comments that suggested that the copy of the work contract be provided on the day the worker's visa is issued or at the time of recruitment. These comments stated that it is unfair to allow a worker to travel hundreds or thousands of miles before learning the terms and conditions of employment, and that far too often workers are not accurately apprised of the terms of the work contract until they are in the U.S. The Department agrees. Accordingly, the Final Rule requires that a written copy of the work contract be provided to an H–2A worker no later than the time at which the H–2A worker applies for the visa in a language understood by the worker (as discussed above). The written copy can be provided at any point in the hiring process prior to this point to ensure that the H–2A worker has written notice of the terms and conditions of employment prior to departing the worker's home country. A written copy of the contract need not be provided to each foreign worker who is a potential candidate for employment during the process of recruiting or soliciting. However, when the employer and the worker have reached a stage in discussing employment that has gone beyond the recruiting or solicitation stage and an offer of employment has been made, a copy of the work contract has to be provided. For a worker in corresponding employment, a copy needs to be provided no later than the day on which work begins, although employers may be obligated to provide written disclosure sooner to migrant or seasonal agricultural workers covered by MSPA. Recognizing that some H–2A workers may move to subsequent approved H–2A employment, the regulations provide in such situations that the copy be provided no later than the time an offer of employment is made by the subsequent H–2A employer. Finally, the requirement to provide a copy of the work contract was already contained in the proposal, and this change only modifies when the copy is to be provided. Therefore, any additional costs would be negligible.

As discussed above, the Final Rule clarifies that employers who have an approved modification of a job order must provide the revised job order to the workers in the language understood by the workers. If the modification of the job order is approved after the workers receive the original job order or contract, disclosure of the revised terms and conditions must occur as soon as practicable.

Application Filing Procedures

8. Section 655.130 Application Filing Requirements

a. What To File

The Department proposed to require employers to file an Application with a copy of Form ETA–790. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM with minor clarifying edits.

b. Timeliness

The Department proposed to accept Applications no less than 45 days from the date of need in order to assure compliance with its statutory mandate to certify all applications within 30 days from the date of need. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM.

c. Location and Method of Filing

The Department proposed to accept Applications by U.S. mail or private mail courier to the NPC. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM.

d. Signatures

The Department proposed, consistent with the 2008 Final Rule, to require applicants to submit original forms and signatures. However, the NPRM clarified that this requirement also applies to associations filing as agents for their members, and requires them to obtain signatures of all their employer-members before submitting the Application to the Department. The Department clarified the existing requirement to ensure that all employer-members are on notice of the obligations each is assuming and must adhere to under the Application. The Department is retaining this requirement.

The Department received comments opposing the signature requirement and indicating that it would be both time consuming and burdensome for associations. The commenters also objected to an alleged lack of justification offered by the Department for imposing the requirement.

In order to foster fair play and full disclosure, the Department has determined that it must require individual signatures of all employers applying for a temporary labor certification. The Department expects that this practice will result in better compliance and more individual involvement by employers to assure that program requirements are met and that both U.S. and foreign workers are treated fairly.

e. Other Comments on Application Filing Requirements

One commenter proposed that all documents filed with the SWA and OFLC be made readily available to U.S. workers and their representatives through the Freedom of Information Act (FOIA) or an electronic means through a publicly accessible Web site. This comment was addressed under the section dealing with the electronic job registry, on which the Department intends to post, when the system is available, all open and pending job orders.

9. Section 655.131 Association Filing Requirements

The Department proposed to continue allowing associations to file on behalf of their members. The NPRM clarified the role of associations as filers (sole employer, joint employer or agent), in order to assist the association and employer-members in understanding the obligations each party is undertaking with respect to the Application. As in the past, an association will be required to identify in what capacity it is filing, so there is no doubt as to whether the association is subject to the obligations of an agent or an employer (whether individual or joint). This requirement is a continuation from both the 1987 Rule and 2008 Final Rule that required an association of agricultural producers to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members. The Department is retaining this provision with a change related to the filing of master applications, as discussed more fully below.

One commenter generally opposed the provision indicating that it should be dropped because it requires associations, agents and FLCs to provide to DOL confidential and/or proprietary business information. The Department notes that neither the NPRM nor the Final Rule requires that program users submit information that is confidential or constitutes proprietary business information. The Final Rule simply requires that the association retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation in response to a Notice of Deficiency from the CO prior to issuing a Final Determination or audit. While we do not believe that information submitted in response to a Notice of Deficiency or an audit request would be confidential business information, we want to reassure employers and associations that information identified as confidential will be protected consistent with Departmental regulations.

a. Individual Applications

As discussed above, the Department proposed to continue permitting associations to file as individuals and is retaining this provision in the Final Rule. The Department received no comments on this proposal.

b. Master Applications

As explained in the NPRM, master applications filed by associations are clearly contemplated by the INA, and the Department has permitted master applications as a matter of practice. In the 2008 Final Rule, the Department recognized their use. The NPRM proposed to continue the use of master applications but in a more limited fashion. The Department is retaining the NPRM provision addressing master applications with several changes. In response to many comments received on this issue, the Department has reconsidered the one-State limitation and has expanded the area of intended employment for associations filing master applications to at most two contiguous States. In addition, the Department is clarifying that a master application may cover the same occupations or comparable agricultural employment.

The Department received a number of comments in response to its proposed regulations governing master applications. One commenter expressed full support for the proposed changes indicating that they will allow for better accountability in the advertising and referral process.

Numerous commenters asserted that the proposed changes to the provision governing the use of master applications will prove more difficult for employers, without sufficient justification by the Department for the changes. Many of these commenters noted that there is no reason to limit the use of the master applications to only one State, some noting that many farms cross over State lines.

Similarly, many asserted that a limitation to a single occupation and comparable work is not justified because many farmers perform different types of work on their farms, and forcing them to duplicate the Application process for each type of job would greatly increase the cost of meeting their labor needs, and in some cases negatively offset the cost sharing

among the employers covered by a master application.

Several commenters opposed the single-State, single-occupation and comparable work limitations, asserting they will incur greater financial and administrative burdens due to a sudden increase in the number of master applications they will be required to prepare and file to cover all employers, workers and job occupations that would have been covered by the same master application under the 2008 Final Rule. These commenters proposed that the Department permit the bundling of job orders and master applications to reach across State lines so long as the jobs are similar and the wages are the same. The same commenters opposed the increased paperwork burden.

Many commenters claimed that the changes appear unjustified and that the Department failed to offer a justification based on instances of violations or data indicating that master applications are being abused in a way that would be addressed by proposed changes. Some commenters asserted that this change, along with other changes in requirements, will increase the cost of compliance and force some employers out of the program.

One commenter indicated that narrowing the scope of master applications that are essential for many H–2A employers will particularly affect smaller employers or those with shorter seasonal needs. According to this commenter, the one-State limitation fails to account for weather patterns and climate that govern the seasons and therefore drive most agricultural activities. Further, it is reasonable to permit employers and workers in regions where similar activities take place at the same time to increase efficiency and effectiveness by working together through the use of master applications.

Another of these commenters noted that both labor and management understand that multi-employer Applications offer a benefit to farm workers by providing job opportunities. The same commenter contended that the Department should provide employers with additional flexibility rather than impose restrictive requirements. In addition, it asserted that an additional benefit of the expanded availability of master applications would result in greater work opportunities for workers, lower costs for employer participation, and a higher level of compliance among the participating farmers.

The Department agrees with the commenters regarding the benefits of master applications and has therefore retained their use, as intended in the INA. The Department's changes to the regulatory requirements are not intended to discourage employers from utilizing master applications but are rather designed to preserve program integrity and foremost, aim at greater protections for U.S. and foreign workers. In addition, the Final Rule continues to require a single date of need as a basic element for a master application, as well as a longstanding requirement that master applications may only be filed by an association acting as a joint employer with its members. The Department highlights joint responsibility of the association and its employer-members by requiring that the association identify all employer-members that will employ H–2A workers. The Application must demonstrate that each employer has agreed to the conditions of H–2A labor certification.

The Department has modified the provision governing master applications to expand the area of intended employment. The modification strikes a balance between the programmatic goals of protecting job opportunities for U.S. workers and ensuring uniform enforcement of the terms and conditions and the need to provide flexibility for employer associations. Monitoring program compliance becomes more difficult and the potential for violations increases when workers under a single application are dispersed across several States. Limiting the area of intended employment to two contiguous States will make it more likely that employers under the same application will learn of and have the ability to correct potential problems and avoid liability.

The Department has determined that limiting the master applications to a single occupation or comparable work provides necessary protections for both U.S. and foreign workers by providing a disincentive to employers to overestimate job opportunities or timeframes. Such limits also provide greater incentives to the domestic U.S. workforce. Recruiting workers under a master application, with many different job openings that may be located at different sites and subject to different terms and conditions, may discourage some U.S. workers from responding. This may also make the recruitment and retention of U.S. workers more difficult because some workers may not want to perform diverse activities. This requirement will also assist employers in working together to ensure that terms and conditions are met with respect to each set of workers employed under a specific master application. The Department expects that the nature of the job opportunities that can be included in a master application will largely mirror how master applications were treated under the 1987 Rule. We further note that the regulatory text has been changed to substitute the word or for the word and in the phrase ''single occupation and comparable work.''

Although associations may be required to prepare greater numbers of applications, the requirement is intended to make it easier for them to track compliance with the terms and conditions. As applications become more specialized, the associations may find that the number of their participating members increases for each application, therefore preserving the cost-sharing benefits. Similarly, the need for efficiency in processing applications is far outweighed by the anticipated improvement in the process, and the increased protections for both U.S. and foreign workers that will result.

The Department is supportive of the use of master applications by employers (large and small) as a means to meet seasonal needs and believes that the commenters' concerns regarding the impact of limitations are exaggerated. The Final Rule returns to the traditional use of master applications as operated between 1987 and 2009. The Final Rule, with its expansion of the use of master applications beyond a single State, preserves the flexibility inherent in the use of master applications while ensuring that they are not vehicles for abuse or a way to skirt program requirements. Nothing in the Final Rule impacts employers with shorter seasonal needs.

10. Section 655.132 H–2A Labor Contractor (H–2ALC) Filing Requirements

The NPRM revised the provision by providing an introductory paragraph that explained what other provisions of the regulations H–2ALCs are subject to and deleted the redundant sections in the H–2ALC section. The Final Rule adopts these changes as proposed, with minor editorial clarifications.

The Department received many comments addressing the need for the regulation of H–2ALCs. Most commenters agreed with the proposal that specific obligations for H–2ALCs are necessary. However, a majority felt that the Department did not go far enough to regulate H–2ALCs, asserting that H–2ALCs are the most egregious violators of the H–2A program. They pointed out that some H–2ALCs recruit workers when they do not have actual jobs to offer; therefore, these commenters were pleased that the Department is now requiring additional

documentation about their contracts and that the WHD has more enforcement authority. One commenter contended that H–2ALCs exaggerate their labor needs in order to maximize their profits by creating something close to a Ponzi scheme in which foreign workers pay exorbitant recruiting fees abroad. This commenter suggested that the Department create a form for the contract between an H–2ALC and fixed-site employer in order to ensure that all necessary information is provided to the Department such as the legal name of the farm, its address, number of workers needed, dates of need, tasks to be performed, and the remuneration that the fixed-site employer intends to pay an H–2ALC. One commenter requested that the Department explicitly acknowledge State and Federal protections provided to all workers during recruitment and employment including those related to discrimination and retaliation. This same commenter requested that we require an H–2ALC to provide a recruitment plan. Additionally, a commenter recommended the creation of a Federal H–2ALC licensing and continuing education requirement.

The Department believes that the proposed regulations provide sufficient protections to address these commenters' concerns, and no additional restrictions or forms or licensing requirements are necessary at this time. The proposed protections, including the requirements to submit proof of the H–2ALCs' work contracts, will help eliminate these egregious abuses and therefore were retained.

a. Scope of H–2ALC Applications

As stated previously, the NPRM proposed to eliminate multiple areas of intended employment in one Application and substituted a requirement that each Application be limited to worksites in only one area of intended employment. The Department received several substantive comments on this particular provision.

A legal aid organization commended the Department for forbidding multiple areas of employment in a single application. The commenter claimed that U.S. workers are harmed because positive recruitment takes place only at the initial area of intended employment and by the time the itinerary reaches some of the later areas of intended employment, the 50 percent rule has lapsed and the U.S. workers lack access to the work opportunities. The commenter also asserted that the H–2A workers incur unnecessary expense because there may be weeks of downtime between areas of intended employment so they travel back home to Mexico at their own expense. The commenter stated that this would not be the case if the job order accurately reflected the actual work activities.

The Department believes that the enhanced restrictions on H–2ALCs serve to address this issue and retains the provision as proposed in the NPRM.

b. Required Information

(i) Identify Name and Location of Fixed-Site Employers and Crop Activities

The requirement to list the name and location of each fixed-site employer to which an H–2ALC expects to provide H–2A workers, including the beginning and ending dates of when the workers are needed and a description of the activities the workers are expected to perform and crops upon which they will work, is the same in both the 2008 Final Rule and the NPRM. The Department received several comments, all in support of this provision. One farm worker advocacy group suggested that the Department add an additional requirement to include the monetary value of the three-fourths guarantee for the applicable work performed at each fixed site. The three-fourths guarantee is not calculated by each fixed-site employer; therefore, the Department cannot implement this suggestion.

(ii) Required Information and Submissions

The Department did not receive any comments on this section of the proposed rule. Therefore, the Department is adopting the provision as proposed with minor editorial changes.

(iii) H–2A Labor Contractor (H–2ALC) Bond Requirements

The Department proposed to continue to require that an H–2ALC obtain a bond to demonstrate its ability to meet its financial obligations to its employees. This permits the Department to ensure that labor contractors can meet their payroll and other obligations contained in the terms of the job order and the H–2A program obligations. The Final Rule requires that an H–2ALC submit the original surety bond (and any extensions thereof) to the Department with the Application. This change is not expected to place any additional burden on an H–2ALC applicant since such applicants were previously required to submit fundamental information from the bond that most applicants accomplished by providing a copy of the bond. This requirement to provide the bond itself will ensure that the Department has legal recourse to make a claim to the surety against the bond following a final order finding violations.

Several farm worker advocates suggested that H–2ALCs should have the option of joint employment with each fixed-site employer in lieu of the bond requirement. They noted that in that situation, fixed-site employers would be held jointly responsible for the treatment of the farm workers. The Department believes that the increased surety bond amounts provide better protections.

(iv) Provide Copies of Work Contracts

The NPRM proposed to add a provision requiring H–2ALCs to provide copies of their work contracts. The comments were generally in favor of this requirement. One commenter requested that additional language be added to this provision, specifically, that each contract disclose the fact that an H–2ALC intends to employ H–2A workers in connection with the contract and that workers employed at the same site at the same time in any work included in the job order are employed in corresponding employment. One commenter opined that we are requiring H–2ALCs to provide too much confidential and proprietary business information and that those provisions should be dropped.

The Department has determined that the requirement to include proof of work contracts is appropriate for protecting agricultural workers, and does not believe additional language is necessary. Additionally, as stated above, the Department intends to protect any material identified as confidential in accordance with Departmental regulations.

(v) Housing/Transportation

The NPRM required housing and transportation to comply with the standards in § 655.122, and relevant comments are addressed in the preamble for that section. The Final Rule adopts the NPRM as proposed.

11. Section 655.133 Requirements for Agents

The NPRM proposed to require agents to provide, as a part of the Application, copies of agreements demonstrating representation—in the form of a contract, agency agreement, or other proof of the relationship and the authority of the agent to represent the employer. In addition, the Department proposed to require agents who are required to register as FLCs under MSPA to provide proof of registration. The Department is retaining this provision as proposed.

The Department received several comments discussing the enhanced requirements for agents. One commenter objected to the changed requirements arguing that agents, associations and labor contractors should not be required to provide confidential/proprietary business information.

Some commenters opposed the requirement arguing that the current Form ETA–9142 *Application for Temporary Employment Certification* (Form ETA–9142) already contains a section where the employer may authorize another to act as an agent on its behalf and that providing the agency agreement creates a redundancy in the application process. One of these commenters indicated that both the employer and agent are required by law to personally attest with original signatures to the accuracy of all representations made in the Form ETA–9142, and knowingly misrepresenting constitutes a felony criminal offense punishable by $250,000 fines and up to 5 years in jail. In light of such severe penalties, this commenter did not see the necessity for additional information ascertaining the validity of the representation.

One commenter claimed that employers hire agents simply to assist them with the paperwork and asserted that the scope of such representation in most cases never involves activities that would require the agent to register as a FLC. In addition, the commenter posited that enhanced requirements are unnecessary because the Department already imposes separate requirements on H–2ALCs and FLCs.

An association of employers opposed the enhanced requirements for agents arguing that the proposed changes are punitive and the Department did not provide justification for the new restrictions and did not explain how they will correct or prevent any program abuses. This commenter specifically opposed the requirement to submit agency agreements and noted that this requirement will simply result in more paperwork and cost for employers. The commenter further asserted that the Department has no need for private contract information and should be solely concerned with employer compliance with program requirements. One commenter expressed concern about the possibility that its proprietary information may be subject to public release under FOIA.

One commenter offered support for the enhanced requirements for agents, including that agents obtain a bond and licensure.

The Final Rule adopts the provision as proposed. The Department is requiring agents to supply copies of the agreements defining the scope of the agency relationship in addition to completing all relevant portions of the Application to ensure that there is a bona fide agency relationship to ensure program integrity. The requirement, however, in no way obligates either the agent or the employer to disclose any trade secrets, or other proprietary business information. For example, the Department has no interest in or need to know the amount of the fee that the agent is charging the employer. The Final Rule only requires the agent to provide sufficient documentation to clearly demonstrate the scope of the agency.

Preserving program integrity requires the Department to ascertain the validity and scope of the agency relationship. The current application procedures require both the employer and the agent to attest under penalty of perjury that all information provided on the Form ETA–9142 is true and correct. It further includes a declaration by the agent or employee of the employer that it is authorized to act on its behalf in connection with the Application. This attestation, however, simply evidences an existing relationship; unlike the actual agency agreement, it does not define the scope of the agency relationship and consequently the scope of employer's or agent's liability. For these reasons, the Department is retaining the provision as proposed.

In addition, the Department wishes to assure all commenters and stakeholders that it will continue to follow all applicable legal and internal procedures for complying with FOIA requests that ensure the protection of private data.

The Department agrees with the commenter supporting the need for enhanced requirements for agents. The Department, however, does not feel that it is appropriate at this time to impose a bonding requirement on agents unless the Department determines on a case by case basis that they are more appropriately classified as H–2ALCs.

12. Section 655.134 Emergency Situations

The Department proposed to retain the criteria for accepting and processing Applications filed less than 45 days before the date of need on an emergency basis. The Department received no comments on this proposal and retains it in the Final Rule, with minor editorial clarifications.

13. Section 655.135 Assurances and Obligations of H–2A Employers

a. Non-Discriminatory Hiring Practices

The Department proposed to require employers to make certain assurances as a condition for certification. The first of these assurances was that the job opportunity remain open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and that rejections of U.S. workers must be only for lawful, job-related reasons.

The Department received a few comments on this provision. The Department received a comment that this provision is not necessary and should be deleted because the employer is already required to comply with all applicable laws. Another commenter suggested adding the phrase and as otherwise provided by State law to the end of the first sentence.

The Department does not agree with suggested deletion. The provision is intended to be specific to the hiring practices of H–2A employers, such that the jobs, even those filled by H–2A workers prior to the end of the recruitment period, remain available to U.S. workers. The Department declines to add the suggested phrase here because this concept is addressed elsewhere in the regulation. Therefore, the Final Rule contains the language proposed in the NPRM, with an edit clarifying that the employer's obligations continue through the 50 percent point of the work contract.

b. No Strike or Lockout

The NPRM proposed that employers be required to assure the Department that there was no strike or lockout in the course of a labor dispute at the worksite.

The Department received several comments from various groups who requested that the Department return to the language of the 1987 Rule and the 2008 Final Rule which limited such assurance to strikes or lockouts involving the specific job opportunity sought to be filled. These commenters claimed that the proposed wording can leave too much room for mischief among those who would seek to block the hiring of H–2A workers. They expressed concern that the proposed language was broad and would allow one or two workers to claim that they walked off the job over a labor dispute and in such a situation the employer's Application would be denied. They also pointed out that the National Labor Relations Act does not cover agricultural employment, which means that there is no official process for determining the existence of a labor

dispute. These commenters state that the 1987 Rule language was carefully crafted to make it clear that if a worker walks off the job claiming a labor dispute, only the job opportunity vacated by that worker, and not the entire Application, is barred from certification. One of the commenters pointed out that the Department provided no justification for the proposed change. Several of the commenters opined that the proposed definition of strike in the definition section does not alleviate this problem because concerted stoppage of work by employees as a result of a labor dispute still allows two employees to act in concert to prevent an Application from being certified.

The Department is concerned that narrowing the provision as recommended by the commenters would unjustifiably limit the freedom of agricultural workers to engage in concerted activity during a labor dispute. This would be inconsistent with Congress' broad prohibition against granting labor certifications where there is a strike or lockout in the course of a labor dispute. The Department believes that revising the language based on these comments would result in H–2A workers performing not only the jobs identified in the certification, but also the jobs performed by those workers engaged in the labor dispute. Therefore, the Final Rule retains the language as proposed.

c. Recruitment Requirements

The Department proposed to require an assurance from the employer that it had and would 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 a job through 50 percent of the contract period including all extensions, and would conduct recruitment activities as set forth in the regulation. The Department received no comments on the section dealing with the assurance. Therefore the Final Rule generally adopts the NPRM provision as proposed with minor clarifying edits. This includes the deletion of the "whichever occurs first" language regarding the end date of the positive recruitment. We have modified this language to impose clarity that one date, if known, will overrule the other. For a full discussion of this provision refer to the preamble discussion under § 655.158.

d. Fifty Percent Rule

The Department proposed reinstatement of the 50 percent rule, which requires employers to hire U.S. workers through 50 percent of the contract period, as outlined in 8 U.S.C. 1188(c)(3)(B)(i). We received many comments for and against this proposal, and for the reasons discussed below, the Department is retaining the provision as published in the NPRM.

Several Congressional commenters supporting the rule noted that the 50 percent rule played a crucial role in the reservation of these jobs for U.S. workers. Another commenter noted that the 50 percent rule was not only an essential protection for U.S. workers, but a significant inducement for employers to make serious attempts to recruit U.S. workers as a condition of H–2A certification. Several commenters cited the role that the rule plays in the continued opportunities for U.S. workers for the jobs, close to and even beyond the start date of the contract. Other commenters who supported a return to the 50 percent rule noted that the longer referral period provides essential access to U.S. workers with respect to H–2A jobs. Even some employer commenters opposed to the reinstatement of the 50 percent rule recognized the Department's statutory need to strike a balance between the priority given to U.S. workers and the right of an employer, when it has met its legal obligations, to employ H–2A workers.

Several employer commenters opposed to the rule focused on the complications the H–2A employer faces in hiring an H–2A worker, only to have the pattern of employment potentially disrupted by a domestic worker. Other commenters asserted that U.S. workers are not well served by the 50 percent rule when the employer does not want to hire them because the foreign workers have arrived. A number of commenters stated that there was not sufficient evidence that the rule worked as intended. Many commenters referred to the alternative 30-day rule imposed in the 2008 Final Rule as a preferred alternative.

Many commenters focused on the unreliability of the domestic workforce referred during the 50 percent period. They noted that referred workers were unlikely to even show up for interviews, and that many of those who are hired last for no more than a few days. Others noted that most employers receiving referrals during the 50 percent period choose not to release the H–2A worker but retain that worker, either in a superfluous position or as the potential replacement worker for when the U.S. worker either does not show up for work or quits employment. One commenter noted that, in its State, referrals more than doubled in 2009 yet very few actually showed up for interviews and ultimately they saw no increase in domestic workers accepting job offers.

Some commenters objected to the cost of interviewing U.S. workers, particularly for small farmers. One commenter questioned the return to the 50 percent rule, noting what this commenter considered to be the small number of workers (11,000) referred by One-Stop Career Centers nationwide.

A commenter stated there is no evidence that the adoption of the 30-day rule in the 2008 Final Rule (as opposed to the 50 percent rule) has adversely impacted U.S. workers. Another asked whether the Department had come across new or different information regarding the effectiveness of the 50 percent rule to merit its reinstatement.

The 50 percent rule predates the H–2A program; it was originally created as part of the predecessor H–2 agricultural worker program in 1978. See § 655.203(e); 43 FR 10316, Mar. 10, 1978. In 1986, IRCA added the 50 percent rule to the INA as a temporary 3-year statutory requirement, pending the findings of a study that the Department was required to conduct and review other relevant materials, including evidence of benefits to U.S. workers and costs to employers, addressing the advisability of continuing a policy which requires an employer as a condition for certification to continue to accept qualified, eligible U.S. workers for employment after the date the H–2A workers depart for work with the employer. 8 U.S.C 1188(c)(3)(B)(i). In the absence of the enactment of Federal legislation prior to the end of the 3-year period, Congress instructed the Secretary to publish the findings immediately and promulgate an interim or final regulation based on the findings.

The study conducted during that time period included the two States determined to have had the highest number of U.S. workers who responded to referrals during the 50 percent period; it sought only to determine the costs to employers that hired workers referred under the 50 percent rule and the concomitant benefits to the U.S. workers hired under the rule. Accordingly, in 1990, pursuant to what is now 8 U.S.C. 1188(c)(3)(B)(iii), ETA published an Interim Final Rule to continue the 50 percent requirement. 55 FR 29356, Jul. 19, 1990. The perceived shortcomings of the study were cited by the Department in calling for comments regarding the 50 percent rule in 2008, and in conducting another study that attempted to secure additional information regarding the effectiveness of the 50 percent rule. That

study, however, also was focused to meet the needs of the 2008 Final Rulemaking process.[12] It selected only 9 participants from each of three stakeholder groups—farm employers, SWAs, and farm worker advocates. Despite the protests of at least one commenter that this study plainly demonstrates the ineffectiveness of the provision, the study did not constitute a comprehensive analysis of the effectiveness of the rule.

The Department had a clear statutory obligation to determine if there was a need to require employers to continue the longstanding practice of accepting referrals from the time of departure of the H–2A workforce until 50 percent of the contract period has elapsed. The Department's obligation continues and must be implemented in furtherance of the Congressional policy that aliens not be admitted under this section unless there are not sufficient workers in the U.S. who are able, willing, and qualified to perform the labor or service needed and that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. 1188(c)(3)(B)(iii). The Department's promulgation of a different timeframe in 2008 Final Rule as an alternative to the 50 percent rule was not in accordance with the Department's Congressional mandate to ensure that foreign workers are not admitted unless sufficient U.S. workers are unavailable and their wages and working conditions will not be adversely affected.

We have considered the commenters' anecdotal concerns about the unreliability of the domestic workforce referred during the 50 percent period. However, the potential costs that may be incurred as a result of U.S. workers leaving shortly after they are hired are outweighed by the benefit to U.S. workers and the Department's statutory responsibilities to ensure that U.S. workers continue to have access to these jobs.

The Department believes the opportunity provided U.S. workers by the 50 percent rule is not insignificant and notes that SWAs have a duty through the labor exchange system to refer qualified individuals. The States have within their grasp a variety of ways to ensure referrals are coordinated and integrated to make sure that those most in need of and desiring access to these opportunities are given the required access through the 50 percent period. States are reminded of their responsibility to use these tools to the fullest extent. Staff-assisted referrals are one significant mechanism by which SWAs can ensure that those seeking these particularized positions have access to them. The Department notes that over the 20 years during which the 50 percent rule was in operation employers did not raise significant concerns with regard to this policy.

With regard to the comment concerning new or different information about the effectiveness of the 50 percent rule, the Department does not rely on new information as the basis for the reinstatement of the 50 percent rule. The information that is available through these comments is in conflict. While employers argue that this rule presents obstacles to their effective operation, worker advocates and some SWAs contend with equal vigor that the existence of the 50 percent rule is essential to ensuring that agricultural job opportunities are available to domestic workers. The 2008 study, which was based on employers that employed only 12 percent of the H–2A workers, was an inadequate basis upon which to change the Department's longstanding rule. The Department finds the lack of definitive data to be the very reason to protect the vulnerable domestic workforce, rather than deny it access to these jobs.

The Department has accordingly determined it must protect the needs of the U.S. worker population, even if there is potential uncertainty for the employer in terms of managing labor supply and labor costs during the life of the contract. Moreover, we note that this benefit, if employers' comments are correct, is one very few U.S. workers avail themselves of—thus making the cost to employers negligible.

With regard to comments that SWAs refer a small number of workers under this rule, the Department does not believe that 11,000 job opportunities for U.S. workers are inconsequential, particularly when compared to the approximately 70,000 H–2A workers admitted. Moreover, with respect to small farmers specifically mentioned as being unduly burdened in this process, Congress provided the option of non-compliance with the 50 percent rule in what is now 8 U.S.C. 1188(c)(3)(B)(ii), as implemented in the Final Rule.

i. Small Farm Exemption

The Department proposed a return to the 1987 Rule's small farm exemption from the 50 percent rule. Most of those supporting the proposal to reinstate this exemption further requested that the Department eliminate the provisions limiting its application to those small farms that are not members of an association filing a master application (or otherwise associated with other employers). The Department cannot accommodate this request. This limitation was not regulatory, but statutory. See 8 U.S.C. 1188(c)(3)(B)(ii). In that provision, Congress specifically excluded small employers who are members of associations from the small-employer exemption to the 50 percent rule. The association, however, can assign any workers referred under the 50 percent rule to employers who need additional workers or who can more easily accommodate the referred workers, thus minimizing or eliminating the burden on small farmers.

ii. Other Comments on the 50 Percent Rule

Another commenter asked whether the Department would reinstate policy guidance addressing the referral of U.S. workers to an H–2A employer after the arrival of the H–2A workers. The Department issued guidance in 1993 and 2007 instructing SWAs to refer U.S. workers to an H–2A employer whose H–2A workers have already arrived only if there is no suitable alternative employment available or if the worker expresses a preference for an H–2A employer's job opening. The Department does not believe it is appropriate to include such guidance in the context of the regulation.

e. Compliance With Applicable Laws

In the NPRM, the Department proposed to require employers to comply with all applicable Federal, State and local laws and regulations, including health and safety laws, during the period of employment that is the subject of the labor certification. This proposal expanded the scope of the prior guarantees which, under both the 1987 Rule and the 2008 Final Rule, limited the required compliance to employment-related laws. In addition, the proposed regulations made explicit that H–2A employers may be subject to the provisions of the FLSA. The Department has decided to retain the enhanced requirement in order to emphasize and ensure that both H–2A and U.S. workers are provided all of the protections to which they are entitled.

One commenter supported the expanded proposal, asserting that the new assurance would assist State and local governments in curbing illegal immigration and exploitation of foreign agricultural workers, and it would also grant more uniform protections to all workers. Another commenter supported

[12] See "Findings from Survey of Key Stakeholders on the H–2A 50 Percent Rule," HeiTech Services, Inc. Contract Number: DOU069A20380, April 11, 2008.

the enhanced provision but suggested a change to expand the protections to the period of recruitment, as well as the duration of the work contract.

The Department agrees that emphasis on compliance with all applicable laws and regulations is intended to bolster protections for both U.S. and foreign workers. The provision puts employers on notice that they must comply with all applicable laws specifically as a condition of program participation. In addition it provides State and local agencies with an incentive to work together with the Department to identify violators and address issues related to the employment of temporary foreign agricultural workers.

As to the comment suggesting an expansion of the protection to the period of recruitment as well as the duration of the work contract, we believe that the prohibition against discrimination during the period of recruitment provides adequate protection. Additionally, several commenters requested that the Department prohibit employers from holding or confiscating workers' passports, visas, or other immigration documents. The Department recognizes the worker's right not to relinquish possession of his or her passport to the employer. Therefore, the Department is adding a provision to this section to require employers to comply with existing Federal law that prohibits confiscation of such documents (William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a)).

f. Job Opportunity is Full-Time

The NPRM proposed to require employers to offer only full-time temporary employment of at least 35 hours per work week, an increase from the 30 hours per week in the 2008 Final Rule. The Department made this change on the basis that that a 35-hour work week more accurately reflects agricultural work patterns and also strikes a more appropriate balance between the employers' needs and the employment and income needs of both U.S. and foreign workers.

The Department received a number of comments on this requirement. Some of these comments addressed the increased requirement in the context of the three-fourths guarantee which is also discussed elsewhere in this preamble.

One commenter offered unqualified support for the proposed 35-hour per week proposal. Another commenter, a legal aid organization, proposed changes to the provision that would define a full-time job opportunity as constituting 8 hours per day and no less than 40 hours per week. Another commenter suggested that the Department adopt a 37-hour per week requirement instead, because it would more accurately reflect the reality in the field. As part of its justification, this commenter argued that an increase in the hours would bolster the three-fourths guarantee and ensure that workers are actually employed for the duration of the contract.

Several commenters opposed the new definition of full-time employment. Some commenters asserted that the increased hourly requirement increases the obligation of the employer to meet the minimum hour requirement and thus increases the number of hours for purposes of the three-fourths guarantee. Another commenter indicated that this would drive up costs for H–2A employers. Other commenters asserted that the proposed change in the requirement would drive labor costs up 16 percent because the requirement and the three-fourths guarantee are now applicable not only to H–2A workers but also to U.S. workers in corresponding employment. One commenter also argued that this change is compounded by the change in the AEWR methodology resulting in prohibitive costs for employers.

Some commenters suggested the Department retain the 30-hour per week requirement because it provides farmers with more flexibility in meeting the three-fourths guarantee when they are faced with unforeseen circumstances such as inclement weather, etc. Several commenters argued that the Department offers no justification for increasing the requirement or statistical data indicating that 35 hours, instead of 30, strikes a more appropriate balance between employers' needs and the needs of U.S. and foreign workers. One of these commenters argued that farmers do not have the flexibility to set the sale prices in order to absorb costs associated with the new proposal, which will result in many family farms going out of business and loss of employment for U.S. workers.

The Department's experience in program administration and enforcement has shown that the 30-hour requirement does not adequately reflect the reality of agricultural production and that most employers over the course of the season offer well in excess of that number of hours. Although the Department believes that agricultural employers need some flexibility to account for the unpredictable factors affecting agriculture, the Department's primary responsibility is to ensure the availability and viability of job opportunities for U.S. workers. The Department has determined that requiring employers to use 35 hours as the minimum threshold for full-time employment will strike a more appropriate balance between the reality in the field, the workers' needs for meaningful hours and wages, and the farmers' need for flexibility. The Department is therefore retaining the 35-hour work week, as proposed.

g. No Recent or Future Layoffs

The Department proposed to require an employer to assure that it has not laid off and will not lay off any similarly employed U.S. worker in the occupation in which the employer is seeking to hire H–2A workers within 60 days of the date of need. The Department has modified the provision in response to comments and has clarified the circumstances under which a layoff would not be improper.

The Department received a number of comments addressing the proposal. One commenter expressed concern that the layoff provision could create confusion and complications for certain employers with long seasons; coupled with the longer recruitment provisions, the employer may be required to begin recruitment of U.S. workers (and the application process for H–2A workers) before or at the time that it is dismissing workers associated with the prior work contract/prior season. This commenter further argued that offering to re-hire these workers may not remedy the situation because many of them may not commit to a job opportunity until a later date. This commenter recommended that the Department adopt a shorter recruitment period, and/or a shorter layoff protection period and/or require employers to attest to their intent to rehire all qualified U.S. workers who have been laid off due to the season ending. Another commenter argued that it and other employers in the industry regularly dismiss their year-round employees between December and February. This commenter proposed that the Department change the provision so it does not bar such employers from using the program.

One commenter proposed changes to the provision to impose the requirement on both the employer and the fixed-site business (to the extent they are not one and the same). In addition, this commenter proposed additional language to prohibit the employer or fixed-site business from causing the layoff in addition to actually laying off the workers.

In response to the concerns of employers with long seasons or who dismiss their employees between December and February that they would be barred from the program the Final

Rule clarifies that layoffs are permissible when H–2A workers are laid off before any U.S. workers in corresponding employment are laid off. We have previously made this point in 29 CFR 501.19(e) and have moved it to this provision. Moreover, we note that the employer is required to offer employment to all U.S. workers employed in the prior season. The Department continues to believe that offering the maximum job opportunities to U.S. workers is critical to the Department's responsibilities under the H–2A program.

The Final Rule does not extend the concept of joint employment to H–2ALCs and fixed-site employers at the same location for purposes of the no layoff provision, where the fixed-site employer does not qualify as a joint employer. Only an employer may lay off its own employees and therefore each employer is individually responsible for ensuring that it does so only for lawful, job-related reasons. Adding the proposed language to the provision would create confusion regarding joint employment and the ultimate responsibility for the workers under the program.

h. No Unfair Treatment

The Department proposed to prohibit employers from intimidating, threatening, coercing, blacklisting, discharging or in any manner discriminating against workers or former workers who file a complaint against the employer, or who institute any proceeding against the employer, or testify in any proceeding against the employer, or consult with an employee of a legal assistance program or an attorney on matters related to a proceeding against the employer, or exercise or assert any right or protection under the H–2A program. This provision supplements existing provisions in these regulations requiring compliance with Federal, State and local laws, and provisions which prohibit unfair treatment. The Department is retaining the provision as proposed.

Some commenters expressed unqualified support for the provision. Other commenters proposed to add into this provision new language that would include protections for workers who file complaints with the SWA or assert rights or institute actions based on State employment or housing law or regulations. A Congressional commenter proposed that the Department consider additional protections, including visa extensions, to prevent retaliation against foreign workers who file complaints alleging unlawful conduct.

The Department believes that its provision requiring compliance with all applicable Federal, State and local laws already provides for the additional State-related protections proposed by one of the commenters.

The Department supports providing protections to workers so that they may complain of violations without fear of retaliation. However, the Department does not have the authority to provide for an extension of status or stay for a foreign worker; this authority rests exclusively with DHS and the Department can take no action with respect to extending the status of any individual worker.

i. Notify Workers of Duty To Leave United States

The NPRM proposed to continue to require an employer to inform H–2A workers that they are required to depart the U.S. at the end of the certified work period, or if they become separated from the employer before the end of that period. The requirement that the workers depart applies to all H–2A workers who do not have a subsequent offer of employment, approved by USCIS in a subsequent nonimmigrant worker petition, from another H–2A employer. This continues a requirement in the program which parallels DHS regulations. The Department received no comments addressing this provision, and is retaining this provision as modified.

j. Comply With the Prohibition Against Employees Paying Fees

The NPRM proposed to prohibit the employer or its agent from seeking or receiving payment of any kind (including, but not limited to, monetary payments, wage concessions, kickbacks, etc.) from an employee for any activity related to obtaining the H–2A labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs, but not costs that are the responsibility of the workers, such as passport fees. The proposed rule deleted the reference in the 2008 Final Rule to visa fees as a cost that is the responsibility of the workers. The preamble to the NPRM explained that visa fees, border inspection fees, and other government-mandated fees are directly related to the employer's need for the workers to enter the U.S. to work for the employer. The Final Rule generally adopts the language as proposed, with the removal of the reference to the FLSA as unnecessary.

Employee advocates generally endorsed the proposed prohibitions on cost shifting. For example, one employee advocate stated that exorbitant recruitment fees imposed on H–2A workers, including transportation fees, passport and visa expenses, require workers to bankrupt themselves and their families just to enter the U.S. This commenter suggested, as did others, that the Department should further clarify that fees are the responsibility of the employer and, because they primarily benefit the employer, may not be recouped in a later workweek. Another employee advocate suggested that the Department should go further to eliminate employers' incentive to prefer H–2A to U.S. workers and prevent employers from shifting to others the costs of importing H–2A by expressly requiring the reimbursement of passport fees, hotel costs while waiting in the consular city to interview for and receive the work visa, and visa processing fees.

A number of employers and their representatives objected to the requirement that employers pay the workers' visa fees. For example, some commenters emphasized that consulate, border crossing and visa fees should remain the responsibility of the workers, stating that workers also benefit from the employment relationship and should have some investment in the relationship. They predicted that there would be increased absconding from the job upon arrival if employees did not have a financial stake in their decision to enter the country. Other employers and their representatives similarly commented that visa fees should remain the responsibility of the worker, both in order to control employers' costs, and because they are a natural cost of the decision to go to another country for a job, from which the employee also benefits. Others emphasized that facilitation of the visa application process by foreign agents, compensated by the foreign beneficiaries, is a longstanding practice, which eases the process at the consulate; they stated that using such facilitators is not a condition of employment, but a voluntary choice by the workers. Moreover, they stated that some applicants will require such assistance because they are not literate in English, do not have access to a computer, or lack the ability to navigate the various Department of State (DOS) forms, yet all of this assistance is outside the control and knowledge of the employer. Another employer representative expressed concern that if it fronted the worker money for the visa appointment fee, the visa application fee and the visa printing fee, its costs would be higher and the worker could simply take the money and disappear. On the other hand, another employer

association acknowledged that many employers already advance these costs or reimburse them in the first workweek as a result of the decision in *Arriaga* v. *Florida Pacific Farms, L.L.C.,* 305 F.3d 1228 (11th Cir. 2002), which held that such visa-related costs are an employer business expense. Moreover, several employer associations stated that they strongly supported the prohibition on collecting fees from workers, stating that it was an essential protection for foreign workers, who are often subject to exploitation in their home countries. A farm bureau similarly supported the concept that workers should not be required to pay these fees, but it expressed concern about liability for cross-border payments that it had no knowledge of and therefore suggested deleting words like kickback, bribe, and tribute.

The Final Rule generally adopts the provision as proposed. Government-mandated fees such as visa application, border crossing and visa fees (including those imposed by the DOS or other government contractors) are integral to the employer's choice to use the H–2A program to bring foreign workers into the country. Such expenses provide no benefit to the employee other than for that particular limited employment situation. As the Department recognized in the preamble to the 2008 Final Rule, requiring employers to bear the full cost of their decision to import foreign workers is a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers. Moreover, as one employer association acknowledged, many employers already are advancing or reimbursing these costs in the first workweek.

As to employer concerns that some unscrupulous individuals may take money that the employer advances and never report for work, the Department notes that employers are not obligated to advance such fees to employees. Employers may wait and reimburse such fees in the employee's first paycheck. Furthermore, the Department is not adopting the suggestion of one employee advocate to require employers to reimburse employees for their passport costs, because employees may use their passport for personal purposes unrelated to their H–2A employment with a particular employer. See Wage and Hour Division Field Assistance Bulletin 2009–2, *http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf.* Finally, as noted in the preamble to the 2008 Final Rule, employers are not responsible for an employee's voluntary choice to use the services of an independent facilitator, such as to assist the employee in obtaining access to the internet and in dealing with the DOS, so long as such fees are not made a condition of access to the job opportunity. However, as was also noted in that preamble, the Department will monitor such activities to attempt to ensure that any such charges are not de facto recruitment fees charged for access to the H–2A program.

The Department does not believe it is appropriate to identify the border crossing, visa, and other government-mandated fees that must be paid by the employer with more specificity, as those fees may change over time. Moreover, there is no need to repeat that such fees may not be recouped in a later workweek, as the discussion of deductions under § 655.122(p) makes clear that deductions for such employer business expenses may not be made if they bring the worker below the required H–2A wage rate.

k. Contracts With Third Parties Comply With Prohibitions

The NPRM proposed to require an employer to assure that it has contractually forbidden any foreign labor contractor or recruiter that the employer engages in the international recruitment of H–2A workers to seek or receive payments or other compensation from prospective employees, except as allowed under the DHS regulation at 8 CFR 214.2(h)(5)(xi)(A). The proposal clarified that the contractual prohibition must extend to any agent of the foreign labor contractor or recruiter, and that the employer must make the documentation available upon request. The Final Rule adopts this provision as proposed, with minor clarifying corrections.

Employee representatives favored the proposed provision. For example, one employee advocate applauded the proposal, which carries forward the current rule's prohibition on shifting recruitment costs, noting that recruitment fees are a burden on foreign H–2A workers and their families. Another employee representative similarly expressed approval of the prohibition against employers and their agents seeking or receiving payments from prospective employees. Several unions commented that farm workers often come to the U.S. as the indentured servants of the recruiters and middlemen to whom they have promised to pay thousands of dollars. Other commenters stated that more must be done to protect vulnerable H–2A workers during recruitment abroad, with the ultimate employers being made responsible for the recruiters they use. One commenter suggested that the Department should require employers to compensate their recruiters to eliminate the incentive for them to charge fees to H–2A workers.

Some farmers expressed concern that they might be required to reimburse employees who claim that they were forced to pay a foreign recruiter a fee, even though the farmer's agent prohibited fees, and they wanted the rule to be clear on what the farmer must do to comply. Others similarly wondered how the Department would investigate workers' claims of alleged payments abroad to verify whether they were paid, and they wanted a clearer explanation of how the provision would be enforced, with objective standards for compliance and a safe harbor if the required contractual terms were in place. One employer representative emphasized that the *Arriaga* decision did not require an employer to pay recruiter fees if the employer is not in a position to know of or exercise control over such payments. And one foreign recruiter stated that it wanted to be able to charge employees a fee, because farmers are not willing to pay recruiters until the employees have worked for some time. Another labor recruiter stated that the prohibition against charging workers for recruiter fees was a respectable decision by the Department. However, it wanted some assurance that the Department would enforce the prohibition, so that responsible employers are not disadvantaged if unscrupulous parties continue to charge workers fees.

As the preamble to the 2008 Final Rule emphasized, the Department is adamant that recruitment of the foreign worker is an expense to be borne by the employer and not by the foreign worker. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported. The Department is concerned that workers who have heavily indebted themselves to secure a place in the H–2A program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.

For the same reasons, the Department continues to believe that employers should be required to assure that they have contractually forbidden their foreign labor contractors or recruiters from seeking or receiving payment from prospective employees, and that the prohibition should extend to their

agents. Contrary to the concerns expressed by some employer commenters, as the 2008 Final Rule preamble recognized, the rule does not require farmers to pay all costs that employees may claim that they paid to recruiters abroad. Rather, the employer must contractually prohibit its foreign labor recruiters and their agents from charging or receiving such fees. In other words, paying such fees cannot be made a condition of access to the job. In response to a recruiter's concern that the Department enforce this requirement to ensure that responsible employers are not disadvantaged while unscrupulous agencies continue to charge workers fees so they can provide workers more cheaply, the Department emphasizes that it will monitor these activities to the extent possible to ensure that the required contractual terms are bona fide. While the Department's power to enforce regulations across international borders is constrained, it will attempt to ensure the bona fides of such contracts and will work together with DHS, whose regulations also preclude the approval of an H–2A petition and provide for potential revocation if the employer knows or has reason to know that the worker has paid, or has agreed to pay, fees to a recruiter or facilitator as a condition of gaining access to the H–2A program. As the 2008 preamble stated, when employers use recruiters, they must make it abundantly clear that the recruiter and its agents are not to receive remuneration from the alien recruited in exchange for access to a job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or continued to use a recruiter about whom the employer had received numerous credible complaints, could be an indication that the contractual prohibition was not bona fide. Finally, we have deleted language referring to the DHS regulations since those regulations defer to DOL regulations to the extent that such costs and fees relating to transportation and certain government mandated fees are prohibited by DOL.

l. Notice of Worker Rights

The Department proposed for the first time to require employers to post and maintain in conspicuous locations at the worksite a poster provided by the Department describing the rights and protections for workers employed pursuant to the INA. The posting is required to be in English and, to the extent necessary, in any language common to a significant portion of the workers if they are not fluent in English. A number of commenters stated that while they thought that having to provide a written job contract or a copy of the job order was already adequate, they did not object to the requirement to display a poster as long as any necessary translations were provided by DOL. We note that the posting of this notice will provide information not only to H–2A workers but will also provide information to U.S. workers, including workers who otherwise may not know that they may be engaged in corresponding employment and be entitled to the terms and conditions of H–2A employment.

Providing such notification of their rights to workers through a worksite poster of their rights is consistent with other programs administered and enforced by the Department. It ensures that both U.S. and H–2A workers are aware of their rights and are provided with resources (in the form of phone numbers or contact information) which they may use to notify the Department of any issues at the worksite or report employers who fail to meet their obligations under the program. The Department is retaining this requirement, with clarification that the poster be in any language common to a significant portion of workers, as made available by DOL.

One commenter expressed opposition to this requirement, indicating that farm operations have limited available space for posting information and that posting may become nonproductive based on the quantity of information posted.

One commenter proposed that the Department adopt a notification requirement whereby the H–2A employer would have to notify the SWA within 2 work days that the H–2A workers have arrived. This commenter argued that this requirement would facilitate outreach by SWAs to H–2A workers and facilitate an understanding by both H–2A and U.S. workers of the work contract terms. It would also give the H–2A workers notice of available resources should any challenges arise. The commenter noted that State resources will also be better used if SWAs are not left to guess or conduct various trips to see whether or not the H–2A workers have arrived.

The Department has determined that requiring the posting of rights specific to workers in the H–2A program is necessary to ensure worker protections and program integrity. Although workers may have access to other information or recourse for violations, directly providing them with knowledge about their rights under the program is intended to ensure timely reporting of violations. It further provides employers with an additional incentive to fully comply with the assurances and obligations under the program.

Several commenters requested that the Department prohibit employers from holding or confiscating workers' passports, visas, or other immigration documents. Some of these commenters noted that this practice deters workers from leaving abusive situations or challenging unfair employer conduct, and that employers use this practice to control and exploit workers.

As required by the Trafficking Victims Protection Reauthorization Act, the Department recognizes the need to inform a foreign worker of his or her right not to relinquish possession of his/her passport to the employer. Although the regulations already incorporate this protection under the provision that requires employers to comply with all applicable laws, the Department is adding a provision under the Assurances section expressly to require employers to comply. The Department anticipates that adding explicit references in these provisions to these requirements will provide the necessary additional worker protections.

The Department declines to adopt the requirement that an employer notify the SWA within 2 working days that the H–2A workers have arrived. The role of the SWAs under these regulations consists of various activities involving the employer related to the recruitment of H–2A workers, including placement of job orders and referring U.S. workers to employers for the designated time period, and conducing housing inspections. Arrival of the H–2A workers is not a key event in these activities.

Processing of Applications for Temporary Employment Certification

14. Sections 655.140–655.145

The Department received no specific comments on the application review process (§ 655.140), the Notice of Acceptance process (§ 655.141), the Notice of Deficiency process (§ 655.143), and submission of modified applications (§ 655.144). However, the Department did receive a comment from a law firm that made it clear to the Department that the organization of this section created confusion. The commenter thought that the Notice of Deficiency would be sent out after the Notice of Acceptance. In reviewing this comment, the Department decided that it would be best to reorganize the order of the sections, delete a misplaced section, and make minor word changes to facilitate a better understanding of the process. Thus, the Notice of Deficiency section will be renumbered and become

§ 655.141 and the first sentence will begin with if the CO determines the Application is incomplete instead of when the CO determines the Application is incomplete. The submission of modified applications will be renumbered and become § 655.142 because only Applications that were returned to the employer with a Notice of Deficiency need to be modified; therefore, it is logical that it must follow the Notice of Deficiency section. The Notice of Acceptance will become § 655.143 and the electronic job registry, which is used only after any deficiencies have been cured and a Notice of Acceptance has been issued, will become § 655.144.

In addition, § 655.141(c)(5) has been changed to state that the employer must seek administrative review within 5 business days or submit a modified application pursuant to § 655.142. The language in the NPRM which required that an application be denied unless the modified application was received within 5 days would have negated the purpose of § 655.142.

15. Section 655.142 (now § 655.144) Electronic Job Registry

The NPRM proposed for the first time the creation of an electronic job registry. The comments received were almost equally divided between those who supported it and those who opposed it. The major concern of those who were against creating a new registry was that the Department did not explain the concept in detail and it was hard for them to understand why it would be any different from America's Job Bank. Several growers' associations and a U.S. Senator declared that this proposal is a waste of taxpayer dollars because the information is already available through the SWAs. They believe that the only justification for such a new database would be the elimination of all the other recruitment requirements. Several of the commenters thought the registry raises privacy issues. They feared that confidential business information would be available on the Internet and would allow advocacy litigators to harass the employers or simply subject the employers to random non-legitimate referrals from across the country, which require the employer to expend time and money responding to such inquiries and referrals.

The NPRM proposed to create this registry for two reasons. One was for public disclosure and transparency. The other was to have an additional tool through which U.S. workers can be matched with employers. A few of the commenters, including SWAs, who agreed with the concept of the registry applauded the Department for more open public disclosure of the information and admitted that the current systems are not uniform and that it will be easier for them to track H–2A job orders and enhance the efforts to match workers with jobs. One of the SWAs thought the public disclosure would help relieve the SWA from the time currently spent responding to inquiries from the media and interest groups. The Department's experience has been that SWA information is not uniform, and that the creation of the job registry will greatly assist the dissemination of this information to the public; that it will save tax dollars through the elimination of numerous requests through the FOIA rather than cost them for what the Department believes is not a redundant system.

A legal aid bureau commended the Department for proposing the registry because it will alleviate the current frustrations experienced by the public and stakeholders who must wait for responses to FOIA requests. The Department also aims to reduce the substantial number of the FOIA requests it receives each year by publishing the job orders online.

Most of the other commenters who agreed with the registry also acknowledged their hope that this Federal registry would become the only electronic registry of H–2A job opportunities and be used in lieu of either the newspaper advertisement or the SWA posting. Some SWAs thought the idea was good in principle, but thought that the Department should use an existing registry such as JobCentral. JobCentral is a partnership between the National Association of State Workforce Agencies and Direct Employers Association. SWAs can use the system at no cost. The Department examined the option of using an existing registry but found that the costs would impose an additional burden on employers. Therefore, the Department has decided not to adopt this proposal.

The NPRM did not provide a great deal of detail on how the registry would operate. Those details are provided here. The Department will announce through a notice in the **Federal Register** when the registry is operational. After creating the infrastructure for the registry, the Department plans to scan the Form ETA–790 after redacting confidential information, as it would for a FOIA request. The redacted image of the Form ETA–790 will be posted on the registry. This should alleviate commenters' concerns about the public dissemination on the Internet of confidential business information. The same search functions that are available to currently search PDF files will be available to search the postings on the registry. The Department believes this will be an effective mechanism to make this information available to workers, employers and advocates.

Post-Acceptance Requirements

16. Sections 655.150–655.158

The NPRM proposed both pre- and post-filing recruitment. The SWA would, as always, be responsible for placing the job order. If the initial test of the labor market did not yield enough U.S. workers, the employer would file an Application with the Department. Once the CO accepted the Application, the CO would direct the SWA to place the job order in its interstate clearance system and send the job order to any States designated by the CO to be traditional supply States. The employer would be directed to place the newspaper advertisements where the CO determines appropriate. As in both the 1987 Rule and the 2008 Final Rule, the NPRM requires that newspaper advertisements direct applicants to report or apply for the job opportunity at the nearest office of the local SWA where the ad appears.

The 1987 Rule contained very specific additional recruitment requirements that an employer had to perform in order to comply with the positive recruitment requirements of the regulations, such as radio advertising, contacting FLCs, migrant workers and other potential workers by letter and/or telephone, or contacting such entities as schools, business and labor organizations, or fraternal and veterans' organization. The 2008 Final Rule changed the additional recruitment requirements by eliminating many of these steps and by requiring employers to contact former U.S. employees. The NPRM proposed a hybrid of the two earlier rules. The NPRM kept the 2008 Final Rule requirement to contact former employees but proposed to give the CO discretion to order additional recruitment as determined necessary, which could include newspaper or radio advertising, contacting local unions or FLCs or any other method used by non-H–2A employers, depending on the prevailing practice in the area of intended employment.

The requirement to recruit in traditional or expected labor supply States is a statutory requirement in 8 U.S.C. 1188(b)(4). The 1987 Rule required the OFLC Administrator to ascertain the normal recruitment practices of non-H–2A agricultural employers in the area to determine what recruitment efforts, if any, should be

required of the employers in other traditional or expected labor supply States. The 2008 Final Rule mandates that the Secretary publish a **Federal Register** notice each year that specifies which States are considered traditional or expected supply States and which newspapers in those States are to be used for advertising. The NPRM eliminated the **Federal Register** notice requirement and put the burden of determining the places and methods of recruitment on the CO at the NPC. The NPRM did not mention mandated newspaper advertising in the traditional or expected supply States.

17. Section 655.150 Interstate Clearance of Job Order

One commenter misunderstood the proposed role of the SWA, thinking that the NPRM proposed to return recruitment oversight to the SWA. In fact, under the NPRM the NPC would take on that role. Another commenter misunderstood the role of the SWA under the 2008 Final Rule by saying that it does not require the SWA to place interstate job orders, when in fact it does. Other commenters were against maintaining the requirement for placing job orders through the interstate clearance system. These commenters thought the interstate clearance system was an antiquated process that does not produce enough U.S. workers. An association of growers provided anecdotal evidence about how few referrals are received by the growers in the commenter's State from the interstate clearance system. This commenter contended that because the number of referrals added up to less than 3 percent of the total number of workers needed by its grower members, the system is a failure. The Department recognizes that growers cannot, in all cases, meet their labor needs through the domestic labor force. However, the Department's objective is to make sure that every U.S. worker who wants a job in agriculture is made aware of the opportunity. Use of the interstate clearance system is also required by statute at 8 U.S.C. 1188(b)(4). Congress specifically directed the Department to make sure that employers' job orders are circulated in the interstate employment service system. Therefore, the Department is not able to eliminate this provision, and it is retained in the Final Rule with minor editorial modifications.

18. Sections 655.151–655.152 Newspaper Advertisements/Advertising Requirements

The Department proposed to require employers to engage in newspaper advertisement as part of their positive recruitment efforts. The Department removed proposed § 655.151(b) because it was inconsistent with the requirements of the CO to direct recruitment, but has otherwise adopted the proposed provision with clarifying modifications.

The Department received several comments, with only one in favor of the newspaper advertising requirement. The vast majority requested that the Department abolish this form of recruitment because it is both too costly and ineffective. Several commenters, including one U.S. Senator, requested that the Department justify the requirement for newspaper advertising with statistical evidence of its efficacy.

The 2008 Final Rule eliminated a number of recruitment steps whose value was questionable, difficult to monitor and burdensome on the employer, such as mandatory contact with FLCs, schools, fraternal and veterans' organizations, and nonprofit organizations. As commenters pointed out during the comment period in this rulemaking and in the rulemaking for the 2008 Final Rule, agricultural workers usually find out about agricultural jobs by word of mouth. The Department agrees but, as pointed out in the 2008 Final Rule, it is almost impossible to mandate and enforce such a recruitment step. What the Department has found over more than 20 years of H–2A program experience is that even though the agricultural workers themselves may not frequently buy and read the newspapers, their friends and relatives often do, as do job placement agencies and those who advocate on behalf of, and provide services to, such workers. None of the commenters presented the Department with a viable alternative for getting notice of job opportunities to interested constituencies. Therefore, the Department declines to remove this requirement.

Some commenters specifically objected to the Sunday edition requirement because it is more expensive to place the ad in the Sunday edition and because that edition is more expensive to buy. Commenters also pointed out that newspapers are going out of business because of all of the new electronic media available. The Department does not disagree with the commenters on these points. However, newspapers are still the best medium in which to advertise low-skilled jobs, and Sunday is still the most popular day for job listings. Therefore, the Department declines to eliminate this requirement.

One comment requested that the Department allow associations of agricultural producers acting as agents for their members and filing master applications to advertise their master applications in lieu of an individual advertisement for each member, and allow the association to name itself in the advertisement instead of requiring it to list every individual employer associated with the Application. The NPRM did not change the master application concept. Master applications can only be filed by associations who will be joint employers with their members. The association only needs to place one advertisement on behalf of itself and its members. Each member does not need to place an individual ad. Likewise, the NPRM did not propose to require associations filing master applications to list all of the members in the advertisement. Quite the contrary, the language in § 655.152(a) requires only a statement that the names and locations of its members can be obtained at the local SWA in the State where the advertisement appeared. However, if the association wishes to file an Application as an agent, it may do so only on an individual basis for each of its members separately, and the advertisements would need to be run by each individual member. The wording of the regulation in this particular instance is very clear, and we decline to make any changes in the Final Rule.

The Department received numerous comments on the new requirement that advertisements should direct applicants to report or apply at their local SWA. The NPRM included a provision requiring that where the worksite is remote relative to the population most likely to apply for the job opportunity, an accessible alternative location for any required interviews must be provided by the employer.

One commenter, a SWA, agreed with this requirement. All of the other SWAs that commented on the issue were against this provision, because they thought it was an added cost burden that would require farmers to rent and staff offices. Some of the commenters did point out that a SWA would probably have space available for interviewing, but that it still would force the farmer to lose valuable time on the farm to travel to the interview site. Several asked why the Government is requiring farmers to have face-to-face interviews when the virtual office now exists allowing so many people in other professions to conduct such interviews over the phone or other virtual means, the Government is requiring farmers to conduct face-to-face interviews.

The Department agrees with these comments. The provision was proposed because of the practice of some

employers to demand face-to-face interviews in remote places that cost the worker not only transportation costs to arrive at the location, but even an entrance fee to get on the property, such as a National Forest.

However, several farmers stated that if the workers cannot even find their way to the worksite for an interview, then it is likely that they will be unable to get themselves to the job site each day to report to work or it is an indication that they are not interested. The Department categorically disagrees with this assessment. The statute requires that the job be advertised in other States and territories of the U.S. where U.S. workers are willing to travel once offered the job, such as to a remote job site.

After considering all of the comments, the Department has decided to amend its regulation to resolve the problem identified by the commenters. In-person interviews cannot play a significant role in the H–2A process since numbers of domestic applicants, and all of the prospective H–2A workers, are hired at locations distant from the area of intended employment. Domestic applicants generally are interviewed, if at all, by telephone. Potential H–2A workers are interviewed, if at all, by an employer's representative overseas. The Final Rule reflects these realities by requiring that employers who conduct interviews must do so by telephone or establish a means by which applicants may be interviewed in the location in which they are applying. We have also continued the prohibition on employers requiring employees to pay fees to apply for the job for which they are sought and on other fees such as testing fees. The Department views entrance fees or access fees to property where the interview is to be conducted as indicating a lack of good faith in the recruitment of such workers. The interview process must be one that represents little or no cost to the worker.

Some of the commenters claimed that the Department did not account in our cost-benefit analysis for the cost to the employer of having access to a place in which to conduct interviews. However, because we are not and never have required in-person interviews of workers, and because we also assumed employers who wanted face-to-face interviews would use the free services of the One-Stop Career Centers, we need not factor in any costs. Employers who wish to require more costly interview methods do so by their own choice, not from any requirement of these regulations.

19. Section 655.153 Contact With Former U.S. Employees

The 2008 Final Rule listed specific methods for contacting former employees and methods of recording responses. The NPRM proposed to simplify the procedures for contacting these former employees. A few commenters opined that the new, less specific language meant that the employer now had to send all correspondence to former U.S. employees by certified mail. The NPRM allowed employers to continue to use the methods described in the 2008 Final Rule, such as maintaining copies of correspondence signed and dated by the employer or maintaining dated logs demonstrating that each worker was contacted, including the phone number, e-mail address, or other means used to make contact. However, if it is easier for the employer to print out a list of previous employees and attach a telephone bill that shows calls placed to all of the employees, then the Department will not require that employer to rewrite the entire contact list into a formal log. The 2008 Final Rule also specifically required the employer to enter the data a second time into the recruitment report. The recruitment report requirements are clear in § 655.156, and do not need to be repeated in this section. All workers who apply or respond to solicitations must be listed in the recruitment report.

A worker advocate group commended the Department on keeping the requirement to contact former employees; however, it pointed out that this provision has been very poorly enforced because many former employees report being refused re-hire by companies using H–2A workers. The Department believes the text of the rule provides clear and appropriate requirements with which employers should be able to comply; therefore the Final Rule adopts the NPRM language with minor editorial changes.

20. Section 655.154 Additional Positive Recruitment

The requirements for positive recruitment and for recruitment in traditional or expected labor supply States are mandated by statute. Specifically, the statute requires that positive recruitment efforts be made within a multistate 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.

The NPRM cited the statute and gave the CO discretion to determine if any additional recruitment is necessary in such States. The CO would order recruitment efforts that are normal for similar and smaller employers in the area of intended employment.

Some commenters opined that the 2008 Final Rule was more specific on how the traditional or expected labor supply States will be determined than was the NPRM. The majority of commenters did not think that giving the CO discretion to determine what the additional recruitment should be and where was a good idea. These commenters asserted that the NPRM lacks any objective and transparent standards, which means that employers will be subject to inconsistent, arbitrary, or contradictory directions from COs. Another commenter felt that the Department did not have the right to delegate the Secretary's statutory obligations to COs. Several commenters opined that the Department did not explain how the States would be identified or how many would be required.

One commenter went into great detail about the lack of rationale in the NPRM for changing to a discretionary model from a specific model. According to this commenter, the 2008 Final Rule contained an extensive analysis of the rationale behind the requirements in the section in its preamble and the Department failed to justify its reasons for departing from the rationale. This commenter stated that the Department failed to explain the basis for changing course and has provided so little description of what the employers might expect that the Department failed to provide the necessary notice and opportunity for comment to the employers. This commenter requested that the Department return to the 2008 Final Rule language.

An agricultural service provider concurred with many of the comments mentioned above, citing its experience with current processing procedures and noting the cost and futility of the advertising currently required by the CO. Another commenter contended that employers must be advised of the requirements and costs they will incur before they decide to enter the program. We acknowledge this concern and have accordingly sought to limit the expense to employers while still satisfying the Department's statutory obligation to ensure recruitment of U.S. workers in traditional labor supply States.

A U.S. Senator was concerned that there was no set limit on the number of traditional or expected labor supply States that could be designated whereas

before the Department had promised that there would never be more than three States designated. The Department did not plan to designate more than three but, in light of all the comments, has added that explicit provision to the regulatory text. The Senator also opined that if the Secretary believes that sufficient workers can be found in other States, then the Secretary should expend the time and resources necessary to find them instead of the employers having to do so.

One commenter believed that the Department was going to require advertising in ethnic newspapers in the traditional or expected labor supply States. The NPRM does not contain such a requirement. The NPRM mentions ethnic newspapers only in the document retention requirements, simply stating that if advertisements were run in an ethnic newspaper, the employer must maintain proof of publication along with the other documents listed in that section.

The Department has determined to retain the proposed requirement with one modification that clarifies that the employer will not be required to conduct positive recruitment in more than three States for each area of intended employment.

First, commenters who suggested that the Department is affirmatively obligated to locate domestic workers before a certification can be denied are incorrect. Under 8 U.S.C. 1188(b)(4), employers seeking to use H–2A workers must conduct positive recruitment outside the local area.

In the NPRM, the Department moved from the rigid model imposed by the 2008 Final Rule to one in which the CO has more discretion in order to allow the Department more flexibility in gathering information to determine where available workers may be found, even within a single growing season. Since many farm workers migrate over the course of the year and since the time it takes to perform various farm work activities varies from year to year, the more flexible model proposed in the NPRM gives the CO the opportunity to use current information to determine the States to which to refer an employer to conduct positive recruitment. The designation model of the 2008 Final Rule required the Secretary make such designations on an annual basis by formally soliciting and then reviewing information supplied from States, employers, and worker organizations. The annual designation process was an ambitious and unnecessarily formalized process of collecting information from a wide range of sources, and then making a decision for each State which three other States, if any, would be designated as States in which positive recruitment must be conducted. This process ties the CO's hands and prevents the CO from using later information which may show that workers are available in a State different from one of the pre-designated States or from using information that shows that workers are not available in one of the pre-designated States. The Department believes it can accomplish the same collection of information through less formal means, and use that information more effectively by allowing the CO some discretion in the selection of the methods and areas in which they are employed based on the best and most recent information available. The NPC already receives information on the availability of workers from SWAs and will welcome, although not require, information on labor supply from those same entities identified previously to assist in its decisions on the best sources of labor to be required of employers.

The types of recruitment used in the program have not varied tremendously through the decades. The Department intends to continue to rely on newspaper advertising. While not as important a recruitment tool as it may have been in the past, we believe it remains valuable and imposes no additional costs over what has been required since the 1987 Rule.

Finally, the Department did not plan to designate more than three States but, in light of the comments, has added an explicit provision to the regulatory text limiting to three the number of States in which an employer will be required to conduct positive recruitment.

21. Section 655.155 Referrals of U.S. Workers

The NPRM proposed to eliminate the requirement that SWAs verify employment eligibility and return to the standard of the 1987 Rule requiring applicants to indicate that they are qualified. The Department received numerous comments on this proposal, which are discussed above.

22. Section 655.156 Recruitment Report

The NPRM proposed to have the employer submit the recruitment report only once on a date certain as specified by the NPC in its letter of acceptance. The NPRM preamble inadvertently included two submissions of the recruitment report to the CO. The Department received comments noting that submitting the report twice was an unnecessary burden. The Department agrees and because the regulatory text only required one submission, the Department clarifies its intent to require only one submission of the recruitment report in this preamble and does not make any changes to the Final Rule.

One commenter requested that the Department eliminate the need to continue updating the recruitment report throughout the 50 percent rule period because the employer's obligation to recruit ends when the H–2A worker leaves to come to the U.S. While the employer's positive recruitment obligation ends when the H–2A workers depart for the job site, the obligation to continue to accept referrals or to process potential gate hires continues throughout the period of the 50 percent rule. The Department needs to be able to determine whether the employer has met its obligations. Thus, the employer must continue to log those referrals into the recruitment report and explain whether or not they were hired and if not, what the lawful job-related reason was. Therefore, the Department declines to change the requirement to update the recruitment report and has made one minor editorial change to this section.

23. Section 655.157 Withholding of U.S. Workers Prohibited

The statute prohibits the willful withholding of U.S. workers until the beginning of the contract period in order to force the employer to send the H–2A workers home under the 50 percent rule. One commenter expressed support for the Department's inclusion of these provisions in the proposed regulation. Another commenter requested that the Department make a minor change to the section by inserting the words "if possible" after the requirement that the employer clearly identify the person or entity that withheld the workers. This commenter asserts that it is sometimes difficult for the employer to know who the actual person or entity is. The Department declines to make this change and retains the proposed language, because without identifying the actual person or entity allegedly withholding U.S. workers the Department has no facts upon which to investigate the complaint. Additionally, the Department corrected a typographical error in this provision.

24. Section 655.158 Duration of Positive Recruitment

The NPRM proposed, consistent with the INA, that positive recruitment end on the date H–2A workers depart for the employer's place of business.

One commenter claimed that the Department provided no rationale for requiring recruitment up to and including the day the H–2A workers

depart for the employer's place of business and requests that the Department remove this requirement. The same commenter also requested that the Department adopt the additional provision from the 2008 Final Rule of stopping the recruitment 3 days before the first date of need. The Final Rule clarifies that 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 business.

Labor Certification Determinations

25. Sections 655.160–655.167

The Department did not receive any comments that were within scope for §§ 655.160–.162. One commenter did suggest that we add requirements for training new crew leaders and field supervisors to § 655.160, which only deals with the 30-day requirement for the Department to adjudicate an Application. The Department does not believe this suggestion is appropriate for this section and training of employees of an H–2A employer, particularly in the H–2ALC context, is dealt with more specifically in the H–2ALC section. The Department has also made minor editorial changes to §§ 655.164–.165, deleting language believed to be unnecessary.

26. Section 655.163 Certification Fee

The NPRM did not propose to change the certification fee and received one comment agreeing with the fee structure. The Department is adopting the provision as proposed.

27. Section 655.166 Appeal Procedures (Now Determinations Based on Unavailability)

The Final Rule simplifies the regulatory text by centralizing the information about appeals in § 655.171. A commenter identified one type of determination for which appeal rights did not appear to be included in the provision. Specifically, the commenter was referring to the right to appeal a denial or partial denial, where U.S. workers were found to be available, but later became unavailable. The INA requires that this particular right to appeal must be adjudicated within 72 hours, while § 655.171 only provides for 5-day turnarounds. Therefore, the Department has added procedures similar to those in the 2008 Final Rule that provided the process for requesting such redeterminations.

28. Section 655.167 Document Retention Requirements

The NPRM proposed a document retention requirement of 5 years. A number of comments opposed the proposed increase to 5 years, from the 3-year requirement in the 2008 Final Rule. The reasons varied from simply that the requirement being too burdensome on employers to the need for consistency with other less onerous statutory document retention requirements such as the FLSA and MSPA. In light of all the comments, the Department has reconsidered its position on this issue and changed the Final Rule to reflect a 3-year retention requirement.

Post-Certification Activities

29. Sections 655.170–655.174

The Department proposed certain post-certification activities. These included the allowance and process for short-term extension requests; appeals of denial of submitted Applications; employers' obligations in the event of withdrawal of a job order; the setting of (and process for appealing) meal charges; and the creation of public disclosure data of H–2A applicants. The Department received comments on most of these provisions.

30. Section 655.170 Extensions

The Department received one comment noting that the Department eliminated the right to appeal denials of extension requests. The commenter pointed out that the Department did not cite any relevant statistics about extension requests, number of denials, number of appeals, and number of unsuccessful appeals, nor did it provide any justification for removing the right to appeal in the NPRM. The Department agrees and has provided for appeal rights in these cases. Additionally, the Department has included a requirement that employers provide a copy of the approved extension to workers in accordance with the disclosure requirements.

31. Section 655.171 Appeals

The Department has modified the provision concerning de novo hearings to require that such hearings be held in 5 business days after the Administrative Law Judge (ALJ) receipt of the administrative file. While no comments were received on this provision, our administrative experience has shown that the 5 calendar day provision was not workable.

32. Section 655.172 Withdrawal of Job Orders and Application for Temporary Employment Certification

The Department received no comments on this proposed section. It is accordingly adopted as proposed.

33. Section 655.173 Setting Meal Charges, Petition for Higher Meal Charges

The NPRM did not propose any changes to the section addressing meal charges for workers. The Department received a comment from a farm worker advocacy group that requested we include a statement that the maximum meal charge set by these regulations is subject to applicable State law and an employer may deduct only the lesser of the two. This same commenter also wanted us to amend this section to prohibit employers from deducting for days that the employers offered the workers no work or less than 8 hours. This commenter contends that some employers combine several crops into one job order and have such lengthy down times as to cause workers' wages for a week to have a zero balance once the meal charges are deducted.

With respect to meals, the employer must either provide three meals a day (with an allowable charge) or must furnish free and convenient cooking and kitchen facilities that will enable the workers to prepare their own meals during the entire contract period. The commenter's suggested language that an employer should be prohibited from charging employees for meals consumed on days where no work was provided was not proposed in the NPRM and it would not be appropriate to make this change without the opportunity for public notice and comment. With regard to meal charges and State law, the regulations elsewhere specifically require the employer to comply with applicable State laws. Therefore, the Department declines to make any changes to this provision.

34. Section 655.174 Public Disclosure

The 2008 Final Rule did not discuss public disclosure. The Department has been providing publicly accessible information about users of the H–2A program on its Web site for several years now at *http://www.flcdatacenter.com/.* The NPRM proposed to codify a longstanding practice of disclosing this information.

The Department received several comments on this proposal. Several thought it was duplicative of the electronic job registry proposed in § 655.142; however, it is not. The electronic job registry will be a

temporary posting of scanned copies of the job order and other pertinent documents for the duration of the recruitment and 50 percent referral periods. Then those documents will be removed. The public disclosure data will continue, as it is now, to be in a spreadsheet format with only the most basic information, such as the name of the employer, attorney, and agent, address of the employer, case number, decision and date, contract period certified, number of workers requested and number certified, occupation of certified workers, number of work hours a week, wage rate, and the State where the foreign workers will perform the work. This disclosure data will remain on the OFLC Web site for at least 3 years.

Some commenters requested that the Department add language to this section to clarify and reiterate that States must disclose all information such as housing inspection reports, and other pertinent documents when requested to do so under a FOIA. These commenters state that the States are refusing to provide information under the guise of protecting privacy. However, States are not subject to FOIA, which governs Federal agencies. Therefore, the Department declines to add any text to the regulatory language.

One farm worker advocacy group requested that we mandate employers to contract with non-profit groups to provide "Know Your Rights" training to all first-time H–2A workers during paid work hours. This request is beyond the scope of the NPRM. The cost associated with such a requirement was not accounted for in the cost-benefit analysis and employers did not have a chance to comment on such a requirement. The Department believes that the new requirement that was proposed in the NPRM and is in the Final Rule requiring employers to post a Department-provided worker's rights poster will be sufficient to apprise foreign workers of their rights.

Integrity Measures

35. Section 655.180 Audits

The Department proposed to make minor changes to the audit process established in the 2008 Final Rule. The proposed section retains the Department's discretion to choose which labor certifications requests it will audit. The Department is retaining the proposed provision with additional minor changes.

One commenter proposed a change to the language of the provision substituting the word will for the word may in order to clarify that the Department has the discretion to audit a particular Application, not that it will necessarily audit each Application. The Department agrees and made the requested change.

A few commenters contended that the audit procedure is a duplicative process since both WHD and OFLC have concurrent enforcement authority enabling each to separately audit an Application. These commenters asserted that only WHD should have the enforcement authority under the final regulations governing the H–2A program, because duplicative enforcement will unnecessarily expend government resources and create confusion and a burden for employers.

Several commenters contended that the 2008 Final Rule more justifiably included the audit procedure because of its reliance on self-attestations by employers, and that the NPRM proposed a full-adjudication model, therefore eliminating the justification for using the audit process. This commenter further argued that after certification, the Department should have only one investigative process—WHD investigations—and suggested that the Department eliminate the audit procedures.

One commenter argued that should the proposed Audit procedures be included in the final regulations, the Department should extend to 30 days the minimum time for a response to a Department audit request.

Two commenters, a national farm bureau and a grower's association, opposed the requirement that the CO refer any findings of discrimination to the Department of Justice (DOJ), arguing that such a finding may or may not have merit considering the relative complexity of discrimination law. These commenters argued that the Department's proposed regulations attempt to deputize COs to make findings about violations of law for which they have no mandate or expertise.

The Department disagrees with the commenters. The Department's audit responsibilities rest solely with OFLC. These responsibilities are distinct from its revocation and debarment authorities and therefore are not duplicative. OFLC's authority to conduct audits is an integral part of ensuring that both U.S. and foreign workers are provided the full scope of protections available under the H–2A program. The audit gives OFLC an opportunity to assess compliance and instruct the employer to make changes or adjustments in its compliance with the regulations and program requirements. OFLC focuses on the issuance and denial of labor certifications, while WHD focuses on whether employers have complied with the obligations to U.S. and H–2A workers. While audits may lead to revocation and/or debarment, they also allow OFLC to determine whether the certifications it has granted have been correctly adjudicated so that it can adjust its processes to more accurately adjudicate Applications.

The Department disagrees with those commenters who called for a longer response period. The Final Rule provides for a timeframe of no more than 30 days for an employer to respond to an audit letter. The Department has concluded that the proposed timeframe strikes a balance between the employer's need for sufficient time to prepare its audit response and the Department's need to ascertain the level of compliance in time to address any potential violations affecting U.S. and H–2A workers.

Both the 2008 Final Rule and this Final Rule include the provision requiring the CO to refer findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices. The Department wishes to clarify that it is not undertaking a new or separate mandate to conduct audits for the purpose of identifying employers engaging in alleged discriminatory hiring practices. Rather, the Final Rule documents an existing practice under which the Department assists the Office of the Special Counsel to carry out its responsibilities under 8 U.S.C. 1324B prohibiting unfair immigration-related employment practices. Under the Final Rule, employers are placed on notice that engaging in a practice to discourage U.S. workers from applying for H–2A job opportunities or similar discriminatory practices may lead to additional liability under the INA and the DOJ regulations at 28 CFR part 44.

36. Section 655.181 Revocation

The NPRM proposed to expand the grounds upon which the Department may revoke an approved labor certification. It also proposed to change the revocation procedure so that the Department no longer sends a Notice of Intent to Revoke. We received a number of comments on these proposals. The Department has retained the provision with some modifications. One edit clarifies throughout that it is the OFLC Administrator, rather than the CO, who exercises the revocation authority. The

Final Rule also amends the basis for revocation proposed at § 655.181(a)(1) of the NPRM.

Several commenters generally objected to the expansion of the Department's power of revocation authority. These commenters opposed the NPRM's elimination of the many restrictions that the 2008 Final Rule puts on the Department's authority to revoke. For example, the standard proposed in the NPRM would allow revocation for any failure to cooperate with a DOL investigation, rather than for only significant failures to cooperate as in the 2008 Final Rule, and the proposed standard would allow revocation for any substantial violation of a material term or condition of the certification without requiring that the violation be willful or that the employer be given an opportunity to cure the violation.

One commenter stated that the proposed changes would allow revocation if an employer submits documents in response to an audit just 1 day late, even if the tardiness is due to an emergency or weather that delays the mail. The same commenter also contended that the proposed changes would allow the CO to revoke for one instance of an H–2A ranch worker acting outside the area of intended employment, even if his actions are to retrieve an animal that has wandered away from the herd in order to comply with a State law that prohibits sheepherders from abandoning sheep. Other commenters worried that expansion of the grounds for revocation would allow the Department to revoke certifications of well-intentioned employers making minor errors.

Several employer associations stated that revocation is an extremely harsh penalty. Because a revocation can have such a damaging effect on the employer's business, these commenters believe that revocation is appropriate only for employers who willfully commit substantial violations. They argued that the restrictions built in to the 2008 Final Rule's revocation standards ensure that the Department does not apply such a severe penalty erroneously. Some of these associations argued that revocation was too harsh a penalty for anything other than fraud or willful misrepresentation and that the Department's other enforcement methods (including audits, debarment, and civil money penalties) were sufficient to address most violations.

One employer association argued that the Department does not have the statutory authority to revoke certification on the expanded grounds proposed in the NPRM. The same commenter acknowledged that some revocation authority may be inferred when fraud has occurred, but the statute does not give authority to revoke because DOL has decided to revisit the merits of the Application. The commenter stated that Congress was specific about the power to revoke previously approved labor certifications: it gave DOL the power to notify DHS when revocation should be imposed, but gave no authority for DOL to revoke a previously approved petition. The commenter stated that the statute does not give the Department the broad powers of authority asserted in the NPRM, such as revoking because an H–2A worker performed an incidental activity that is not specifically listed in the job order.

The same commenter argued that the Department has no legal authority to revoke labor certifications according to the standards proposed in the NPRM, because those standards are destructive to the H–2A program. The commenter contends that this would constitute an illegal taking under the Fifth Amendment.

Some employer associations objected to the proposal because the Department did not support the necessity of expanding the revocation power with any data. These commenters stated that the revocation standards in the 2008 Final Rule are sufficient to enable the Department to address substantial violations, and that the Department has not presented data to justify departing from the 2008 Final Rule's recent rejection of expanding the revocation authority. Several employers argued generally that the heightened enforcement powers contained in the 2008 Final Rule were an appropriate trade-off to the Department's switch to an attestation-based model. These commenters believe that it is only fair for the Department to relax the enforcement standards if we are going to return to a certification model.

Worker advocacy organizations were generally in favor of the NPRM's expansion of the grounds for revocation, calling it an important improvement to the H–2A regulations. One organization proposed that the Department add that failure to cooperate in an investigation performed by State or other officials enforcing employment or housing laws would be grounds for revocation. One Member of Congress generally urged more enforcement. The Department believes its revocation authority extends only to substantial violations of the H–2A program requirements.

Congress explicitly endorsed the Department's revocation authority as a means of validating the integrity of the program. The INA, codified at 8 U.S.C. 1188(e)(1), specifically refers to a revocation of certification when discussing determinations made by the Secretary. The section does not indicate any limitations on the bases for which the Secretary may determine that the certification should be revoked. Therefore, we interpret the statute as acknowledging that the Secretary has the authority to revoke a labor certification and as providing no limitations on that authority.

The Department understands the concerns of the commenters and we are aware of the severe effects revocation may have on an employer, especially a small employer. The Department believes its revocation authority extends only to substantial violations of the H–2A program requirements. However, the Final Rule retains the text of the NPRM, with some modifications. The removal of the 2008 Final Rule's restrictions on our ability to revoke certifications will ensure that we are able to act appropriately against employers whose grievous actions undermine the integrity of the H–2A program and must be remedied immediately, mid-certification. The Department intends to use its authority to revoke only when an employer's actions warrant such severe consequences. We do not intend to revoke certification if an employer commits minor mistakes or in circumstances that are beyond an employer's control. The changes are meant to ensure that when revocation is appropriate, we have the ability to act.

The Department views our revocation authority as a tool generally to be used to address an employer's flagrant violations. Therefore, we have changed the first ground for revocation to clarify that the Department may revoke if the temporary labor certification was unjustified due to fraud or misrepresentation in the application process.

We view revocation as a remedy to be used in situations that require immediate action. Several commenters expressed their concern that the Department would revoke certification mid-season because we discovered that the employer had committed a substantial violation during a previous certification. This would not fit our conception of our revocation authority, and we regret that the NPRM caused some employer associations to believe we would engage in such revocations for past wrongs. The Department may revoke an employer's certification to remedy actions described in § 655.181(a)(1–4) taken during that same potentially revocable certification. Debarment is the appropriate remedy for

substantial violations committed during a certification that has already ended; the Department's opportunity to revoke the certification has expired.

The Department has many years of experience enforcing the H–2A program. Over those many years, the constraints imposed by prior regulatory language have made it difficult for us to take action in response to flagrant violations. As explained above, we do not intend to revoke certification for any and every violation. We believe that revocation is an essential tool for protecting the integrity of the H–2A program and for addressing violations that must be remedied immediately. The expansion of the revocation power is simply meant to ensure that we are able to use this valuable tool when appropriate.

The commenter's argument that revocation constitutes a taking is premised on the view that the Department is going to use its expanded revocation power to destroy the H–2A program. The Department has no intention of destroying the H–2A program. On the contrary, as we have explained, the Final Rule's changes to the revocation authority are meant to ensure that the Department can use the revocation power to protect the integrity of the H–2A program.

A few commenters stated that the proposed revocation standards are vague and ambiguous. Some commenters also criticized the proposed regulations because they mention but do not define "material term," "failure to cooperate," or "failed to comply."

We disagree that the standards are vague. The Final Rule states that an employer's substantial violation of a material term of the labor certification is grounds for revocation. We believe that the list of violations in § 655.182(d) paired with the list of factors used to determine whether those violations are substantial, listed in § 655.182(e), communicate to employers the conduct that is unacceptable in the H–2A program. These two subsections are referenced in the text of the regulation stating grounds for revocation under § 655.181(a)(2). The words "material term or condition" of a labor certification were added by the 2008 Final Rule to communicate that revocation is not to be used for just any violation of any term of the certification.

The standards "failure to cooperate with a DOL investigation" and "failure to comply" are self-evident. We reiterate that we do not intend to use our revocation authority to remedy minor errors or violations.

A few employer associations commented on the proposed changes to the revocation procedure. One claimed that the elimination of the Notice of Intent to Revoke, replaced with a Notice to Revoke that will be given immediate effect if the employer does not respond within 14 days, would not constitute a fair right of appeal. However, the Notice of Intent to Revoke given under the 2008 Final Rule also took immediate effect after 14 days if the employer did not respond by sending rebuttal evidence. The 14-day time period sufficiently balances the employer's right to appeal against the reality that circumstances warranting revocation require immediate action. The Department would not issue a Notice of Revocation if the reason for doing so did not seriously jeopardize the integrity of the H–2A labor certification process. Accordingly, it is imperative for the Department to be able to act quickly, especially if the safety of the workers is at stake.

Some employer associations commented on the proposed revision to the revocation procedure of the NPRM. Section 655.181(b)(1) states that after reviewing any rebuttal evidence submitted by an employer, if the CO determines that certification should be revoked, the CO will inform the employer. This is a change from the language in the 2008 Final Rule which stated that if, after reviewing the employer's timely filed rebuttal evidence, the CO finds that the employer more likely than not meets one or more of the bases for revocation, then the CO will inform the employer. Some employer associations noted the proposed removal of the words more likely than not and characterized this as diminishing DOL's burden of proof in support of revocation.

The Final Rule does not contain the words "more likely than not". The Department does not intend this to be a substantive change from the 2008 Final Rule; the language was changed merely for clarity. The Department notes that it has no burden of proof at this stage of the revocation procedure, and that the only purpose of reviewing rebuttal evidence is to determine whether the circumstances reasonably appear to warrant revocation. We would not issue a Notice of Revocation if we did not believe that the reason for doing so seriously jeopardized the integrity of the H–2A labor certification process.

One commenter stated that the NPRM eliminated the requirement that the CO consult with the OFLC Administrator when determining whether to revoke certification. What the commenter intended is unclear. The only time the 2008 Final Rule refers to the CO consulting with the OFLC Administrator is at the very beginning of the section describing revocation. This language was not changed in the NPRM. In the Final Rule, we clarify that the OFLC Administrator exercises revocation authority, rather than the CO.

A worker advocacy organization proposed that the Department change the revocation procedure to state that the Department shall commence an investigation to determine whether to revoke certification if information is provided to the OFLC by WHD, a SWA, an employee, or any other person alleging that an H–2A employer or an H–2ALC has engaged in activity constituting the basis for revocation. The organization also proposed that any person who provided information that resulted in a revocation be provided copies of the notices issued in the proceeding. The Final Rule does not mandate that the Department commence an investigation in response to every allegation, nor does it mandate that the Department share the results of a revocation investigation with every person who provided useful information over the course of an investigation. Such a system would be unwieldy and an inefficient use of resources.

37. Section 655.182 Debarment

The NPRM proposed to expand the Department's debarment authority. It also proposed that the WHD have concurrent authority with the OFLC, and it proposed changes to the debarment procedure so that the two offices' procedures would be parallel. The Final Rule adopts these provisions with minor changes.

a. Expansion of the Debarment Authority

Many employer associations asserted that the proposed rule's expansion of the Department's debarment authority would discourage participation in the H–2A program and lead to the program's eventual demise. Some commenters stated that the expansion of the debarment grounds in the 2008 Final Rule was sufficient to address any enforcement problems the Department may have had in the past. These commenters advocated that the Department maintain the debarment authority as provided in the 2008 Final Rule. One stated that we should return to the debarment provisions of the 1987 Rule. On the other hand, farm worker advocacy organizations and a Member of Congress generally supported the proposed expansion of the debarment grounds.

We have considered these comments and we believe that the resulting debarment provision enables us to use our authority to uphold the integrity of

the H–2A labor certification program without unfairly punishing employers who use the program or discouraging their future use of the program. The allegations that the Department is trying to destroy the H–2A program are unfounded. This Final Rule is intended to improve the H–2A program, by taking the best aspects of the 2008 Final Rule and of previous rules to create a program that both protects workers and enables agricultural employers to access an available labor supply.

b. Elimination of the Pattern or Practice Requirement

Several farm worker advocacy organizations and a Member of Congress commented that they supported the proposal that the Department may debar if a party commits one or more acts of commission or omission that constitute a substantial violation, rather than requiring a pattern or practice of such actions, as in both the 1987 Rule and the 2008 Final Rule.

Many employer associations commented that they disagreed with the proposed deletion of the pattern or practice requirement. Many of these commenters are concerned that the change would make it too easy for the Department to engage in debarment proceedings and that the Department is looking to debar employers for innocent mistakes or oversight—that the Department may seek to punish a well-intentioned, honest employer who commits minor mistakes or errors while attempting to follow the rules of the program. These commenters characterize the H–2A program as extremely complex, and one where unintentional mistakes are easily made. Some stated that debarment should be reserved for the truly bad actors in the program. The commenters also stated that the Department provided no data to support the elimination of the pattern or practice requirement.

The Department has considered these comments, and we have decided to retain the NPRM's language deleting the pattern or practice requirement in the Final Rule. We believe that by defining a substantial violation as one or more acts of commission or omission, we will be able to more effectively use our debarment authority to enforce compliance with the rules of the H–2A program. In the past, the requirement that the Department show a pattern or practice of violations has obstructed us from using our debarment authority. As one farm worker advocate recounted, these include instances of flagrant violations, such as an employer who physically assaulted a worker whom he believed had filed an OSHA complaint concerning working conditions on the farm. The commenter stated that even though the employer was found guilty of the charge in criminal court, he continued to be certified and that since the employer had limited the physical assault to a single worker, there was no pattern of substantial violations. By eliminating the requirement that we show a pattern or practice of violations, the Final Rule will enable the Department to remove an employer like this from the H–2A program. This will allow us to better fulfill our statutory duty to protect the integrity of the H–2A program and to debar employers who commit substantial violations.

The Department appreciates the concern of employer associations that by eliminating the pattern or practice requirement, the Department will be able to use its debarment authority more easily. The Department does not intend to debar employers who make minor, unintentional mistakes in complying with the program. The factors listed in § 655.182(e) of the NPRM have also been retained in the Final Rule. These factors are intended to give employers guidance as to what factors the Department will consider in determining whether a violation constitutes a substantial violation to warrant debarment. The elimination of the pattern or practice requirement was intended to ensure that the Department is able to use debarment in circumstances that warrant the penalty, not to punish well-intentioned employers that inadvertently commit minor errors.

c. Specific Proposed Grounds for Debarment

i. Elimination of the Requirement That a Substantial Violation Be Willful

Several employer associations objected that the NPRM eliminated the many qualifiers in the 2008 Final Rule which required that actions be willful or significant to be considered substantial violations. These comments protested that the change would enable the Department to debar employers who commit minor, unintentional mistakes when using the H–2A program. One commenter argued that the term substantial was too broadly defined, given no real qualitative measurement other than the proposed factors. That commenter stated that this contrasted with the 2008 Final Rule, which provided a detailed list of acts and omissions that meet the definition of a substantial violation.

The Final Rule retains the language of the NPRM. As explained above, the Department does not intend to debar well-intentioned employers that commit inadvertent or minor mistakes. The Final Rule includes the list of acts or omissions that meet the definition of a substantial violation as proposed. The Department believes this description of the factors the OFLC Administrator may consider when determining whether debarment is appropriate in a particular circumstance will provide clearer guidance and make the Department's determinations more transparent to the regulated community. Additionally, the term willful restricted the Department's ability to use its debarment authority when appropriate, due to the strict legal definitions given the term in other unrelated areas of the law. The language of the Final Rule is intended to ensure that the Department is able to use its debarment authority when appropriate.

ii. The Elimination of the Definition of Incidental Activities and Its Effect on Debarment

Both the 2008 Final Rule and the NPRM permit debarment of employers who use H–2A workers for activities outside the job order. The 2008 Final Rule, however, contains a qualifier providing that such deviations will not result in debarment where they involve an activity or activities minor and incidental to the activity/activities listed in the job order. The NPRM did not contain this qualification and a number of commenters were concerned that this signaled intent on the part of the Department to debar employers who were only guilty of minor or good faith deviations from the job order. This was not the Department's objective, although the Department does not condone the use of H–2A workers for activities not authorized by the statute.

Several farm worker advocacy organizations and a Member of Congress expressed support of the NPRM's expansion of the grounds for debarment to include employment of an H–2A worker outside the area of intended employment. This remains grounds for debarment in the Final Rule.

The removal of the minor and incidental language from the definition of agricultural labor and services is discussed above in the definitions section.

iii. Debarment for Improper Displacement of U.S. Workers and Workers in Corresponding Employment

The NPRM proposed to add the improper layoff or displacement of U.S. workers or workers in corresponding employment as an additional ground for debarment. Some farm worker advocacy organizations and a Member of Congress commented that they support the proposed expansion of the grounds for

debarment to include the improper displacement of U.S. workers.

Several employer associations objected to the added ground for debarment. These commenters were concerned that the breadth of the concepts of displacement and corresponding employment would allow a significant expansion of the debarment authority.

The Final Rule includes this added ground for debarment. An employer's improper displacement or layoff of U.S. workers frustrates the very purpose of many of the protections for American workers imposed by the INA itself—the primary goal of the H–2A program is to allow agricultural employers access to the labor force they need while protecting the employment opportunities for U.S. workers. Improper displacement of U.S. workers clearly subverts a fundamental purpose of the H–2A program. Additionally, the Department does not believe that improper displacement needs to be more clearly defined—improper displacement is any displacement caused by an employer's failure to comply with the H–2A rules.

iv. Added Grounds of Debarment for Violations of the Anti-Fee Shifting Provisions and the Anti-Discrimination Provisions

Several commenters objected to the proposed additional grounds that would allow debarment of employers that violate the anti-fee shifting provisions or anti-discrimination provisions of the proposed rule. The commenters generally objected that these added grounds were an unwarranted expansion of the Department's debarment authority.

The Final Rule retains the proposed added grounds for debarment. Strict enforcement of the anti-fee shifting provisions and anti-discrimination provisions is essential to providing needed protections to H–2A workers and to workers in corresponding employment. Additionally, strict enforcement of the anti-discrimination provisions is essential to maintaining program integrity and compliance, because intimidation of farm workers who file complaints or otherwise participate in the enforcement process impairs the Department's ability to effectively enforce the requirements of the H–2A program.

v. Failure To Pay Certification Fees in a Timely Manner

The NPRM proposed to define a substantial violation to include an employer's failure to pay a necessary fee in a timely manner. The Final Rule adopts this proposed change but clarifies that the "necessary fee" to which the NPRM refers is the certification fee, described in § 655.163. One commenter contended that this ground for debarment is overly harsh. The commenter stated that because the proposed rule has eliminated the requirement of showing a pattern or practice of violations, this means that the Department may debar an employer if a fee payment arrives one day late in the mail. The commenter points out that most employers who use the H–2A system live in rural areas where mail delivery is not efficient, and the employers often live a far distance from a post office. He points out that many agricultural employers are small, family-run businesses that may not have enough time to spare a person to go to the post office in times of bad weather. Finally, the commenter argues that this proposed provision departs from other immigration programs run by the Department, where one late payment could never cause the harsh result that the employer could not participate in the program for years to come.

The Department is very aware of the severe consequences that debarment has for an employer's business, especially for a small business. Again, the Department's objective in expanding the definition of "substantial violation" is not to debar employers for minor errors or circumstances beyond the employer's control. We expanded the definition to ensure that we will be able to institute debarment proceedings when circumstances warrant it, and to ensure that we are not obstructed by our own regulatory language. The Department must take very seriously the failure to pay the required certification fees in a timely manner simply because we do not believe that it is an effective use of our limited resources to track down employers who fail to pay fees. By defining the late payment of certification fees as a substantial violation in the Final Rule, we intend to impress upon employers that the timely payment of such fees is their responsibility which we expect them to fulfill if they choose to participate in the H–2A program.

vi. Failure To Pay Wages

The NPRM did not propose changes to this requirement. One farm worker advocacy organization commented that the Final Rule should include an explicit statement that multiple reports of unpaid wages will result in debarment. The same commenter stated that there should also be a streamlined system for filing wage complaints and immediate investigations upon receiving the complaints. We believe that the explicit statement is unnecessary; the Final Rule includes as grounds for debarment the failure to pay or provide the required wages to H–2A workers or workers in corresponding employment. That provision would allow the Department to debar an employer if the employer is found to have failed to pay the required wages, especially if it failed to do so multiple times. As for the streamlined system, we believe that this is available through the Job Service Complaint System.

d. Grounds for Debarring Joint Employer Associations

Several employer associations commented on the NPRM's expansion of the standard for debarment of members of joint employer associations to any member that has reason to know of the association's debarrable violation. These commenters stated that the standard is too expansive and unduly harsh, and that the 2008 Final Rule's participation or knowledge standard should be retained. Some commenters also objected that the Department had not provided any data supporting the need for this change.

The Final Rule retains the language proposed in the NPRM. The Department's change to the debarment standard for members of joint employer associations is consistent with the statutory language in 8 U.S.C. 1188(d)(3)(B)(1), which states that an individual producer-member of a joint employer association will not be debarred if the association commits a substantial violation unless the member participated in, had knowledge of, or reason to know of the violation.

e. Debarment of Agents/Attorneys

The NPRM proposed to authorize the Department to debar agents and attorneys. One commenter stated that the INA only gives the Department authority to debar employers, and therefore the Department has no authority to debar agents or attorneys. As explained in the 2008 Final Rule's preamble, we believe that acts committed by agents and attorneys of employers may constitute substantial violations and, accordingly, that agents and attorneys of employers should be debarrable parties.

The commenter's argument that the statute does not give the Department the power to debar agents or attorneys seems to be premised on the argument that by naming one thing in the statute, Congress meant to exclude all others, a legal maxim of statutory construction referred to as expressio unius est exclusio alterius. However, this maxim

is limited in application. In order for it to apply, the necessary implication is that Congress considered the unnamed possibility (such as debarring agents or attorneys) and meant to exclude it, as opposed to excluding the term inadvertently or simply deciding not to address it. *Barnhart* v. *Peabody Coal Co.,* 537 U.S. 149, 168 (2003) (citing *United Dominion Industries, Inc.* v. *United States,* 532 U.S. 822, 836 (2001)). The application of the maxim can also be limited where the exclusion would result in inconsistency or injustice or would undermine the general purpose of the statute. See *Ford* v. *United States,* 273 U.S. 593, 612 (1927), and *Herman & MacLean* v. *Huddleston,* 459 U.S. 375, 387 n.23 (1983).

The INA makes no reference to the role of agents or attorneys in its labor certification provisions. The involvement of two parties in the H–2A certification process is strictly a construct of the regulations. Therefore, it would be difficult to believe that Congress actually considered acts committed by agents and attorneys, much less deliberately excluded them when it drafted the debarment provision. Additionally, if the Department were not able to debar agents or attorneys, the integrity and effectiveness of the H–2A program potentially would be at risk, which would seem to undermine the Department's ability to carry out its responsibilities under the statute. Criminal cases under other immigration programs are strong evidence that agents and attorneys can commit flagrant violations of the INA, sometimes without the knowledge of their clients.

Additionally, the Department has inherent authority to regulate the conduct of attorneys and agents who practice before it. The Department has invoked this authority to debar agents and attorneys under the PERM and H–1B immigration programs. As discussed in the preamble to the PERM fraud rule, there is extensive case law establishing that Federal agencies have the authority to determine who can practice and participate in administrative proceedings before them. The general authority of an agency to prescribe its own rules of procedure is sufficient authority for an agency to determine who may practice and participate in administrative proceedings before it, even in the absence of an express statutory provision authorizing that agency to prescribe the qualifications of those individuals or entities. *Koden* v. *United States Department of Justice,* 546 F.2d 228, 232–233 (7th Cir. 1977) (citing *Goldsmith* v. *United States Board of Tax Appeals,* 270 U.S. 117 (1926)). See also *Schwebel* v. *Orrick,* 153 F. Supp. 701, 704 (D.D.C. 1957) (The Securities and Exchange Commission has implied authority under its general statutory power to make rules and regulations necessary for the execution of its functions to establish qualifications for the attorneys practicing before it and to take disciplinary action against attorneys found guilty of unethical or improper professional conduct). In addition, an agency with the power to determine who may practice before it also has the authority to debar or discipline such individuals for unprofessional conduct. See *Koden,* 564 F.2d at 233. Further, as the Department has the authority to prescribe regulations for the performance of its business (as is the case with all executive departments under 5 U.S.C. 301), it likewise has the authority to determine who may practice or participate in administrative proceedings before it and may debar or discipline those individuals engaging in unprofessional conduct. The Department has exercised such authority in the past in prescribing the qualifications and procedures for denying the appearance of attorneys and other representatives before the Department's Office of Administrative Law Judges under 29 CFR 18.34(g). See also *Smiley* v. *Director, Office of Workers' Compensation Programs,* 984 F.2d 278, 283 (9th Cir. 1993). Accordingly, the Department has the authority to debar agents and attorneys. We have decided to assert this authority to maintain the integrity of the H–2A program and to be consistent with other immigration programs.

The same commenter argued that the Department's assertion of its authority to debar attorneys will have severe implications on attorney-client privilege, impairing an attorney's ability to give advice about these regulations to his or her clients, lest a client's question cause the attorney to know or have reason to know about a client's substantial violation. The Department acknowledges this concern. However, as explained in the preamble to the 2008 Final Rule, the Department does not intend to make attorneys (or agents) strictly liable for debarrable offenses committed by their employer clients. The Department does not intend to debar attorneys who obtain privileged information during the course of representation regarding their client's violations. We asserted authority to debar attorneys, like the authority to debar agents, to ensure that we are able to address substantial violations committed by the attorneys or agents themselves, or committed in concert with the employers. The Department is not seeking to debar attorneys who, while working to assist their clients in complying with the H–2A program, make an error. Nor are we seeking to debar attorneys whose clients disregard their legal advice and commit substantial violations; the appropriate party to be debarred in that situation would be the employer-client. However, the Department is asserting its authority to debar attorneys who work in collusion with their employer-clients to commit substantial violations. Therefore, in response to the comments, we have modified the Final Rule to allow for the debarment of attorneys only if the OFLC Administrator finds that the attorney has participated in a substantial violation.

f. Statute of Limitations for Initiating Debarment Proceedings

The NPRM did not propose any changes to the statute of limitations for debarment proceedings. One commenter suggested that the Department change the time limitation to issue a Notice of Debarment. The commenter suggested that rather than stating the notice must be issued no later than 2 years after the occurrence of the violation, the regulations should require a Notice of Debarment be issued no later than 2 years from the time the debarring authority learns of the debarrable activities.

However, the restriction to 2 years is mandated by the INA. Accordingly it is maintained in the Final Rule.

g. Debarment Procedure

i. Concurrent Authority With WHD

The NPRM proposed and the Final Rule provides WHD the authority to debar employers, agents, and attorneys who commit substantial violations, in addition to OFLC's authority to debar. A number of commenters supported this change from the 2008 Final Rule, because they believe that it will strengthen and improve the efficiency of enforcement of the H–2A regulations. Conversely, many employer associations opposed concurrent debarment authority, predicting inconsistencies in the two agencies' interpretation of the regulations. These comments are discussed in the sections that discuss the debarment authority of the WHD.

The Final Rule states that the OFLC and the WHD will coordinate their activities so that only one debarment proceeding is imposed for the same substantial violation. The Department notes that the two agencies have been concurrently involved in debarment

proceedings from the beginning of the H–2A program, with WHD performing the investigations and OFLC conducting the actual debarment proceedings on WHD's recommendations. This experience the two agencies have in coordinating their actions will help minimize any inconsistencies that may exist between the agencies' interpretations of the program requirements. Furthermore, the two agencies' debarment proceedings are the same, which is intended to eliminate any inconsistencies between the agencies' interpretations. Three grounds for debarment are listed in § 655.182(d)(2–4) that are not present in the regulations governing WHD's involvement in the H–2A program, because these grounds concern the processing of an employer's Application for H–2A labor certification, which is solely within the jurisdiction of the OFLC. The Department believes that conferring concurrent debarment authority on both agencies will improve the quality of H–2A enforcement and increase efficiency.

ii. Changes to the Debarment Procedure of OFLC

The NPRM proposed to extend concurrent debarment authority to the WHD, and made changes to the OFLC debarment procedure so that it would parallel the debarment procedure of the WHD. This included eliminating the step wherein the OFLC sends the employer a Notice of Intent to Debar, and eliminating the employer's opportunity to submit rebuttal evidence to the OFLC Administrator upon receiving that Notice of Intent. Instead, the proposed rule gave the employer an immediate right to a hearing before the ALJ, and then the right to request review before the Administrative Review Board (ARB). The Final Rule adopts many of the proposed changes, but it amends the proposed elimination of an employer's chance to submit rebuttal evidenced. The Final Rule also clarifies that the OFLC Administrator rather than the CO will exercise debarment authority, and the Final Rule makes minor changes relating to service so as not to preclude, for example, electronic service. Additionally, the Final Rule makes a minor change to the provision in § 655.182(f)(3) of the NPRM that stated the ALJ's decision after a debarment hearing will be provided to the employer, OFLC Administrator, DHS, and DOS by means normally assuring next-day delivery. The Final Rule states that the ALJ's decision will be immediately provided to the parties to the debarment hearing by means normally assuring next-day delivery. This change was made so the language would include an attorney or agent if that person (rather than the employer) was the party subject to the debarment hearing. Additionally, the reference to DHS and DOS was eliminated here because it is redundant; § 655.182(g) states that final debarment decisions will be forwarded to DHS promptly.

Many employer associations objected to the changes proposed to the OFLC debarment procedures. A number of commenters objected to the elimination of debarred parties' opportunity to submit rebuttal evidence providing them with only one option to respond to a Notice of Debarment, namely to request a hearing before the ALJ. Many commenters stated that this would deny the parties due process.

The Department considered these comments and is restoring the right to submit rebuttal evidence. The Final Rule adopts a hybrid approach. The procedure for a debarment proceeding that is initiated by WHD will still follow the procedure as proposed. A regulatory provision for submission of rebuttal evidence by an employer in a debarment proceeding conducted by the WHD is unnecessary—a WHD debarment proceeding will be predicated on a WHD investigation that involves numerous opportunities for communication between the WHD and the party that is subject to the investigation. However, the procedure for a debarment proceeding initiated by the OFLC will include a provision allowing the party who receives a Notice of Debarment to choose first to submit rebuttal evidence to the OFLC Administrator before requesting a hearing before the ALJ. This procedure for OFLC debarments is better suited to the method of OFLC investigations, which consist mainly of an OFLC audit and written exchanges between the OFLC and the party subject to debarment. This procedure for OFLC debarment is also more closely parallel to the OFLC procedure for revocation. However, the OFLC debarment procedure will still parallel WHD's debarment procedure after the potentially debarred party's opportunity to submit rebuttal evidence, including a party's opportunity to request a hearing before an ALJ and then on appeal to the ARB. This procedure will ensure that employers have ample opportunity to be heard during debarment proceedings initiated by the OFLC while also maintaining the ARB as the single highest authority for all debarments from the H–2A program, whether initiated by the WHD or the OFLC. This will ensure consistency in the application of debarment standards by both agencies.

Other employer associations commented that there should also be a process by which an H–2A employer can appeal a Notice of Debarment. The intended meaning of this comment is unclear since there is provision for an appeal.

Finally, as in its comments regarding the revocation section, one farm worker advocacy organization proposed that the regulations state that the Department shall commence a debarment investigation if it receives any information provided from a SWA, an employee, or other person alleging activity that may constitute grounds for debarment. The organization also proposed that any person who provided information that resulted in a debarment be provided copies of the notices issued in the proceeding. The Final Rule does not adopt such an inflexible system for the same reasons mentioned under the revocation section—it is inefficient and hinders the Department's discretion in enforcing its regulations.

38. Section 655.183 Less Than Substantial Violations

The NPRM proposed to require an employer to follow special requirements during its recruitment process if the Department believes 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 if the Department determined that the employer was guilty of a less than substantial violation of the terms of its labor certification. It also proposed an appeals process the employer may pursue if it disagrees with the Department's determination. The Final Rule retains this provision as proposed.

A few employer associations opposed this section. Generally, they stated that the provision is ill-defined, costly, and overly harsh. One predicts that due to the Final Rule's expansion of the definition of a substantial violation, virtually every employer who uses the H–2A program will be subject to the special procedures referred to in this section. The commenters also stated that the provision does not confer sufficient due process to contest the imposition of these special procedures, and that the Department fails to cite any evidence showing the need for this provision.

This provision was included in the H–2A regulations from the 1987 Rule until the provision was removed, with no explanation, by the 2008 Final Rule. The Department is restoring the provision to this Final Rule because it

allows added flexibility in enforcing the H–2A regulations. It also gives the Department a mechanism to address employers' less severe violations without pursuing the more serious remedies of revocation or debarment. The Department believes that this added flexibility will suit its enforcement goals while acknowledging employers' concerns about the harshness of revocation or debarment.

39. Section 655.184 Applications Involving Fraud or Willful Misrepresentation

The Department proposed a process for the referral of applications involving potential fraud or misrepresentation to the DHS and the Department's Office of the Inspector General for investigation and action. The Department received no comments in response to this proposal; therefore, the Final Rule adopts the language of the NPRM.

40. Section 655.185 Job Service Complaint System; Enforcement of Work Contracts

The NPRM proposed to continue the requirements for the filing of complaints arising under this subpart through the Job Service Complaint System and the referral of complaints alleging discrimination against eligible U.S. workers to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices. These requirements were also included in the 2008 Final Rule. The proposed rule additionally requires the SWA to refer complaints alleging fraud or misrepresentation to the attention of the CO who will commence the audit process to determine whether the allegations are valid and warrant imposing employer sanctions or penalties. The Department is retaining the provision as proposed in the NPRM.

One commenter misunderstood the proposed requirement for complaint referral to the CO and stated that the filing with the CO may be challenging for migrant and seasonal workers who rely on the SWA to prepare and file their complaints. Another commenter who opposed this requirement asserted that the CO does not have the ability to determine whether or not a complaint alleging fraud is valid. Two employer organizations also opposed the requirement, contending that the NPRM did not include safeguards to prevent third parties from abusing the system to harass employers. Another commenter proposed that the Department implement user-friendly complaint procedures.

An association of growers proposed that the Department disallow anonymous complaints so that employers can face their accusers. This commenter also requested that the Department limit the application of its integrity measures to only those cases in which it has additional corroborative evidence, beyond the initial Job Service Complaint System complaint. Furthermore, it proposed that the Department require that Job Service Complaint System complaints consist of detailed written statements signed under penalty of perjury.

Another commenter called for improved oversight of complaint processing by the SWAs. This commenter also proposed a change to the regulations to mandate the exchange of certain information (such as outcomes of investigation or administrative proceedings conducted by the SWA or any Federal agency) between the WHD and the OFLC and the Office of Special Counsel for Unfair Immigration-Related Employment Practices at DOJ and the OFLC.

The Job Service Complaint System is part of the State agencies' mandate under the Wagner-Peyser Act. See Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 *et seq.;* 38 U.S.C. chapters 41 and 42; 5 U.S.C. 301 *et seq.;* 20 CFR. 658.410, 658.411 and 658.413 also issued under 44 U.S.C. 3501 *et seq.* These regulations apply to State agencies and require them to establish and administer the Job Service Complaint System in order to accept complaints from migrant and seasonal farm workers. This enables workers who may already have a relationship with the SWA as a result of referral to go back to the SWA for assistance. The NPRM did not propose to amend the regulations governing the operation of the Job Service Complaint System found in 20 CFR part 658, subpart E. Therefore, the Department is unable to respond to the many suggestions discussed above that would require changes to these regulations.

The Department agrees that the SWAs play an essential role in accepting and evaluating complaints from workers. The requirement that the SWAs refer certain complaints to the CO is intended to bolster program integrity by ensuring that the Department most effectively directs its enforcement resources to curb and address program abuses. In response to a commenter's assertion of potential abuse of the Job Service Complaint System by third parties, the Department does not anticipate that the Job Service Complaint System will be used as a widespread tool to harass employers. Furthermore, under the Final Rule, the COs will receive any complaints alleging fraud or misrepresentation and will use their longstanding and extensive programmatic knowledge and understanding of the user community to distinguish between frivolous complaints and those asserting real and supported claims. No entity will be subject to penalties or sanctions when the CO ascertains that the employer is in compliance. Finally, closer cooperation with its State partners in the area of enforcement will enable the Department to ensure program integrity and increase protections for both U.S. and foreign workers participating in the program.

In response to one commenter's suggestion that the regulations mandate information sharing between different agencies, the Department has determined that the part of that suggestion that is specific to amendments to the Job Service Complaint System falls outside the scope of this rulemaking as the process of the system is regulated by 20 CFR 658. However, this is not to say that information is not shared with our sister agency. As explained further above and below, the Deparment affirmatively shares information with DHS and other agencies, within defined limits, to enable those agencies to take action.

Therefore, the Department is retaining this provision as proposed.

III. Revisions to 29 CFR Part 501

The Final Rule amends the Department's regulations at 29 CFR part 501, which set forth the responsibilities of the WHD to enforce the legal, contractual and regulatory obligations of employers under the H–2A program so that WHD can carry out its statutory mandate to protect temporary H–2A workers and U.S. workers. These amendments are adopted concurrent with and in order to complement the changes ETA is making in its certification procedures.

Since this Final Rule makes changes to several of the existing regulations in 29 CFR part 501, we have included the entire text of the final regulations and not just the sections which have been amended.

a. Subpart A General Provisions

1. Sections 501.0 and 501.1 Introduction and Purpose and Scope

Consistent with its statutory mandate, the Department proposed to amend its regulations in order to enhance its enforcement program and better protect workers—including U.S. workers, H–2A workers, and/or workers employed in

corresponding employment—from adverse effects and from potential abuse by employers who fail to meet the requirements of the H–2A program or violate its provisions. Modifications were proposed to §§ 501.0 and 501.1 to more clearly outline the differing authority and responsibilities of ETA and WHD, to identify the various groups of workers who are entitled to protections under the program, and to state the effective date of the Final Rule.

The Department is adopting the provisions as proposed, with clarifications and the following change: since the NPRM was issued, the Department has eliminated the Employment Standards Administration (ESA), which was the former umbrella organization of the WHD. Therefore, the Final Rule deletes the reference to ESA in § 501.1(c).

Many commenters representing workers, farm worker advocacy organizations, unions, SWAs, Congress, and individuals generally supported the proposed changes to 29 CFR part 501, and they advocated stronger enforcement of program requirements across the board. Several of these commenters noted the long history of abuses under guest farm worker programs, dating back to the Bracero program of the 1940's. They noted that these workers are particularly vulnerable. Since their work visas are tied to a single employer they are reluctant to complain for fear of losing their jobs and being deported, and they often have limited English skills and limited access to social services or legal representation. These commenters welcomed the reversal of many aspects of the 2008 Final Rule, and they endorsed more active enforcement by WHD.

Most commenters representing employers generally opposed the enhanced enforcement proposals. Many employers complained that the proposal is not balanced, since it reinstates the labor certification requirements of the 1987 Rule yet retains the elevated penalties which were added by the 2008 Final Rule. They argued that the elevated penalties were a trade-off for the streamlined attestation procedures in the 2008 Final Rule, suggesting that one cannot be retained without the other. One commenter asserted that the NPRM retains the most burdensome and, in its view, punitive provisions of the 1987 Rule and 2008 Final Rule, while adding new and onerous requirements. A commenter asserted that the proposed enforcement changes exceed the Department's underlying statutory authority, that the NPRM failed to include any citations or legal analysis supporting the changes, and that the Department generally ignored its own analysis in the 2008 Final Rule.

The Department disagrees. The proposed changes are clearly authorized by the INA, which authorizes the Secretary to deny certifications and to take such other actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to ensure compliance with the terms and conditions of employment. The Department believes that these enhanced enforcement regulations are necessary to properly carry out its statutory obligations to protect workers.

As explained both in the NPRM and in the foregoing preamble sections, the Department has now determined that the 2008 Final Rule did not effectively carry out the Department's statutory mandate to protect workers and failed to allow for robust and meaningful enforcement of the terms of the approved job orders and other regulatory requirements. While most employers of temporary H–2A workers are law-abiding, some are not. The Department has carefully crafted its enhanced enforcement tools so as to continue allowing law-abiding employers to use the program to recruit U.S. workers and/or guest workers to meet their seasonal employment needs. At the same time, it seeks to target those employers who fail to meet their legal obligations to recruit and hire U.S. workers, and/or to offer required wages and benefits to workers. We believe that the Final Rule achieves the proper balance between meeting the seasonal labor needs of farmers and protecting the rights of farm workers.

2. Section 501.2 Coordination Between Federal Agencies

The Department also proposed to expand § 501.2 to allow broader information sharing and coordination between agencies both within and outside of DOL, and to grant WHD and OFLC express authority to share information for enforcement purposes and, where appropriate, with other agencies such as DHS and DOS which play a role in immigration enforcement. In addition, because the Department proposed that ETA and WHD have concurrent debarment authority, the Department also proposed to limit its enforcement to only one debarment proceeding (by either OFLC or WHD, but not both) resulting from a single set of operative facts, and proposed that OFLC and the WHD would coordinate their activities to accomplish this result. It also proposed that copies of any final debarment decisions be forwarded by DOL to DHS so that it can take appropriate action.

No comments were received on this proposed section. Therefore, the Department is adopting the provision generally as proposed, with slight wording changes.

3. Section 501.3 Definitions

As in the 2008 Final Rule, the NPRM proposed to incorporate the definitions listed in 20 CFR part 655, subpart B that pertain to 29 CFR part 501. The discussion of changes to the definitions can be found in the preamble for 20 CFR part 655, subpart B above.

4. Section 501.4 Discrimination Prohibited

The Department proposed to move this provision from § 501.3 to § 501.4, and to add a reference to debarment as a potential remedy for employers or others who engage in prohibited discrimination, along with other minor editorial changes. The Final Rule adopts the provisions as proposed without change.

Worker advocacy organizations supported the proposal requiring workers' compensation coverage and the submission of proof of coverage. They also requested that the Final Rule include a provision making discrimination against workers who file a workers' compensation claim a violation of these regulations. This protection is already provided. The regulation at 20 CFR 655.122(e), like the statutory provision it implements, provides a right to workers' compensation coverage under State law or, where the employee is not covered by State law, private insurance. The right to workers' compensation coverage would be meaningless if it did not include the right to file a claim under that coverage without risking retaliation. Accordingly, the right to file a claim is provided under the INA, as well as these regulations. Section 501.4(a)(5) states that discrimination against any person asserting a right or protection afforded by the INA or these regulations is prohibited. Therefore, persons filing workers' compensation claims under a workers' compensation policy mandated by the statute are protected from discrimination. In addition, as a condition of H–2A certification, employers must agree to comply with Federal, State and local laws and regulations during the period of employment. Where State laws prohibit discrimination against employees making workers' compensation claims, a violation of those laws would also be a violation of these regulations.

5. Section 501.5 Waiver of Rights Prohibited

The Department proposed to renumber § 501.5 (Waiver of rights prohibited), which was previously § 501.4, and to expand the provision to cover U.S. workers who were improperly rejected for employment or improperly laid off or displaced. The Final Rule adopts the proposed amendment.

A legal services organization suggested expanding this provision to also prohibit waivers of the FLSA, applicable State employment laws, and State employee housing laws. The Department notes that the FLSA may not be waived and that State laws may or may not be waivable. The regulations require employers to certify their compliance with all applicable State and local laws and regulations, including health and safety laws. Therefore, the Department does not believe that such additional references need to be included in the no-waiver provision.

6. Section 501.6 Investigation Authority of the Secretary

The Department proposed to renumber, substantially shorten and revise this section to clarify and to eliminate duplication. The Department is adopting the provisions as proposed without change.

Employee advocacy groups commented that this provision should be expanded to require WHD to notify workers (in their language), as well as advocates and local agencies whenever WHD conducts an investigation, and that it notify workers and others of the outcome of investigations. As a matter of enforcement policy, WHD already notifies complainants of the status of their complaint(s), and makes every effort to do so in languages understandable to the worker. Notifying all employees, advocates and local agencies in every case is impracticable. However, WHD is committed to doing outreach to advocates, workers, and affected communities, and intends to work more closely with interested parties in appropriate cases.

7. Section 501.7 Cooperation With Federal Officials

The NPRM proposed to require cooperation with any Federal official investigating, inspecting, or enforcing compliance with the statute or regulations. No comments were received addressing this section. Therefore, the Final Rule adopts the provision as proposed.

8. Section 501.8 Accuracy of Information, Statements, Data

The NPRM also proposed to renumber § 501.8, which was previously § 501.7, but did not otherwise change the provision. No comments were received addressing this section. Therefore, the Final Rule adopts the changes as proposed.

9. Section 501.9 Surety Bond

In order to assure compliance with the H–2A labor provisions and to ensure the safety and economic security of covered employees of H–2ALCs under the H–2A program, the NPRM proposed to continue the requirement that H–2ALCs obtain and maintain a surety bond based on the number of workers to be employed under the labor certification, throughout the period it is in effect, including any extensions. The proposed rule also retained the provision that enables the WHD to require, after notice and the opportunity for a hearing, that an H–2ALC obtain a surety bond with a face amount greater than the amounts specified in the proposed regulation. The Department also proposed to enhance the level of protection for workers by introducing new bond amount tiers that are more closely and appropriately tied to the number of job opportunities for which certification is sought. The Final Rule adopts the NPRM with one change and minor clarifying edits. The Final Rule requires H–2ALCs to provide the original surety bond with their application, rather than just a copy.

In the 2008 Final Rule, surety bond amounts were set at $5,000 for H–2ALCs seeking certification to employ fewer than 25 employees, $10,000 for those seeking certification to employ 25 to 49 employees, and $20,000 for H–2ALCs wanting to hire 50 or more employees. However, assuming that an H–2ALC with 50 employees pays approximately the same for a $20,000 bond as an H–2ALC with 300 employees, the 2008 Final Rule framework disproportionately advantages larger H–2ALCs while providing diminishing levels of protection for the employees of such contractors.

Under the proposed rule, the first two bond amount tiers remained unchanged ($5,000 for H–2ALCs who apply for certification to employ fewer than 25 employees and $10,000 for those H–2ALCs who are applying for certification to employ 25 to 49 workers). The NPRM proposed to require H–2ALCs seeking certification to employ from 50 to 74 workers to obtain a bond of $20,000. In addition, we proposed to require H–2ALCs seeking certification to employ from 75 to 99 workers to obtain a surety bond of $50,000, and those seeking certification to employ 100 or more workers to obtain a bond of $75,000.

In the proposed rule, the Department specifically requested comments addressing the implications for H–2ALCs who may be subject to this requirement. A number of commenters opposed the adoption of the proposed surety bond requirements as being too costly and indicated these increased costs will discourage participation in the H–2A program while not significantly improving worker protections.

A number of commenters supported the surety bond requirements. However, these commenters also expressed the view that the proposed requirements do not go far enough to protect covered farm workers, and they offered suggestions to further strengthen the requirements. These suggestions fall into three general categories: (a) either increase the face amount of the required bond to $1,000 per worker or index the amount of the bond to a percentage of the value of the offered contract; (b) require that the bond be payable to both the DOL and the affected workers; and (c) in lieu of a surety bond, allow H–2ALCs and the fixed-site employers to enter into a written contract in which the fixed-site employer agrees to be responsible for compliance with respect to the H–2ALC's employees as if the employees were jointly employed by both an H–2ALC and the fixed-site employer.

Only those H–2A program applicants who meet the definition of an H–2ALC will be required to obtain a surety bond. The Department is not aware that any H–2ALC has been unable to obtain a surety bond as required under the 2008 Final Rule because it was too costly. 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 meet their obligations to their workers than fixed-site employers. Regarding the comment that the Department does not have the authority to institute a surety bond requirement, the Department notes that 8 U.S.C. 1188 gives the Secretary the authority to take such actions as may be necessary to assure employer compliance with the terms and conditions of employment. Requiring a bond of H–2ALCs is within the scope of that authority to better ensure compliance with H–2A obligations and to protect the safety and security of covered workers employed by H–2ALCs. The Department believes

that the increased bond amounts are appropriate and will better allow the Department to ensure that adequate funds are available to remedy violations that result in lost wages for workers.

The Department has also determined to retain the surety bond levels as proposed in the NPRM. With regard to the suggestions that the bond amount be set at $1,000 per worker, we do not believe this to be necessary as the proposal gives the WHD Administrator the authority to adjust the amounts on an individual basis, as may be warranted in the future. For the alternative suggestion that the amount be indexed to a percentage of the value of the offered contract, it is unclear how bond underwriters would be able to accomplish this.

Other commenters suggested a further amendment to the language to make the bonds payable to both the Administrator of the Wage and Hour Division and to affected employees of the H–2ALCs. The suggestions did not state how to implement such a change since the bond needs to be secured and provided as part of the Application approval process. Moreover, the Department believes that it is most appropriate for the Administrator to be the party named in the bond because the Administrator is responsible for the enforcement of the terms and conditions of the labor certification and will act on behalf of all employees if a violation is found. Therefore, the Department has determined to retain the requirement that the bond be payable to the Administrator of the Wage and Hour Division as proposed.

Certain commenters suggested that the Department adopt, as an alternative to the requirement to obtain a bond, a provision that allows an H–2ALC to forgo obtaining a bond if the fixed-site employer to whom an H–2ALC furnishes workers contractually obligates itself (in writing) to be jointly responsible as a joint employer with an H–2ALC for compliance with all of the provisions of the job offer/contract. To adopt such a provision would necessitate that an H–2ALC enter into a separate contractual agreement with each and every fixed-site employer to whom he or she intends to furnish workers throughout the period for which certification is sought; it is unclear if this is feasible and, further, it would require that each such contractual agreement be scrutinized for legal sufficiency prior to certification, which would impact the finite resources available for processing applications. Therefore, the Department has not adopted this suggestion.

No comments were received on the proposal to change the requirement that H–2ALCs provide written notice to the WHD Administrator of cancellation or termination of the surety bonds from a 30-day to a 45-day notice period, and that the bond must remain in effect for at least 2 years after the expiration of the labor certification (unless the WHD has commenced an enforcement proceeding, in which case the bond must remain in effect until the conclusion of the proceeding and any appeals). Therefore, the Department adopts the proposal in the NPRM.

Finally, the proposed rule required that documentation from the issuer must be provided with the Application identifying the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated in this section), date of its issuance and expiration and any identifying designation used by the surety for the bond. In the Final Rule, the Department is requiring that the original of the bond be submitted with the Application. The Department believes this change will not present any additional costs for applicants since such applicants are already required to provide fundamental information from the bond which most applicants accomplish by providing a copy of the bond. The requirement to provide the original bond is intended to ensure that the Department has legal recourse to make a claim to the surety against the bond following a final order finding violations.

10. Section 501.15 Enforcement

The Department proposed no changes and received no comment on this section. The Department is adopting these provisions as proposed without change.

11. Section 501.16 Sanctions and Remedies—General

The Department proposed to provide WHD with express authority to pursue reinstatement and make whole relief in addition to back wages in cases of discrimination, or in cases in which U.S. workers have been improperly rejected, laid off, or displaced. As explained in the proposal, this was intended to clarify WHD's authority to pursue recovery of improper deductions, such as recruiter fees or other costs improperly deducted or paid in violation of the required assurances under the Application, which forbid such deductions and payments. The Final Rule adopts the provisions as proposed.

Many commenters representing farm workers, farm worker advocacy organizations, unions, SWA, Congress, and individuals generally endorsed the enhanced enforcement provisions. Employee advocacy groups commented that this provision should be expanded to require WHD to notify workers (in their language) and invite them to participate whenever it files an administrative proceeding, and serve them with notices of all hearings, settlements, decisions and orders in each case; they also suggested improving outreach and follow-up communications with State and County staff after complaints are filed.

Many other commenters representing employers, recruiters and employer associations complained that the proposed enhanced penalties and remedies would punish innocent employers and deter them from using the program. Specific comments are addressed below.

Several commenters representing employers expressed concerns about the breadth and potential severity of the proposed new remedies, in particular make whole relief, which they feared could potentially include compensatory damages for non-economic injuries such as pain and suffering, or other civil damages of the type available in Federal or State courts. Another commenter questioned how WHD would exercise its new authority, asserting that the provisions were vague and would leave employers vulnerable to endless litigation and harassment based on the flimsiest of allegations.

These concerns are unfounded. The Department intended make whole relief to be limited to its traditional meaning, such as, reinstatement, hiring, reimbursement of monies illegally demanded or withheld, or the provision of specific relief such as the cash value of insurance benefits, housing, transportation or subsistence payments which the employer was required to, but failed to provide, in addition to the recovery of back wages where appropriate. Nothing in the regulations allows for the recovery of pain and suffering or other civil or punitive damages on behalf of workers in addition to actual damages and equitable relief. Moreover, the Department has been enforcing H–2A regulations for many years. It intends to continue to use its traditional enforcement discretion to review cases based on their facts, and to select for prosecution only those which an investigation has shown the case to be well-founded.

Other commenters suggested that, where an employer has restricted its agents by contract arrangement from receiving recruitment fees or kickbacks

from workers, yet a worker complains that he or she was forced to pay a prohibited fee, the employer should be shielded from liability. The Final Rule requires that H–2A employers contractually prohibit their recruiters and agents from seeking or receiving such payments, directly or indirectly. As in every enforcement case, WHD will examine the evidence and will seek to enforce appropriate remedies against the proper parties. Therefore, if an employer's recruiter or agent has violated this provision, but the employer can show that it had a bona fide contractual provision preventing or barring the violative action by its agent, the employer has not violated the regulation.

12. Section 501.17 Concurrent Actions

The Department proposed to grant concurrent debarment authority to OFLC and WHD, while recognizing the differing roles and responsibilities of each agency under the program. Under the proposed revisions, debarment authority for violations arising out of the application process remained with OFLC, but the WHD Administrator gained debarment authority for issues arising from WHD investigations. The proposal also included safeguards requiring coordination between the agencies to ensure streamlined adjudications and that an employer would not face two debarment proceedings for violations arising from the same facts. The Department is adopting the provisions as proposed without change.

Several employers and employer associations disagreed with the Department's proposal to grant debarment authority to WHD. They noted that the Department had rejected this approach in the 2008 Final Rule. As in 2008, they expressed concerns about conflicting regulatory interpretations by OFLC and WHD, and contended that allowing both agencies to exercise debarment authority would be inefficient and confusing, and result in twice as much bureaucracy for employers.

Worker advocates and others who commented in favor of the proposed change agreed that WHD should have the power to debar employers who violate program requirements. They cited examples where unscrupulous FLCs failed to provide any work, failed to pay their workers, demanded kickbacks, engaged in Ponzi schemes, lied to, assaulted, and abused workers, committed fraud, engaged in human trafficking, and even pled guilty to criminal conduct (assaulting a worker for filing a complaint with OSHA), yet were permitted to continue operating as H–2ALCs. These commenters welcomed additional enforcement and debarment authority by WHD.

In 2008 the Department considered extending debarment authority to WHD, yet decided not to do so, fearing that such authority could result in unnecessary confusion. However, upon further reflection, the Department has concluded that this fear is unfounded. Providing WHD with the ability to order debarment, along with or in lieu of other remedies, will streamline and simplify the administrative process, and eliminate unnecessary bureaucracy by removing extra steps. Under the 2008 Final Rule, WHD conducts investigations of H–2A employers, and may assess back wages, civil money penalties, and other remedies, which the employer has the right to challenge administratively. However, under the 2008 Final Rule, WHD cannot order debarment, no matter how egregious the violations, and instead must take the extra step of recommending that OFLC issue a Notice of Debarment based on the exact same facts, which then has to be litigated again. Contrary to the commenters' assertions, allowing WHD to impose debarment along with the other remedies it can already impose in a single proceeding will simplify and speed up this duplicative enforcement process, and result in less bureaucracy for employer-violators. Instead, administrative hearings and appeals of back wage and civil money penalties, which the WHD already handles, will now be consolidated with challenges to debarment actions based on the same facts, so that an employer need only litigate one case and file one appeal rather than two. This means that both matters can be resolved more expeditiously.

Furthermore, this change is consistent with recommendations made as far back as 1997 in a General Accounting Office (GAO) report to Congress, in which GAO proposed that WHD be given authority to suspend employers with serious labor standard or H–2A contract violations. See U.S. Gen. Accounting Office: "Report to Congressional Committees: H–2A Agricultural Guestworker Program, Changes Could Improve Services to Employers and Better Protect Workers," 68, 70 (1997). Moreover, WHD has extensive debarment experience under regulations implementing other programs, such as H–1B and the Service Contract Act. See, *e.g.* 29 CFR 5.12, 5.1

Nevertheless, the Department is sensitive to the perception of some employers that OFLC and WHD may interpret certain rules differently, and that employers should not be faced with double jeopardy for a single violation. Therefore, it has included several safeguards on this new authority. First, each agency must coordinate their activities when considering debarment. Second, the proposal also expressly identifies which violations will be pursued by which agency. For example, OFLC will continue to institute its own debarment proceedings regarding issues that arise during the application or recruitment process, or from an OFLC audit, while WHD may order debarment as a result of different violations which it discovers during its investigations. Third, the standards for debarment to be applied by both OFLC and WHD have been revised to ensure that they are identical and to ensure consistency in application. Finally, the Final Rule also provides that debarment for any violation arising out of the same facts will be addressed only by a single agency. This will allow for more expeditious proceedings and more efficient enforcement, without any negative impact on law-abiding employers.

13. Section 501.18 Representation of the Secretary

The NPRM proposed to modify this provision to conform to the statute, which provides for administrative appeals, but does not grant the Secretary independent litigating authority in civil litigation. No comments were received addressing this section. Therefore, the Final Rule adopts the changes as proposed.

14. Section 501.19 Civil Money Penalty Assessment

The Department proposed to amend this section in several ways. It proposed to increase the maximum civil money penalty (CMP) amount from $1,000 to $1,500 for each violation in most cases, noting that this amount had not been adjusted since 1987. It proposed to increase the penalty amount for a failure to meet a condition of the work contract that results in displacing a U.S. worker to up to $15,000, and added a new penalty of up to $15,000 for improperly rejecting a U.S. worker who has made application for employment. It also proposed to increase the potential penalty in cases where a violation of an applicable housing or transportation safety and health provision of the work contract causes the death or serious injury of any worker to up to $50,000 per worker, and to double the maximum penalty to up to $100,000 per worker where the violation of safety or health provisions causing the death or serious injury was repeated or willful; it

eliminated the separate provision in the 2008 Final Rule which had previously increased the maximum penalty to $100,000 in cases where the employer failed, after notification, to cure a specific violation. The Department is adopting the provisions as proposed without change, with the exception of moving language regarding layoffs from § 501.19(e) to 20 CFR 655.135(g).

Several employer associations and employers commented that the proposed increases in the penalty structure are too severe, are unsupported by data or by examples of violators, and seem designed to discourage use of or even to destroy the program. Overall, most of these commenters argued that the proposed rules are the worst of both worlds for program users, since they abandon the simplified attestation model of the 2008 Final Rule, but retain the elevated penalties contained in that rule. They contended that the return to supervised recruitment requirements makes the enhanced penalties unnecessary.

Other employer associations expressed concern about the potential multiplier effect of the proposed penalties, and wondered whether a separate penalty could be assessed for each incorrect paycheck, resulting in astronomical penalties. These commenters also questioned the changes to the repeat violation definition, worrying that multiple violations in one incident could be deemed repeat violations, even where the employer has promptly corrected the violations. Other commenters criticized the assessment of a penalty for unintentional violations, for each violation or for each failure to pay a worker, which they characterized as a new provision.

Commenters representing workers applauded the proposal to increase the proposed penalties and enforcement in general. They stated that abuse of H–2A workers by unscrupulous employers is rampant, that enforcement has historically been very weak, and that many workers do not complain for fear of retaliation. They asserted that the lack of enforcement and the occasional fines or sanctions levied by WHD in the past have led to an environment where crew leaders and employers believe that they have immunity from the law, and where financial gains from lawbreaking exceed the costs. One advocacy group claimed that the vast majority of H–2A workers in the U.S. are victims of wage theft for which they have no effective recourse. These groups uniformly supported more consistent, thorough and timely enforcement to serve as a deterrent to worker abuse.

The Department agrees with the commenters who assert that stronger penalties are necessary to adequately protect workers. Increasing the proposed penalties for violators who disregard their obligations will provide the Department with more effective tools to discourage potential abuse of the program and will have little if any impact on law-abiding employers. Such penalties are intended to deter violations, discrimination, and interference with investigations, and strengthen worker protections. These penalties will be especially useful to deter repeat violators, who have committed violations knowing that many H–2A workers are unlikely to file complaints or seek legal assistance to enforce their rights.

The increases in the proposed penalties for violations of applicable safety and health provisions, especially those which cause serious injury or death, and those for repeat violations, are intended to encourage participants to ensure that housing and/or transportation provided to their workers meets all applicable safety and health requirements, and that housing and/or vehicles used in connection with employment do not place workers in danger. The higher penalties are consistent with the increased penalties recently authorized by Congress for child labor violations which cause death or serious injury to a worker (see the Genetic Information Nondiscrimination Act Section 302 (2008), codified at 29 U.S.C. 216(e)). They are also lower than those that can be imposed by the Mine Safety and Health Administration as a result of the MINER Act of 2006, codified at 30 U.S.C. 820 (2006), which increased the penalty for flagrant violations up to $220,000, and the penalty for failure to notify the agency of a death or injury to up to $60,000. See 72 FR 13592, Mar. 22, 2007. The Department believes that the increases for H–2A violations are in line with these other recent increases in penalties in other programs administered by the Department.

Contrary to the assumptions of some commenters, the assessment of a particular penalty (or of an enhanced penalty for a repeat or willful violation) is not mandatory, but guided by consideration of the seven factors listed in paragraph (b), the facts of each individual case, and by common sense. For example, before assessing any penalty, the WHD Administrator must consider the type of violation, its gravity, the number of workers affected, and several mitigating and/or aggravating factors including, but not limited to, the explanation offered by the employer (if any), its good faith or lack thereof, any previous history of violations, and any financial loss, gain or injury as a result of the violation. These safeguards are intended to ensure that inadvertent errors and/or minor violations are not unfairly penalized.

Finally, the assessment of a penalty for each violation is not a new provision, but has been included in the regulations since at least the 1987 Rule, including the 2008 Final Rule. Compare 52 FR 20531, Jun. 1, 1987 and 73 FR 77235, Dec. 18, 2008. Indeed, in the 2008 Final Rule the provision was clarified to reflect the then-existing practice that a CMP could be assessed for each violation committed (with each failure to pay a worker properly or to honor the terms or conditions of a worker's employment constituting a separate violation). The only change made by the Final Rule is to move this explanatory language up from § 501.19(c) into the general provision at § 501.19(a). However, it is not new, and there is no reason to fear that it will be applied in an unfair or arbitrary manner. The provision is written so as to protect smaller employers and first-time unintentional violators while appropriately targeting repeat and willful violators and those who abuse or exploit large numbers of workers with the largest penalties.

15. Other Comments Pertaining to Enforcement and Sanctions

An employer association commented that DOL should have retained the portion of the 2008 Final Rule preamble warning workers that they are not permitted to aid or abet trespassing on an employer's private property, although consulting with legal aid lawyers and other representatives is protected activity under 20 CFR 655.105(k)(4). DOL believes that such language is not necessary. Trespassing is a matter of state law, and is not enforced by the WHD.

16. Section 501.20 Debarment and Revocation

The Department proposed this section to grant concurrent debarment authority to WHD. Under the proposal, OFLC would retain the authority to debar an employer based on violations occurring during the application, recruitment and certification process, while WHD would gain new authority to debar employers, agents or attorneys based on evidence discovered during WHD investigations. The proposal noted that the two agencies would apply identical standards, and would coordinate their activities in this area. It also proposed conforming changes to other sections to

reflect this new debarment authority, with minor clarifying changes.

The Department received many comments regarding these standards. These comments and the Department's responses are explained above in the section of this preamble discussing OFLC's debarment authority. In addition, the reference to res judicata in this provision has been deleted because the Department believed it was unnecessary. Otherwise, the Department retains the WHD debarment authority as proposed.

17. Section 501.21 Failure To Cooperate With Investigations

The NPRM proposed to expand this section to include remedies for failure to cooperate with a WHD investigation, and to add debarment to the list of potential remedies for such failure. No comments were received addressing this section. Therefore, the Final Rule adopts the changes as proposed.

18. Section 501.22 Civil Money Penalties—payment and collection

No comments were received on this provision, however; the Final Rule contains several clarifying edits.

19. Sections 501.30–501.47

The NPRM proposed few changes to the administrative proceedings set forth in §§ 501.30–.47 of the 2008 Final Rule. Because the NPRM proposed to authorize the WHD to pursue debarment proceedings, the NPRM added references to debarment in §§ 501.30, 501.31, 501.32(a), and 501.41(d). These sections of the proposal also specified that these procedures will govern any hearing on an increase in the amount of a surety bond. They also replaced the term unpaid wages with the term monetary relief to reflect the fact that WHD may seek to recover other types of relief, such as if an employer fails to provide housing or meet the three-fourths guarantee.

The Department proposed to modify § 501.33 to permit hearing requests to be filed by overnight delivery, as well as by certified mail, and to reiterate that surety bonds must remain in force throughout any stay pending appeal. The Department also proposed to add a new § 501.34(b), in order to conform H–2A procedures to those used in the H–1B program. The new provision provides discretion to an ALJ to ensure the production of relevant and probative evidence while excluding evidence that is immaterial, irrelevant or unduly repetitive without resort to the formal strictures of the Federal Rules of Evidence. Other than very minor editorial changes or corrections of typographical errors, the NPRM proposed no other changes to §§ 501.30–501.47. The Final Rule adopts the provisions as proposed, with minor changes relating to service so as not to preclude, for example, electronic service.

As noted above, several commenters representing employers generally objected to the breadth of the proposed new remedies, seeking reassurance that the Department would not seek compensatory damages for non-economic injuries such as pain and suffering, or other civil damages of the type available in Federal or State courts. These concerns are unfounded. The Department intended that the term monetary relief as used in this section be limited to its traditional meaning: for example, reimbursement of monies illegally demanded or withheld, or reimbursement of the cash value of insurance benefits, housing, transportation, subsistence or other payments which the employer was required to provide (but failed to do so), in addition to the recovery of back wages where appropriate. Nothing in the regulations allows for the recovery of pain and suffering or other civil or punitive damages for individual workers in addition to actual damages and equitable relief.

IV. Administrative Information

A. Executive Order 12866

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is significant and therefore subject to the requirements of the E.O. and to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines an economically significant regulatory action as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this Final Rule is significant, but not an economically significant regulatory action under sec. 3(f)(1) of E.O. 12866. The timeframes and procedures for fixed-site agricultural employers, H–2ALCs, or associations of agricultural producer-members to file a job offer and application, prepare supporting documentation, and satisfy the required assurances and obligations under the H–2A visa category under this regulation are substantially similar to those under the 2008 Final Rule and would not have an annual economic impact of $100 million or more. This regulation would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. In fact, this Final Rule is intended to provide agricultural employers with clear and consistent guidance on the requirements for participation in the H–2A temporary agricultural worker program. The Department, however, has determined that this Final Rule is a significant regulatory action under sec. 3(f)(4) of the E.O. and, accordingly, OMB has reviewed this Final Rule.

1. Need for Regulation

The Department has significant concerns with the 2008 Final Rule that necessitate new rulemaking. First, the Department has determined that there were insufficient worker protections in the attestation-based model of the 2008 Final Rule in which employers do not actually demonstrate that they have performed an adequate test of the U.S. labor market. It has come to the Department's attention that some employers, due to a lack of understanding or for other reasons, were attesting to compliance with program obligations with which they had not complied. The Department is accordingly concerned about the use of attestations to demonstrate program compliance.

The Department is amending its regulations through the changes discussed in the sections below with the primary purpose of adequately protecting U.S. and foreign H–2A workers. The Department took into account both the regulations promulgated in 1987, as well as the substantive re-working of the regulations in the 2008 Final Rule to arrive at a Final Rule that balances the worker protections of the 1987 Rule and the program integrity measures of the 2008 Final Rule.

Much of the 2008 Final Rule has been retained in format, as it presents an understandable regulatory roadmap; it has been used when its provisions do not conflict with the policies in this Final Rule. To the extent the 2008 Final Rule presents a conflict with the policies underpinning this Final Rule, it

has been rewritten or the provisions of the 1987 Rule have been adopted. To the extent the 1987 Rule advances the policies underlying this Final Rule, those provisions have been retained. These changes are pointed out above.

2. Alternatives

The Department has considered three alternatives: (1) to make the policy changes contained in this Final Rule; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to revert to the 1987 Rule. The Department believes that the first alternative—the policies contained in this Final Rule—represents retention of the best features of both the 1987 Rule and 2008 Final Rule. The Department has chosen not to retain the 2008 Final Rule for the reasons mentioned above. It has also rejected reversion to the 1987 Rule as inefficient and ineffective, given societal and economic changes that have occurred since its promulgation.

3. Economic Analysis

The economic analysis presented below covers the following industry sectors: Crop production; animal production; activities for agriculture; logging; and fishing, hunting, and trapping. Many commenters indicated that because of their uniqueness, reforestation and pine straw activities should not be added to the H–2A Program. The Department has agreed with these concerns and is not including these activities in this Final Rule. Reforestation and pine straw activities remain a part of the H–2B Program.

In 2007, there were over 2.2 million farms, of which 78 percent had annual sales of less than $50,000, 17 percent had annual sales of $50,000 to $499,999, and the remaining 5 percent had annual sales in excess of $500,000.[13]

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 Final Rule, against the benefits and costs associated with implementation of provisions contained in this Final Rule. The benefits and costs of the provisions of this Final Rule are estimated with respect to the baseline. Thus, costs and benefits that are statutory or that exist as a result of the 2008 Final Rule are not considered as costs and benefits of this Final Rule. We explain how the required actions of workers, employers, government agencies, and other related entities are linked to the expected benefits and costs of this Final Rule.[14]

The Department has quantified and monetized the benefits and costs of this Final Rule where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively. The analysis covers 10 years (2009 through 2018) to ensure it captures all major benefits and costs.[15]

In addition, the Department provides a qualitative assessment of transfer payments associated with the increased wages and protections of U.S. workers. Transfer payments, as defined by OMB Circular A–4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect but do not result in additional costs or benefits to society. When summarizing the benefits or costs of specific provisions of this Final Rule, we present the 10-year averages to estimate the typical annual effect or 10-year discounted totals to estimate the present value of the overall effects.

The Department reviewed the public comments submitted in response to the NPRM and made revisions where feasible in the economic analysis of this Final Rule. The Department used projected H–2A participant values in the NPRM because FY 2009 was not yet complete. The economic analysis of this Final Rule, however, uses the actual participant values for the full FY 2009. The Department also removed reforestation and pine straw employers and workers from the analysis. For many of the impacts included, these modifications caused a relative decrease in magnitude from the NPRM to this Final Rule.

Additional revisions to this Final Rule relative to the NPRM are the inclusion of costs to employers for paying visa and border crossing fees for H–2A workers, costs related to the new requirement that employers disclose the terms and conditions of the employment no later than the time an H–2A worker applies for a visa, and costs related to the requirement that employers provide a copy of revised contracts to affected workers where the employer applies for an extension of the certification. The Department also made several changes to impacts already included in the NPRM, including revising the documentation retention requirement and the assumption related to the time required by employers to review the new rule. Finally, the Department includes transfer estimates related to the larger bonding requirement for large H–2ALCs.

4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the following provisions of this Final Rule against the baseline (*i.e.,* the 2008 Final Rule): the new methodology for estimating the AEWR, an enhanced U.S. worker referral period for employers after certification, the increased costs to the Department for developing and maintaining an electronic job registry, changes in administrative burdens placed on SWAs by increased timeframes for recruitment, changes in administrative benefits resulting from eliminating employment verification requirements, enhanced worker protections resulting from compliance certification, enhanced coverage of expenses for transportation to and from the place from which the worker departed to work for the employer, coverage of visa/border crossing expenses, changes in the requirements for contract revisions and the disclosure of terms and conditions, and changes in the requirement for housing inspections. For each of these subjects, the relevant costs and benefits are discussed, as well as transfer payments that may apply.[16]

The Department's analysis below does not consider impacts associated with activities not required by this Final Rule or provisions that are not changing between the 2008 Final Rule and this Final Rule. For instance, several commenters expressed concern about the value of the requirement in the NPRM that H–2A employers retain the recruitment report and supporting documentation and other records for 5 years rather than 3 years. The Department concurs with this concern. This Final Rule, similar to the 2008 Final Rule, requires that employers maintain a complete recruitment report and all supporting documentation for 3 years. Because this requirement is not a change from the 2008 Final Rule, there is no additional cost associated with the provision, and the Department does not consider it in this analysis.[17]

a. New Methodology for Estimating the AEWR

The Department has determined that the wages of agricultural workers have been adversely impacted to a far greater

[13] Source: 2007 Census of Agriculture, United States Department of Agriculture.

[14] In response to comments, the Department includes the calculations used in the estimates of costs and benefits in order to increase the transparency of the analysis. The total cost and benefit estimates presented in this analysis are subject to rounding errors.

[15] For the purposes of the cost-benefit analysis, the 10-year period starts on October 1, 2009.

[16] For the purpose of this analysis, H–2A workers are considered temporary residents of the U.S.

[17] The NPRM included the assumption that employers require 1 hour to review the new rule. The Department, in response to public comments, increased the estimate for this requirement to 2 hours.

extent than anticipated by the 2008 Final Rule. As discussed further below, the change in the calculation of the AEWR from the method used under the 1987 Rule to a method based on local prevailing wages under the 2008 Final Rule resulted in a reduction of farm worker wages in many labor categories and an increase in only a few others.

The 2008 Final Rule based the estimation of the AEWR on data from the OES Wage Survey collected by BLS. This Final Rule changes the methodology for estimating the AEWR, basing it instead on data from the USDA survey. The change to the OES method of computing the AEWR resulted in a decline in the average certified wage for H–2A workers to $8.02 per hour. This wage calculated under the 2008 Final Rule was 11.2 percent lower than the $9.04 average wage for FY 2009 applications received before January 19, 2009 and processed under the 1987 Rule, and it was 10.8 percent lower than the $9.00 average wage rate for FY 2008 applications, all processed under the 1987 Rule.

The 2008 Final Rule based the estimation of the AEWR on the OES Wage Survey collected by BLS, whereas the basis for the AEWR under the 1987 Rule was data compiled by the USDA NASS. This Final Rule changes the methodology for estimating the AEWR to the USDA survey. As explained above, the wage survey methodology in this Final Rule is associated with a nationwide average wage rate that is $1.02 higher than that under the 2008 Final Rule. That is, a nationwide average H–2A wage rate of $9.04 as opposed to $8.02.

i. Transfers

The principal transfers of the higher wages are from H–2A workers to U.S. citizens and from U.S. employers to both H–2A workers and U.S. citizens.

A transfer from H–2A workers to U.S. citizens arises because, as labor market research indicates, as agricultural wages for U.S. workers increase, a larger number of U.S. workers may be attracted to work in the agricultural labor force. While some of these workers may be drawn from work in other industries, some of these workers would otherwise remain unemployed or out of the labor force entirely, earning no salary. The increase in labor supply resulting from higher wages is captured by the so-called wage elasticity of the U.S. agricultural labor supply. A recent study found that this elasticity is 0.43; for each 1 percent increase in wages, there is a 0.43 percent increase in the labor supply of U.S. agricultural workers. Another study estimated a labor supply elasticity of 0.36.[18] Although the increase in wages for documented workers in agriculture will lead to complex labor market dynamics which involve both labor supply and demand and which are difficult to quantify, the Department believes that the net effect of the expected increase in wages as a result of this Final Rule will be more U.S. workers employed in agriculture.

The higher wages for workers associated with the new methodology for estimating the AEWR is beneficial to U.S. workers, improving their ability to meet costs of living and to spend money in their local communities.[19] These are important concerns to the current Administration and a key aspect of the Department's mandate to ensure that the wages and working conditions of similarly employed U.S. workers are not adversely affected. The increase in the wage rates for some workers represents a transfer from agricultural employers to their workers, both H–2A and corresponding U.S. workers.

The Department received comments focusing on the spending patterns with respect to the transfers, noting that since the money received by H–2A workers eventually leaves the U.S., it results in a transfer from the U.S. economy to foreign economies. The ultimate destination of the funds, which cannot be assessed with any certainty, is not relevant to this analysis. E.O. 12866 does not require that consumption patterns of recipients of transfers be considered in the cost analysis.

There may be a transfer of costs from government entities to employers as a result of lower expenditures on unemployment insurance benefit claims. Previously unemployed individuals who were not willing to accept a job at the lower wage may now be willing to accept the job and would not need to seek new or continued unemployment insurance benefits. The Department, however, is not able to quantify these transfer payments with precision. Difficulty in calculating these transfer payment arises from uncertainty about the actual entries of H–2A workers, the quantity of corresponding U.S. workers, the types of occupations to be included in future filings, the ranges of wages in the areas of actual employment, and the point at which any occupation in any given area is subject to the prevailing wage (hourly or piece rate) or Federal or State minimum wage or collectively bargained wages, rather than the application of the OES or USDA FLS to the calculation of the AEWR.

Several commenters noted that, in rare instances, the prevailing wage rate increases above the AEWR mid-season due to market forces. In the Department's experience, prevailing wage increases occur rarely. In FY 2009, for instance, the AEWR was not applicable in only 10 percent of the cases certified before the implementation of the 2008 Final Rule. In addition, some states do not perform prevailing wage surveys, so the Department cannot determine the magnitude of the difference between the prevailing wage and the AEWR for those States. Due to these data limitations, the Department is not able to estimate the frequency that the prevailing wage increases beyond the AEWR, the duration for which the difference exists, or the magnitude of the difference and, thus, the Department does not quantify the transfer resulting from such increases.

Other commenters noted that in some instances, the presence of Collective Bargaining Agreements (CBAs) is associated with wages above the AEWR. Agricultural employers who are parties to a CBA would be required by the CBA to pay the collectively-bargained wage rate (unless it was lower than one of the alternative wage rates). The requirement in this Final Rule that employers pay the collectively bargained wage rate when it is the highest alternative only codifies what the Department understands to be required by the labor contract. Therefore, this provision does not in itself represent an additional burden to employers.

ii. Costs

In standard economic models of labor supply and demand, an increase in the wage rate is an increased production cost to employers, and it will lead to a reduction in the demand for agricultural labor. Because production costs increase with an increase in the wage rate, there is a resulting loss in profits for agricultural employers. In addition, workers who would have been hired at a lower wage rate are not hired at the higher wage rate, resulting in forgone earnings for workers. The loss in profits for agricultural employers and the

[18] See Julie L. Hotchkiss and Myriam Quispe-Agnoli, "Employer Monopsony Power in the Labor Market for Undocumented Workers," Federal Reserve Bank of Atlanta, Working Paper 2009–14a, June 2009, and Duffield, J.A. and R. Coltrane, 1992, "Testing for Disequilibrium in the Hired Farm Labor Market," American Journal of Agricultural Economics, 74: 412–20. The Department includes these elasticity estimates for reference. They are not used in the analysis.

[19] An additional transfer noted by a commenter is increased remittances to the worker's home country. Due to data limitations, however, the Department does not address this issue quantitatively.

forgone earnings combine to form what is known as "deadweight loss" because it is lost to society. In order to estimate this lost benefit, we would need to calculate the estimated reduction in employment, assuming an elastic labor demand. The elasticity of labor demand measures the extent to which employers respond to an increase in wages by lowering employment. Using standard estimates of the elasticity of labor demand, the deadweight loss is not projected to be large.[20]

b. Coverage of Visa/Border Crossing Expenses

Under this Final Rule, the employer must pay the visa and border crossing fees of the H–2A workers they employ. As the Department recognized in the preamble to the 2008 Final Rule, requiring employers to bear the full cost of their decision to import foreign workers is a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers. Government-mandated fees such as visa application, border crossing, and visa fees are integral to the employer's choice to use the H–2A program to bring temporary foreign workers in the country.

Transfers

The reimbursement of visa application and border crossing fees by employers is a transfer from employers to H–2A workers. Each H–2A worker must pay a visa application fee of $131.00 and a reciprocity fee based on their country of origin. To be conservative in its estimate of costs to U.S. employers, the Department used the maximum reciprocity fee of $100,000 to obtain a total cost per H–2A worker of $231.00 ($131.00 + $100.00).

c. Enhanced U.S. Worker Referral Period

Although the recruitment requirements of employers will not change substantively, this Final Rule increases the amount of time that employers must accept referrals for temporary agricultural opportunities from qualified U.S. workers. Specifically, this Final Rule requires that SWAs extend their job advertising efforts on behalf of employers so as to keep the job order on active status through 50 percent of the period of employment, as opposed to 30 calendar days after the date of need under the current regulation.

i. Costs

The extension of the referral period in this Final Rule will result in increased SWA staff time required to maintain job orders for the new U.S. worker referrals. SWAs will need to maintain additional job orders for the new applicants to the H–2A program in the States in which temporary workers are expected to perform work and for all applicants to the H–2A program in the States designated as States of traditional or expected labor supply. The Department estimates the average annual cost associated with this activity to be $0.4 million.[21]

The Department recognizes that the requirement that employers accept referrals for a longer time will likely lead to additional referrals and, therefore, additional costs to employers. However, the Department does not have sufficient data on the number of average additional referrals (and the ensuing additional cost in terms of contractual obligations to a greater number of workers) to accurately monetize such a cost to employers.

The expansion of DOL oversight of the H–2A program will result in increased time dedicated by the Department to review applications. We estimate this cost by multiplying the total number of new applications by the time required for Department staff to review each application, and then by the average hourly compensation of this staff. The Department estimates the average annual cost associated with this activity to be $0.5 million.[22]

ii. Transfers

As more U.S. workers are hired as a result of this Final Rule, those workers who were previously unemployed will no longer make claims for new or continued unemployment insurance benefits.[23] Other things constant, we expect the States to experience a reduction in unemployment insurance expenditures as a consequence of U.S. workers being hired. However, the Department is not able to quantify these transfer payments due to a lack of adequate data.

d. New Electronic Job Registry

Under this Final Rule, the Department will create and maintain an electronic job registry. The Department will post and maintain employers' H–2A job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The job registry will serve as a public repository of H–2A job orders for the duration of the enhanced U.S. worker referral period: 50 percent of the certified period of employment. The job orders will be posted in the registry by a CO upon the acceptance of each submission. The posting of the job orders will not require any additional effort on the part of the SWAs or H–2A employers.

i. Benefits

The job registry will improve the visibility of agricultural jobs to U.S. workers. Thus, the job registry represents a benefit to society by expanding the period during which agricultural jobs are available to U.S. workers and, therefore, improving their employment opportunities. In addition, the establishment of a job registry will provide greater transparency with respect to the Department's administration of the H–2A program to the public, members of Congress, and other stakeholders. Transferring these agricultural job orders (Form ETA–790 and attachments) into electronic records for the job registry will eliminate

[20] Many commenters on the NPRM mentioned the effect of the proposed rule on food prices. The effect on food prices is incorporated in this calculation through the demand curve which fully summarizes the employer's optimization problem—including prices in the product market.

[21] Between July 1, 2007 and June 30, 2008, there were 70,722 U.S. migrant seasonal farm worker referrals, or 194 (70,722/365) referrals per day. The Department scales up this value by the growth of the total number of H–2A applications across the analysis period to estimate the number of referrals per day in each year. The Department multiplies the number of referrals per day (194) by the extension of the recruitment period (86 days) to obtain a total of 16,566 (194×86) extra referrals in 2009. We assume that a State employee with a job title of "Compensation, Benefits, and Job Analysis Specialists" conducts this activity. The median hourly wage for this occupation is $21.69, which we scaled up by a factor of 1.52 to account for employee benefits (source: Bureau of Labor Statistics), resulting in a total hourly labor cost of $32.97 ($21.69 $\times$ 1.52). The Department then multiplies the total number of extra referrals by the SWA staff time to place a job order, and the hourly compensation of an SWA staff member. The Department assumes that it takes SWA staff 30 additional minutes (0.5 hours) per application to maintain a job order. These assumptions result in a total cost of $273,087 ($16,566 \times 0.5 \times \$32.97$) in 2009. The Department then repeats this calculation for each year of the analysis period and then averages the costs to obtain an average annual cost of $351,096.

[22] The Department assumes that Department staff (GS–12, step 5) spend one additional hour to review each application. The hourly salary for a GS–12, step 5 staff ($31.34) was multiplied by an index of 1.69 to account for Federal government employee benefits and proportional operating costs, resulting in an hourly rate of $52.96. The 1.69 index is derived by using the Bureau of Labor Statistics' index for salary and benefits plus the Department's analysis of overhead costs averaged over all employees of the Department's OFLC. The Department multiplies this hourly labor cost by the cumulative number of new applications received in 2009 (2,717) to obtain a total cost of $143,887 ($52.96 $\times$ 1 $\times$ 2,717) in 2009. The Department repeats this calculation in each year of the analysis, using the number of new applications projected to be received in each year, and averages the results to obtain an average annual cost of $469,737.

[23] Similarly, when U.S. workers shift from other industries to fill agricultural jobs, additional workers from the pool of the unemployed will inevitably fill the vacant positions.

unnecessary paper records currently maintained by the CO and result in a better and more complete record of H–2A labor certification petitions. Finally, because Form ETA–790 and attachments are among the documents most commonly requested by members of the public, Congress, and other stakeholders, the Department anticipates some reduction in FOIA requests for these agricultural job orders, thereby saving staff time and resources.

ii. Costs

The establishment of an electronic job registry in this Final Rule imposes several costs directly on the Department: The increased costs for developing business requirements and design documentation outlining the functional components of the job registry; increased costs for application programming, testing, and implementation of the electronic job registry into a production environment; increased costs to maintain and continuously improve the electronic job registry; and additional staff time to maintain job orders placed on the registry. The Department expects that the majority of costs to develop and implement the new electronic job registry will occur within the first 12 months of implementing the regulation. Out-year costs will include maintenance and additional staff time to maintain job orders on the registry. The Department estimates average annual costs of maintaining an electronic job registry to be approximately $0.5 million.[24]

e. Reduced SWA Administrative Burden By Eliminating Employment Verification

Under this Final Rule, SWAs will no longer be responsible for conducting employment eligibility verification activities. These activities include the completion of the Form I–9 and the vetting of application documents by SWA personnel. However, there will be additional costs to employers as they resume the function of their own employment eligibility verification.

i. Benefits

Under the 2008 Final Rule, SWAs are required to complete Form I–9 for agricultural job orders and inspect and verify the employment eligibility documents furnished by the applicants.[25] Under this Final Rule, SWAs will no longer be required to complete this process, resulting in cost savings. To estimate the avoided costs of employment eligibility verification activities, the Department multiplies the estimated number of U.S. farm workers that are referred to H–2A jobs through One-Stop Career Centers by the cost per application.[26] The Department estimates average annual avoided costs of employment eligibility verification activities to be $ 0.03 million.

Under the 2008 Final Rule, after the adjudication of employment eligibility, SWAs issue certifications for eligible workers. Under this Final Rule, SWAs will no longer be required to issue such certifications. The avoided costs include the value of staff time to prepare and print the certification form, as well as the costs of paper, envelopes, and postage. The Department estimates annual avoided costs of certification issuance to be $0.02 million.[27]

SWAs are also required to retain records for the employment eligibility decisions. Under this Final Rule, SWAs will no longer be required to retain the records. The avoided costs include the value of staff time to copy, organize, and store all relevant documents, as well as the material costs of paper and photocopy machine use. The Department estimates average annual avoided costs equal to approximately $0.02 million.[28]

The employment eligibility verification activities currently in place require the training of SWA to properly complete the process. Under this Final Rule, SWAs will no longer incur the costs of this training. These costs include the value of staff time to attend training courses, the staff time to teach training courses, and the material costs of producing training manuals. The Department estimates average annual avoided costs of SWA staff training equal to approximately $0.4 million.[29]

[24] The Department assumes first-year development, testing, and implementation staff time and labor categories as follows: Project Manager II, 1,253 hours; Computer Systems Analyst II, 1,253 hours; Computer Systems Analyst III, 2,037 hours; Computer Programmer III, 3,995 hours; Computer Programmer IV, 3,995 hours. For out-year maintenance costs, the Department assumes that 376 hours will be required for the following labor categories: Program Manager, Computer Systems Analyst II & III, Computer Programmer III & IV, Computer Programmer Manager, Data Architect, Web Designer, Database Analyst, Technical Writer II, Help Desk Support Analyst, and Production Support Manager. Finally, the Department uses the following loaded rates based on an Independent Government Cost Estimate (ICGE) produced by OFLC and inclusive of direct labor and overhead costs for each labor category: Program Manager, $138.34; Project Manager II, $106.90; Computer Systems Analyst II, $92.14; Computer Systems Analyst III, $109.84; Computer Programmer III, $89.63; Computer Programmer IV, $107.72; Computer Programmer Manager, $123.88; Data Architect, $104.99; Web Designer, $124.76; Database Analyst, $77.80; Technical Writer II, $84.81; Help Desk Support Analyst, $55.28; Production Support Manager—$125.76. The Department multiplies the assumed number of hours by the appropriate labor rates to obtain a first-year cost of $1,261,554 and a cost in subsequent years of $464,341. The Department averages the costs over the 10-year analysis period to obtain an average annual cost of $544,063.

[25] The cost estimate assumes the use of the Form I–9 rather than the E-Verify system. The most recent count indicates that relatively few SWAs are using E-Verify.

[26] To estimate the cost per application, the Department sums the time for the SWA staff to complete the Form I–9, the time required to review employment eligibility documents, and the time to file the completed form in a systematic manner, to obtain a total of 13 minutes of labor per application. The Department then divides this result by 60 to approximate the fraction of an hour (0.22) required to process each application. The Department assumes this work would be done by a SWA Compensation, Benefits, and Job Analysis Specialist at an hourly rate of $32.97 ($21.69 multiplied by 1.52 to account for employee benefits). For 2009, the Department then takes the total number of U.S. migrant seasonal farm worker (MSFW) referrals between July 1, 2007 and June 30, 2008 (70,722) and multiplies this total by the percentage of MSFWs that did not refer themselves (10 percent) and by the percentage of MSFW referrals that were H–2A jobs (67 percent) to obtain an annual total of 4,715 referrals ($70{,}722 \times 0.10 \times 0.67$). The Department then multiplies this annual number of referrals by the fraction of an hour required to process each application and by the hourly wage rate to obtain a total avoided cost in 2009 of $33,679 ($4{,}715 \times 0.22 \times \$32.97$). The Department then repeats this calculation for each year of the analysis period and averages the results to obtain an average annual avoided cost of $33,679.

[27] The Department estimates the cost of staff time by multiplying the number of U.S. farm workers who are referred to H–2A jobs through One-Stop Career Centers (4,715 in 2009, as calculated above) by the time required to print the form (5 minutes or 0.08 hours) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist ($21.69) scaled by 1.52 to account for employee benefits ($32.97). This results in total labor costs of $12,954 ($4{,}715 \times 0.08 \times \$32.97$) in 2009. The Department then adds to this cost the materials cost per application assuming that the cost of a sheet of paper, cost of an envelope, and cost of postage per envelope are $0.02, $0.04, and $0.44, respectively. This calculation results in total materials cost of $2,358 ($4{,}715 \times (\$0.02 + \$0.04 + \$0.44)$). Summing the labor and materials costs results in a total avoided cost of $15,311 for 2009. The Department repeats this calculation for each year of the analysis period to obtain an average annual avoided cost of $15,311.

[28] The Department estimates the cost of staff time by multiplying the total number of H–2A workers requested (4,715 in 2009, as calculated above) by the time required to copy, organize, and store all relevant documents (5 minutes or 0.08 hours) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist ($21.69) scaled by 1.52 to account for employee benefits (for a total hourly labor cost of $32.97). This results in a total labor cost for 2009 of $12,954 ($4{,}715 \times 0.08 \times \$32.97$). The Department then adds to this labor cost the materials cost per record by multiplying the total number of H–2A workers requested (4,715) by the cost per record, assuming the number of sheets photocopied is 5 and cost per photocopy is $0.12. This calculation results in total materials cost of $2,829 ($4{,}715 \times (5 \times \$0.12)$). Summing the labor and materials costs results in a total avoided cost of $15,782 for 2009. The Department repeated this calculation for each year of the analysis period to obtain an average annual avoided cost of $15,782.

[29] The Department estimates the avoided costs of attending training courses by multiplying the number of One-Stop Career Centers (1,794) by the number of workers trained per center (2), the length

Continued

ii. Costs

Costs associated with retention of documentation and application fees exist as a result of the 2008 Final Rule and, therefore, are not considered in this analysis. The Department acknowledges that employers will experience increased costs related to employment eligibility verification for referred employees who will no longer need to be verified by SWAs under this Final Rule. The cost to employers is, however, not equivalent to the cost representing the benefit to SWAs, as employers are not required to also complete the certification required of SWAs.

f. Enhancing Worker Protections Through Compliance Certification

The 2008 Final Rule used an attestation-based model: Employers conducted the required recruitment in advance of application filing and, based upon the results of that effort, applied for certification from the Department for a number of foreign workers to fill openings. That is, under the 2008 Final Rule, employers attested that they had undertaken the necessary activities and made the required assurances to workers. In contrast, under the 1987 Rule, such actual efforts or documentation were reviewed by a Federal or State official to ensure compliance. The Department has determined that there are insufficient worker protections in the attestation-based model in which employers merely confirm, and do not actually demonstrate, that they have performed an adequate test of the U.S. labor market. As a result, this Final Rule mandates a fully-supervised labor market test and requires the submission of documentation, such as workers' compensation, housing certification issued by the SWA, and proof of registration and surety bond for H–2ALCs.

i. Costs

The certification of compliance will impose some costs on employers because they will need to submit copies of recruitment activities, details of job offers, workers' compensation documentation, and for H–2ALCs, registration, surety bond, and work contracts, rather than attesting that they have complied with the required elements of the H–2A program. Employers are already required by the 2008 Final Rule to obtain and retain these documents, and this Final Rule simply requires the submission of those documents, particularly workers' compensation and housing inspections, to the Department in order to satisfy the underlying statutory assurances. The Department estimates the cost of this requirement by multiplying the total number of applications by the difference in time to prepare the new H–2A application as compared to that under the 2008 Final Rule. We then multiply this product by the average compensation of a human resources manager at an agricultural business. Because the H–2A application in this Final Rule requires more to be submitted than the application under the 2008 Final Rule, we add the incremental costs of photocopying the additional pages and the postage required to ship them to DOL.[30] This calculation yields an average annual cost to employers of $0.6 million.[31]

ii. Transfers

The Department maintains its requirement that an H–2ALC post a surety bond to demonstrate its ability to meet its financial obligations to its employees.[32] In addition to the bond amounts specified in the 2008 Final Rule, the Department is adding larger bonding requirements applicable to H–2ALCs with larger crews. Under the 2008 Final Rule, H–2ALCs seeking to employ 50 or more workers are required to obtain a surety bond of $20,000. Under this Final Rule, H–2ALCs seeking to employ 75 to 99 workers will be required to obtain a surety bond in the amount of $50,000, and H–2ALCs seeking to employ 100 or more workers are required to obtain a surety bond in the amount of $75,000. The Department estimates average annual transfers due to increased surety bond requirements to be approximately $0.03 million.[33]

of training (3 hours), and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist ($32.97 as calculated above). This calculation results in a total avoided cost of training courses of $354,876 in 2009 (1,794 × 2 × 3 × $32.97). The Department estimates the avoided costs of trainer workload by multiplying the number of trainers (1 per 5 One-Stop Career Centers, or 359 trainers (1,794/5)) by the length of training (3 hours) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist ($32.97). This calculation results in a total avoided cost of trainer workload of $35,488 in 2009 (359 × 3 × $32.97). The Department estimates the avoided cost of producing training manuals by multiplying the number of One-Stop Career Centers (1,794) by the number of workers trained per center (2), the pages per training manual (30) and the cost per photocopy ($0.12). This calculation results in a total avoided cost of producing training manuals of $12,917 in 2009 (1,794 × 2 × 30 × $0.12). The Department sums these costs to obtain a total avoided training cost of $403,281 ($354,876 + $35,488 + $12,917) in 2009. The Department repeated this calculation for each year of the analysis period to obtain a total average avoided cost of $403,281.

[30] The Department received 8,150 applications in 2009 and projects the annual number of applications to increase to 22,601 by 2018. To estimate the materials cost, the Department estimates that 150 additional pages will need to be photocopied at a cost of $0.12 per photocopy. These assumptions result in a cost of $146,700 in 2009 (8,150 × 150 × $0.12) for photocopying. The additional pages weigh approximately 17.6 ounces and require $0.80 in postage per application. This cost estimate is based on mailing the additional 150 pages via Priority Mail (2-day delivery) from Topeka, Kansas to the NPC in Chicago (source: *http://postcalc.usps.gov*). These assumptions result in a cost of $6,520 (8,150 × $0.80) for mailing applications in 2009. Summing the photocopying and mailing costs results in a total materials cost of $153,220 in 2009.

[31] The Department received 8,150 applications in 2009 and projects the annual number of applications to increase to 22,601 by 2018, of which approximately 2,717 and 2,421 of the applications submitted in 2009 and 2018, respectively, would not have been previously submitted. The Department estimates that this work would be performed by a human resources manager at an agricultural firm at an hourly rate of $42.15 (as published by the Department's OES Survey, O*Net Online), which we multiplied by 1.43 to account for employee benefits (source: BLS) to obtain a total hourly wage rate of $60.27. For applications that would not have been previously submitted, the Department assumes that preparing an application using the certification application process, as compared to the attestation process, will result in increased agricultural employer staff time of 30 minutes (0.5 hours) per application. These assumptions result in a total labor cost of $81,873 in 2009 (2,717 × 0.05 × $60.27) for applications that would not have been previously submitted. For applications that would have been previously submitted under the H–2A program, the Department assumes there will be a 20-minute (0.33 hours) increase in staff time using the certification application process. The Department determined the number of applications that would have been previously submitted (5,433) by subtracting the number of new applications that would not have been previously submitted (2,717) from the total number of applications received in 2009 (8,150). These assumptions result in a total labor cost of $109,164 in 2009 (5,433 × 0.33 × $60.27) for applications that would not have been previously submitted. Summing the labor and materials costs for 2009 results in a total cost of $344,257 ($81,873 + 109,164 + 153,220). Using the projected number of applications, the Department repeats this calculation for each year of the analysis period to obtain an average annual cost of $573,481.

[32] Some States (*e.g.,* California) already have existing surety bond requirements for FLCs.

[33] The Department assumes that 4 percent and 2 percent of H–2ALCs hire 75–99 workers and 100 or more workers, respectively. The Department also assumes that the surety bond premium is approximately 1.5 percent of the total bond amount. To calculate the increased cost to H–2ALCs that hire 75–99 workers, the Department multiplies the number of FLCs participating in the H–2A program (594) by the percent of H–2ALCs that hire 75–99 workers (4 percent), the increase in bond size required ($30,000), and the bond premium as a percent of the total bond value (1.5) to obtain a total of $10,699 in 2009. To calculate the increased cost to H–2ALCs that hire 100 or more workers, the Department multiplies the number of FLCs participating in the H–2A program (594) by the percent of H–2ALCs that hire 100 or more workers (2 percent), the increase in bond size required ($55,000), and the bond premium as a percent of the total bond value (1.5 percent) to obtain a total of $9,807 in 2009. The Department then sums these two values to obtain a total value of the transfer of $20,506 ($10,699 + $9,807) in 2009. The Department repeats this calculation for each year of the analysis to obtain an average value of the transfer of $26,338.

g. Contract Revisions and the Disclosure of Terms and Conditions

This Final Rule requires that employers disclose the terms and conditions of the employment no later than the time an H–2A worker applies for a visa in the foreign country rather than by the first day of employment. This modification to the 2008 Final Rule requires that employers mail the terms and conditions document to workers instead of delivering the document to workers by hand once they arrive at the work site. The Department estimates average annual costs of mailing terms and conditions disclosures to be approximately $0.2 million.[34]

This Final Rule requires employers to provide a copy of a revised contract to affected workers when the employer applies for an extension of the H–2A certification. This occurs in situations in which employers are required to adjust their labor schedules due to unforeseen events, such as bad weather. The Department estimates average annual costs of contract revisions to be approximately $0.02 million.[35]

h. Changes in the Requirement for Housing Inspections

This Final Rule retains most of the 2008 Final Rule provisions governing housing inspections. The employer's obligations with respect to housing standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and family housing under the regulations remain the same as under the 2008 Final Rule. One notable difference, however, is the timeframe in which an inspection of the employer's housing must occur.

In this Final Rule, when an employer places a Form ETA–790 with the SWA serving the area of intended employment 60 to 75 days before the date of need, the employer is required to disclose the location and type of housing to be provided to domestic and H–2A workers. Upon receipt of the Form ETA–790, the SWA will schedule and conduct an inspection of the employer's housing. Unlike the 2008 Final Rule, this Final Rule requires that the pre-occupancy inspection of the employer's housing be completed prior to the issuance of a temporary labor certification, which is 30 days before the date of need.[36]

The Department expects that this change in timing will have a minimal economic impact on employers. Because employers are required to place the job order with the SWA between 60 and 75 days prior to the date of need, the SWA will have between 30 and 55 days to schedule and conduct a timely inspection of the housing. The Department believes that this enhanced recruitment timeframe will also provide a sufficient amount of time for SWAs to conduct the required pre-occupancy housing inspection. Prior to the 2008 Final Rule, the Department's experience is that most employers who routinely use the H–2A program prepare their housing in advance of inspection and/or communicate with SWA staff with respect to changes in the location(s) or type(s) of housing before application filing occurred at 45 days prior to the date of need. This past practice was necessary, particularly among large grower associations, to allow SWAs to schedule and conduct pre-occupancy housing inspections in a timely manner and to minimize disruptions to the process of obtaining labor certification, petitioning for workers at USCIS, obtaining visas through the U.S. consulate, and bringing foreign workers to the worksite by the certified date of need.

The Department examined program activity data for FY 2007 and FY 2008 to determine if this Final Rule's requirement of completion of a pre-occupancy housing inspection prior to temporary certification would have a significant negative impact on employers. For employer applications certified in FY 2007 and FY 2008, the Department issued determinations an average of 27 calendar days before the employer's certified start date of need; the median in both years was 29 calendar days before the employer's certified start date of need. This processing timeframe provided employers with sufficient time to petition USCIS and obtain visas from the U.S. consulate in order to bring foreign workers from their place of residence to the worksite by the certified start date of need. Any downstream delays in processing at either USCIS or the U.S. consulate, such as scheduling and conducting interviews for foreign workers, cannot be attributed to the Department's processing of the temporary labor certification.

The Department also examined the percentage of H–2A labor certifications that were issued during FY 2007 and FY 2008 beyond the statutory 30 days timeframe such that the issuance of the determination would have negatively affected the employer's ability to obtain foreign workers by the certified start date of need. To do this, the Department assumed that, following issuance of the temporary labor certification, generally employers would receive the labor certification within 2 days, file an I–129 petition for non-premium processing and receive approval from USCIS within 5 business days, file appropriate applications with DOS and obtain visas within 5 days, and transport foreign workers to the worksite in the U.S. over the course of 3 days. Using these assumptions, the Department determined that any labor certification issued later than 15 business days before the employer's certified start date of need would have negatively impacted the employer's ability to obtain foreign workers.

For FY 2007, of the H–2A labor certification applications approved between October 1, 2006 and September 30, 2007 (273 out of 4,526 certifications) for employers and associations of employer producers, approximately 6 percent were issued by the Department less than 15 days before the certified start date of need, thus having a potential adverse impact. For FY 2008, of the H–2A labor certification applications approved between October 1, 2007 and September 30, 2008 (271 out of 5,014 certifications) for employers and associations of employer producers, approximately 5.4 percent were issued

[34] The Department assumes that 50 percent of employers use foreign recruiters, which means that terms and conditions for all recruited workers can be sent directly to the recruiter who then disseminates the terms and conditions to workers. To estimate the cost for this population in 2009, the Department divides the total number of H–2A workers certified in 2009 (99,472) by the average number of workers per employer application (12) and then multiplies this value by 50 percent to obtain a total of 4,145 packages send to recruiters. This value is then multiplied by the cost of shipping a package to Mexico via the U.S. Postal Service ($9.60) to obtain a total cost of $39,789 for mailing terms and conditions to foreign recruiters. To estimate this cost for employers that do not use foreign recruiters in 2009, the Department multiplies the total number of H–2A workers certified in 2009 (99,472) by the percent of employers who do not use foreign recruiters (50 percent) and the cost of shipping a mailer to Mexico via the U.S. Postal Service ($1.59) for a total cost in 2009 of $79,080. The Department then sums these two costs to obtain a total cost in 2009 of $118,869 ($39,789 + $79,080). The Department then repeats this calculation for each year of the analysis period, using the projected number of H–2A workers certified each year, to obtain an average annual cost of $172,200.

[35] To estimate the cost of photocopying the revised ETA–790 for each worker in 2009, the Department multiples the total number of H–2A workers certified (99,472), the number of pages in the ETA–790 (1 page), and the cost per photocopy ($0.12) to obtain a total cost in 2009 of $11,937. The Department repeats this calculation each year to obtain an average annual cost of $17,292.

[36] The Department notes that such inspection is mandated by other regulations governing the agricultural clearance process. Pursuant to 20 CFR 654.400, SWAs must deny intrastate and interstate recruitment services unless, among other things, a preoccupancy inspection has been conducted (with conditional access permitted for H–2A employers for a limited time period). These regulations govern all migrant seasonal worker housing inspections.

by the Department less than 15 days before the certified start date of need. Some proportion of these resulted from delays in the housing inspection, but the Department cannot identify how many were delayed for this reason alone apart from those delayed for other reasons (for example, a failure of the employer to provide the Department with evidence of the coverage of workers by workers' compensation). The Department's program experience has demonstrated that the new requirement for a pre-occupancy housing inspection prior to temporary labor certification has not and will not have a significant impact on employers' ability to obtain foreign workers by the certified start date of need.

Because of data limitations, we were not able to monetize the costs and benefits associated with this provision. The Department believes such costs will be minimal.

i. Enhanced Coverage of Transportation Expenses

Under the 2008 Final Rule, the employer provides for travel expenses and subsistence for foreign workers only to and from the place of recruitment, defined as the appropriate U.S. consulate or port of entry. Under this Final Rule, the Department no longer limits the definition of the place of recruitment to the appropriate U.S. consulate or port of entry but rather reverts to the standard in place under the 1987 Rule. The employer is required to pay the costs of transportation from the worker's place of recruitment to and from the place of employment. The Department estimates average annual costs of these additional transportation expenditures to be approximately $9.1 million.[37]

j. Other

During the first year that this Final Rule would be in effect, all employers would need to learn about the new application process and how compliance will be judged. We estimate the cost of this process by multiplying the number of applications submitted by employers by the time required to read the new Final Rule and any educational and outreach materials that explain the H–2A application process under this Final Rule by the average compensation of a human resources manager at an agricultural business. The Department estimates this one-time cost to employers at $1.0 million.[38]

This Final Rule requires that contracts be translated into the languages of employees who do not speak English. Employers are already required to provide contract translation for Spanish-speaking workers. The Department multiplies the percent of H–2A workers who do not speak English or Spanish by the total number of H–2A applications to estimate the number of contract translations required.[39] The Department then multiplies the resulting value by the average number of pages per contract and the cost per page for translation.[40] The Department estimates average annual costs of contract translation at $0.08 million.

This Final Rule also requires that H–2ALCs submit photocopies of contracts with fixed agricultural sites as well as the original surety bonds. To estimate the number of H–2ALCs that will be subject to this requirement, the Department multiplies the total number of H–2A applications by the percent of H–2A employers who are foreign labor contractors. To estimate the cost of submitting photocopies of contracts, the Department multiplies the resulting value by the average number of pages per employer contract and the cost per photocopy, resulting in average annual costs of contract submission of $0.006 million.[41] To estimate the cost of providing the surety bond, the Department multiplies the number of H–2ALCs that will be subject to this requirement by the average number of pages per surety bond and the cost per photocopy, resulting in average annual costs of surety bond documentation of $0.001 million.[42]

To inform the public about this Final Rule, the Department will produce and deliver outreach and education materials to employers in order to explain the new application process and how compliance will be judged. We estimate this cost by multiplying the hours required to develop, maintain, and distribute such materials by the average compensation of Department staff and find average annual cost to the Department equal to $0.1 million.[43]

Several commenters noted that H–2A employers would incur additional costs associated with off-site interviews and

[37] The Department estimates the cost of this requirement in 2009 by multiplying the total number of H–2A workers certified in 2009 (99,472) by the cost of bus fare from the worker's place of recruitment to the consulate and back. The Department multiplies by two the one-way cost of bus fare of $31.50 (based on the cost of a bus trip from Oaxaca to Mexico City, source: *http://www.ticketbus.com.mx).* These assumptions result in a total cost for this requirement in 2009 of $6,266,736 ($99,472 \times \$31.50 \times 2$). The Department repeats this calculation, using the projected number of H–2A workers, for each year of the analysis period to obtain an average annual cost of $9,078,346 for this requirement.

[38] The Department estimates that employers will spend 2 hours to read the new rule and outreach and educational materials explaining the program. The Department assumes that this labor will be performed by a human resources manager at an agricultural firm at an hourly wage rate of $60.27, as calculated above. The Department multiplies this hourly wage rate by 2 and by the total number of H–2A applications received in 2009 (8,150) to obtain a total cost for this requirement of $982,474 in 2009.

[39] Approximately 0.6 percent of H–2A workers do not speak English or Spanish (source: *http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table32d.xls*). The Department multiplies this percentage by the total number of H–2A applications certified in 2009 (7,665) to obtain a total of 47 contracts needing to be translated in 2009.

[40] The Department assumes that the average number of pages per contract is 50, and the cost per page for translation is $19.50 (source: *http://www.languagescape.com*). The Department multiplies the number of contracts needing to be translated in 2009 (47) by the average number of pages per contract (50) and the cost per page for translation to obtain a total cost of $45,720 in 2009. The Department repeats this calculation for each year of the analysis period using the projected number of H–2A applications certified to obtain an average annual cost of $80,233 for this requirement.

[41] The Department estimates that approximately 7 percent of H–2A employers are foreign labor contractors. The Department multiplies this percentage by the total number of H–2A applications requested in 2009 (8,150) by the average number of pages in a contract (50) and the cost per page for photocopying ($0.12) to obtain a total cost in 2009 of $3,566. The Department repeated this calculation for each year using the projected number of H–2A applications requested to obtain an average annual cost of $6,258 for this requirement.

[42] The Department estimates that the average number of pages per surety bond is 5, and the cost per photocopy is $0.12. Using these assumptions and the same assumptions as above for the number of applications results in a total cost for this requirement of $357 ($0.07 \times 8{,}150 \times 5 \times \$0.12$) in 2009. The Department repeats this calculation for each year using the projected number of H–2A applications requested to obtain an average annual cost of $626 for this requirement.

[43] The Department estimates that Department staff (GS–12 step 5) will spend 160 hours during the first year of the program to develop educational and outreach materials. For every subsequent year, the Department estimates that staff will spend 40 hour to review and update educational materials, as appropriate. The hourly salary for Department staff ($31.34) was multiplied by an index of 1.69 to account for employee benefits and proportional operating costs, resulting in an hourly rate of $52.96 for a GS–12, step 5. These assumptions result in a total labor cost of $8,474 ($52.96 \times 160$) for 2009 and $2,119 ($52.96 \times 40$) in subsequent years. To estimate the materials cost of this requirement in 2009, the Department used the total number of H–2A applications requested in 2009 (8,150) and multiplied it by the assumed percentage of applicants that are small farms (98 percent) to obtain a total of 7,987 compliance guides needed. The Department then determines the cost for photocopying by multiplying the average page length of a compliance guide (100 pages) by the cost of $0.12 per page. The Department then includes the cost of a clasp for a heavyweight envelope ($0.12) and a cost of $4.95 per compliance guide for postage. Multiplying these costs together results in a total materials cost of $56,468 for this requirement in 2009. Summing the labor and materials costs together results in a total cost of $64,942 ($8,747 + $56,468) for this requirement in 2009. The Department repeats this calculation for each year to obtain an average annual cost of $101,849.

courier (overnight mail) services. The use of private off-site interview space and courier services is not required by this Final Rule. Therefore, any costs associated with such activities are not considered in this analysis.

5. Summary of Cost-Benefit Analysis

Exhibit 1 presents a summary of the cost-benefit analysis of this Final Rule. The monetized costs and benefits displayed are the yearly summations of the calculations described above. In some cases, the totals for 1 year are less than the totals of the annual averages described above. For example, the annual average cost of enhanced transportation expenses—the largest cost component of this Final Rule—is $9.1 million across the 10-year time horizon, but the individual yearly values range from $6.3 million in 2009 to $12.5 million in 2018. This increase in yearly costs is due to the changes in program participation across the time horizon of the cost-benefit analysis. The monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate. The size of the net benefits, the absolute difference between the projected benefits and costs, is negative.

EXHIBIT 1—SUMMARY OF MONETIZED BENEFITS AND COSTS

Year	Monetized benefits ($millions/ year)	Monetized costs ($millions/ year)
1. 2009	0.47	9.52
2. 2010	0.47	8.34
3. 2011	0.47	9.03
4. 2012	0.47	9.77
5. 2013	0.47	10.58
6. 2014	0.47	11.46
7. 2015	0.47	12.41
8. 2016	0.47	13.45
9. 2017	0.47	14.58
10. 2018	0.47	15.80
Undiscounted total	4.68	114.93
Total with 7 Percent discounting	3.29	77.70
Total with 3 Percent discounting	3.99	96.41

Totals may not add because of rounding.

Due to lack of adequate data, the Department is not able to provide monetary estimates of several important benefits to society, including the increased employment opportunities for U.S. workers and the enhancement of worker protections for U.S. and H–2A workers.

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

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce a compliance guidance for small entities if the rule has a significant economic impact. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), under the RFA at 5 U.S.C. 605(b), and certified that this rule will not have a significant economic impact on a substantial number of small entities.

1. Definition of a Small Business

A small entity is one that is independently owned and operated and which is not dominant in its field of operation. The definition of small business varies from industry to industry to the extent necessary to properly reflect industry size differences. An agency must either use the SBA definition for a small entity, or, establish an alternative definition for the agricultural industry. The Department has adopted the SBA definition, which is an establishment with annual revenues of less than $0.75 million.

2. Impact on Small Businesses

The Department has estimated the incremental costs for small businesses from the 2008 Final Rule (the baseline) to this rule. We have estimated the costs of the increased wages paid to H–2A workers, reading and reviewing the new application and compliance processes, the enhanced coverage of transportation expenses, coverage of visa and border crossing expenses, the enhanced worker protections through compliance certification, the changes in the requirement for housing inspections, the enhanced U.S. worker referral period, the changes in the requirements for contract revisions, and the disclosure of terms and conditions. This analysis includes the incremental cost of this rule as it adds to the requirements in the 2008 Final Rule. This analysis does not include the baseline costs of the 2008 Final Rule, such as the associated application fees and costs for record keeping, because none of these requirements have changed from the 2008 Final Rule.

Approximately 98 percent of U.S. farms have revenues of less than $0.75 million and, therefore, fall within the SBA's definition of small entity. The Department estimates that by 2018 there will be approximately 22,601 applications (not necessarily applicants) to the H–2A program. Even if all 22,601 applications are filed by unique small farms, the percentage of small farms applying for temporary agricultural worker certification will be only 1.2 percent of the total number of small U.S. farms.[44] Because the rule will impact less than 10 percent of the total number of small U.S. farms, the rule will not have an impact on a substantial number of small entities as described by the RFA.

To examine the impact of this rule on small entities, the Department evaluates the impact of the incremental costs on the average small entity, which is assumed to apply for 12 temporary workers. The Department estimates that these farms have annual revenues of about $367,000.[45]

a. Increased Wages Paid to H–2A Workers

As discussed earlier, the use of the USDA survey for the determination of wages as opposed to the BLS OES Wage Survey, which was used in the 2008 Final Rule, results in an increase of $1.02 in hourly wages paid to H–2A workers. The Department multiplies this hourly wage increase by 8 hours to obtain a daily cost of the increase in wages of $8.16 ($1.02 × 8). The

[44] Based on the number of farms in 2007 and assuming that the number of farms will decline at the same average annual rate as it has in the past 10 years, the Department estimates that in 2018 there will be approximately 1,878,971 farms.

[45] Based on the average duration of temporary agricultural workers' stay, the Department estimates that these workers work, on average, 198 days. As already discussed, temporary agricultural workers will be paid, on average, $9.36 per hour. Given this hourly rate and 1,584 working hours per year, a small entity hiring 12 temporary workers incurs hired farm labor costs of $177,915 ($9.36 × 1,584 × 12). Based on the 2002 Census of Agriculture, hired farm labor costs account, on average, for 41.2 percent of total farm costs while total costs represent, on average, 86.3 percent of total revenues. Applying these rates to the estimated hired labor costs, we estimate that a small farm employing 12 temporary agricultural workers would have total production expenses of $316,777, revenues of $366,936, and net farm income (*i.e.,* revenues minus production expenses) of $50,159 per year.

Department then multiplies this daily labor cost by 198, which is the average number of days worked by H–2A workers. This results in a total cost of $1,615.68 ($8.16 × 198) per H–2A worker per year and an average annual cost of $1,615.68 over the 10-year analysis period due to the increase in wages. For employers hiring the average number (12) of H–2A workers, this results in a total cost of $19,388.16 ($1,615.68 × 12) per year due to the increase in wages, or an average annual cost of $19,388.16 over the 10-year analysis period.

b. Reading and Reviewing the New Application and Compliance Processes

During the first year that this rule would be in effect, employers would need to learn about the new application process and how compliance will be determined. We estimate this cost by multiplying the time required to read the new rule and any educational and outreach materials that explain the H–2A application process under this rule by the average compensation of a human resources manager at an agricultural business. In the first year of the rule, the Department estimates that the average small farm will spend approximately 2 hours of staff time to read and review the new application and compliance processes, which amounts to approximately $120.55 ($60.27 × 2) in labor costs in the first year and an average annual cost of $12.06 ($120.55/10) over the 10-year analysis period.[46]

c. Enhanced Coverage of Transportation Expenses

Under the 2008 Final Rule, the employer provides for travel expenses and subsistence for foreign workers only to and from the appropriate U.S. consulate or port of entry. Under this Final Rule, the employer is required to pay the costs of transportation from the worker's place of recruitment to and from the place of employment. The Department estimates that the average small farm would incur costs of $63.00 ($31.50 × 2) per worker per year related to the enhanced coverage of transportation expenses, or an average annual cost of $63.00 per worker.[47] For employers hiring the average number of workers (12), this requirement results in an average annual cost of $756.00 ($63.00 × 12).

d. Coverage of Visa/Border Crossing Expenses

Under this Final Rule, the employer must pay the visa and border crossing fees of the H–2A workers they employ. Although this cost is a transfer from U.S. employers to H–2A workers, this requirement represents an increase in the cost of U.S. employers. Each H–2A worker must pay a visa application fee of $131.00 and a reciprocity fee based on their country of origin.[48] To estimate the cost of the reciprocity fee to employers, the Department researched the reciprocity fee for the five top countries supplying H–2A workers. The reciprocity fees for these countries ranged from $0 to $100.00, which is the reciprocity fee for Mexico, the top source of H–2A workers.[49] To be conservative in its estimate of costs to U.S. employers, the Department used the maximum reciprocity fee of $100.00 to obtain a total cost per worker of $231.00 ($131.00 + $100.00). For employers hiring the average number of workers (12), this requirement results in an average annual cost of $2,772.00 ($231.00 × 12).

e. Enhancing Worker Protections Through Compliance Certification

The certification of compliance will represent minimal costs to employers because they will need to submit copies of recruitment activities, details of job offers, workers' compensation documentation, and for H–2ALCs, registration, surety bond, and work contracts, rather than attesting that they have complied with the required elements of the H–2A program. Under the 2008 Final Rule, employers are already required to obtain and retain these documents and this rule simply requires the submission of those existing documents, particularly workers' compensation and housing inspections, to the Department in order to satisfy the program's underlying statutory assurances. The Department estimates this cost by multiplying the difference in time to prepare the new H–2A application as compared to that under the 2008 Final Rule for both new H–2A applicants and previous applicants. We then multiply these products by the average compensation of a human resources manager at an agricultural business ($60.27 per hour, as calculated above).

For small employers applying to the program for the first time, the Department estimates that the application will take approximately one-half hour (0.5 hours) more to complete. This results in additional labor costs equal to $30.14 ($60.27 × 0.5). For applicants familiar with the process, the Department estimates that the application will require approximately 20 additional minutes (0.33 hours) to complete. The result is additional labor costs of $20.09 ($60.27 × 0.33) for applicants familiar with the program. Because the application will be longer, the Department adds the costs of photocopying additional pages and additional postage required to the labor costs above.[50] In total, the Department estimates that the average small farm that is a new H–2A applicant would incur an average annual cost of $48.94 ($30.14 + $18.80), and the average small farm that is a previous H–2A applicant would incur an average annual cost of $38.89 ($20.09 + $18.80).

This rule also requires that contracts be translated into the languages of employees who do not speak English. Employers are already required to provide contract translations for employees who speak Spanish. We multiply the percent of H–2A workers who do not speak English or Spanish by the average number of pages per contract and the cost per page for translation.[51] The Department estimates the average small farm would incur average annual costs of contract translation of $5.96 (0.6 percent × 50 × $19.50).

f. Changes in the Requirement for Housing Inspections

This Final Rule retains most of the 2008 Final Rule provisions governing housing inspections. The employer's obligations with respect to housing standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and family housing under this

[46] The Department estimates that employers will spend 2 hours to read the new rule and outreach and educational materials explaining the program. In addition, the Department estimates that the median hourly wage for a human resources manager is $42.15 (as published by the Department's OES survey, O*Net Online), which we increased by 1.43 to account for private-sector employee benefits (source: BLS for an hourly wage rate of $60.27.

[47] The Department estimates these costs by multiplying the total number of H–2A workers certified by the cost of bus fare from the worker's home to the consulate and back. The Department assumes one-way cost of bus fare of $31.50.

[48] Source: *http://travel.state.gov/visa/temp/types/types_1263.html#temp.*

[49] Source: *http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3272.html.*

[50] The Department estimates that an average of 150 additional pages will need to be photocopied at a cost of $0.12 per photocopy. The additional pages weigh approximately 17.6 ounces and require $0.80 in postage per application. These assumptions result in a total materials cost of this requirement of $18.80 ((150 × $0.12) + 0.80).

[51] Approximately 0.6 percent of H–2A workers do not speak English or Spanish (source: *http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table32d.xls*). The Department assumes that the average number of pages per contract is 50, and the cost per page for translation is $19.50 (source: *http://www.languagescape.com*).

rule have remained the same as under the 2008 Final Rule.

One notable difference, however, is the timeframe in which an inspection of the employer's housing must occur. Unlike the 2008 Final Rule, this rule requires that the pre-occupancy inspection of the employer's housing be completed prior to the issuance of a temporary labor certification, which is 30 days before the date of need for the workers.

The Department expects that this change in timing will have a minimal economic impact on employers. Prior to the effective date of the 2008 Final Rule, the Department's experience was that the majority of employers who routinely used the H–2A program prepared their housing in advance of inspection and/or communicated with SWA staff with respect to changes in the location(s) or type(s) of housing before application filing occurred at 45 days prior to the date of need. Because of data limitations, we were not able to monetize the costs and benefits associated with this provision.

g. Contract Revisions and the Disclosure of Terms and Conditions

This rule requires that employers disclose the terms and conditions of the employment no later than the time an H–2A worker applies for a visa in the foreign country rather than by the first day of employment. As discussed above, this requires that employers mail the terms and conditions documents to workers instead of delivering the document to workers by hand once they arrive at the work site. To estimate the cost of this requirement to a small entity, the Department uses the cost of shipping a package to Mexico via the United States Postal Service ($9.60) for entities required to mail packages for the average number (12) of H–2A workers. For the smallest of entities employing only one H–2A worker, the Department assumed the cost of this requirement was equal to the cost of shipping a mailer to Mexico via the United States Postal Service ($1.59). The average annual cost of this requirement is thus $9.60 for entities employing the average number of H–2A workers, and $1.59 for the smallest of entities employing only one H–2A worker.

As discussed previously, this rule requires employers to provide a copy of a revised contract to affected workers when the employer applies for an extension of the H–2A certification. To determine the cost to small entities, the Department multiplied the number of pages in the Form ETA–790 (one page) and the cost per page for photocopying ($0.12) to obtain a total cost per affected entity of $0.12 ($0.12 × 1) for Form ETA–790 revision. The average annual cost of this requirement is thus $1.44 ($0.12 × 12) for entities employing the average number (12) of H–2A workers and $0.12 for the smallest of entities employing only one H–2A worker.

h. Additional Costs for Small Employers Who Are H–2ALCs

Employers who are H–2ALCs will incur additional costs related to the submission of contracts and the provision of the surety bond. For both categories, we estimate the cost by multiplying the additional photocopies required by the cost per photocopy. The Department estimates that the average small H–2ALC will incur average annual costs of $6.00 for the submission of contract photocopies (50 × $0.12) and $0.60 (5 × $0.12) for the provision of the surety bond.[52]

i. Other Issues

The Department does not anticipate that the increased SWA activity under this rule will result in significant processing delays, as the Department continues to operate under the statutory mandate to make a determination of whether or not the application meets the threshold requirements for certification within 7 days of filing. The Department's analysis pursuant to E.O. 12866, above, contains an analysis of potential delays for all employers, including small employers, incurred for all reasons, not just for the reason of delays that may happen as a result of increased SWA activity. The conclusion that the Department has drawn from this analysis is that the increased SWA activity, which the Department believes is required by statute, will not result in increased delays to employers.

Several commenters on the proposed rule noted that H–2A employers would incur additional costs associated with off-site interviews and courier services. As discussed above, the use of private off-site interview space and courier services are not required by this Final Rule and, therefore, do not constitute a cost to small entities.

3. Total Cost Burden for Small Entities

The Department's calculations indicate that the total average annual cost of this rule is $22,994 for the average small entity applying to the program for the first time and $22,984 for the average small entity that has previous program familiarity.[53]

For small entities that apply for 1 worker instead of 12 (representing the smallest of the small farms that hire workers), the Department estimates that the total average annual cost of the rule ranges from $1,968 for those that have previous program familiarity to $1,978 for small entities new to the program.[54]

For employers that are H–2ALCs, the Department estimates that the total average annual cost of this rule is an additional $85 for the average small entity applying to the program for the first time and an additional $75 for the average small entity that has previous program familiarity.[55]

For the smallest H–2ALCs that would apply for only one worker instead of the average of 12 workers, the Department estimates that the total annual average cost of the rule ranges from an additional $65 for those that have previous program familiarity and an additional $75 for small entities new to the program.[56]

Due primarily to the increase in wages paid to H–2A workers, the rule is expected to have a significant impact on affected small entities. The affected small entities, however, represent approximately 1.2 percent of all small U.S. farms. Therefore, the Department believes that this Final Rule is expected to have a net direct cost impact on a very limited number of small agricultural employers, above and beyond the baseline of the current costs required by the program as it is currently implemented under the 2008 Final Rule.

4. Alternatives Considered as Options for Small Businesses

While we have concluded that this regulation will not have a significant economic impact on a substantial number of small entities, we have recognized the concerns expressed by small businesses and have made every

[52] We assume that the average number of pages per contract is 50, the number of pages per surety bond is 5, and the cost per photocopy is $0.12.

[53] For illustration, the total cost of $22,994 for the average small entity applying to the program for the first time results from summing the totals for the various rule requirements described above as follows: $22,998 = $19,388.16 + $12.06 + $756.00 + $2,772.00 + $48.94 + $5.96 + $9.60 + $1.44.

[54] For illustration, the total cost of $1,968 for small entities with previous program familiarity and employing only one worker results from summing the totals for the various rule requirements described above as follows: $1,968 = $1,615.68 + $12.06 + $63.00 + $231.00 + $38.89 + $5.96 + $0.12 + $1.59.

[55] For illustration, the total cost of $85 for the average small H–2ALC applying to the program for the first time results from summing the totals for the various rule requirements described above as follows: $85 = $12.06 + $48.94 + $5.96 + $1.44 + $9.60 + $6.00 + $0.60.

[56] For illustration, the total cost of $65 for small H–2ALCs with previous program familiarity and employing only one worker results from summing the totals for the various rule requirements described above as follows: $65 = $12.06 + $38.89 + $5.96 + $0.12 + $1.59 + $6.00 + $0.60.

effort to minimize the burden on all users. The Department's responsibilities under the INA, however, severely constrain our ability to make any adjustments to program requirements in an effort to address concerns unique to small business. The Department's mandate under the H–2A program is to set requirements for employers who wish to import foreign agricultural workers. Those standards are designed to both ensure that foreign worker are imported only if qualified domestic workers are not available and that the importation of H–2A workers will not adversely effect the wages and working conditions of similarly employed domestic workers. These regulations set those minimum standards. To create different and likely lower standards for one class of employers, *e.g.,* small business, would essentially sanction the very adverse effect that the Department is compelled to prevent. The need for parity among all employers is illuminated by the fact that Congress within the INA carved out a specific dispensation for small businesses in a specific area of the statute. Section 218 (c)(3)(B)(ii) of the INA (8 U.S.C. 1188(c)(3)(B)(ii) exempts certain small businesses from the application of the 50 percent rule. The suggestion from the small business community that small farmers who file master applications with other small farmers not lose their 50 percent exemption is specifically precluded by Congress at 8 U.S.C. 1188(c)(3)(B)(ii)(II) & (III). Where Congress has so clearly demonstrated its ability to modify H–2A program requirements to accommodate small businesses, it would be inappropriate, and outside of the Secretary's authority, for the Department to carve out additional exceptions.

Commenters asked the Department to waive the surety bond requirement for H–2ALCs without violations for 3–5 years. In the 2008 Final Rule, surety bond amounts were set at $5,000 for H–2ALCs seeking certification to employ fewer than 25 employees, $10,000 for those seeking certification to employ 25 to 49 employees, and $20,000 for H–2ALCs wanting to hire 50 or more employees. However, assuming that an H–2ALC with 50 employees pays approximately the same for a $20,000 bond as an H–2ALC with 300 employees, the 2008 Final Rule framework disproportionately advantages larger H–2ALCs while providing diminishing levels of protection for the employees of such contractors. Under the proposed rule, the first two bond amount tiers for the smaller H–2ALCs remained unchanged ($5,000 for H–2ALCs who apply for certification to employ fewer than 25 employees and $10,000 for those H–2ALCs who are applying for certification to employ 25 to 49 workers). The NPRM proposed to require H–2ALCs seeking certification to employ from 50 to 74 workers to obtain a bond of $20,000. In addition, we proposed to require H–2ALCs seeking certification to employ from 75 to 99 workers to obtain a surety bond of $50,000, and those seeking certification to employ 100 or more workers to obtain a bond of $75,000. The Department determined to retain the surety bond levels as proposed in the NPRM. Waiver of the bond requirements is not feasible and is inconsistent with the policy objective of the bonding requirement—to reduce the potential for H–2ALCs with insufficient capital to meet program obligations from receiving H–2A certifications. A past pattern of performance with respect to payment of wages does not equal the continuation of future funding to do so, and the point of the bond is to ensure that H–2ALCs can each year meet wage obligations.

Several small business commenters asked the Department to exempt small businesses who apply through a master job order from the multistate recruitment requirement. Commenters from the small business community also recommended that the Final Rule exempt all small businesses from multistate recruitment requirement. After deliberation on the statutory limitations imposed on and operational challenges of such a distinction, the Department has determined that such exemptions are not statutorily permitted and would, moreover, undermine our statutory obligation to ensure access of U.S. workers to the jobs. We were; therefore, unable to include the proposed exemptions.

The Department proposed a return to the small farm exemption from the 50 percent rule, as implemented in the 1987 Rule. The regulation as proposed, and this Final Rule, reflects that statute's exemption for small business applicants. This exemption applies to small farms as defined in the FLSA which are not members of an association or which have not petitioned for foreign workers under a master application. This exemption is not applicable in the case of an association filing a master application because the association can assign any workers referred under the 50 percent rule to member-employers who need additional workers or who can more easily accommodate the referred workers, thus minimizing or eliminating the burden on small farmers. Most of the commenters further requested that the Department eliminate the provisions limiting the application of the small farm exemption to those small farms as described above. The Department cannot accommodate this request. The exemption and its limitations are statutory, not regulatory. See 8 U.S.C. 1188(c)(3)(B)(ii). In that provision, Congress specifically excluded small employers who are members of associations from the small-employer exemption to the 50 percent rule, on the basis that associations have the ability to apportion referred workers among employers where they may be needed. Therefore, the statute prevents the Department from implementing this alternative.

Relatedly, a small business commenter recommended that the Department expand the small farm exemption from the 50 percent rule to businesses meeting the SBA small business test rather than only those meeting the FLSA definition of small farm. Again, we are prevented by statute from making the requested expansion as the INA specifically uses the FLSA small farm definition and not the SBA small business definition. (8 U.S.C. 1188(c)(3)(B)(ii)).

Several small employers asked us to change the definitions of incidental employment and corresponding employment to exempt small business from their application. Commenters were concerned that the removal of incidental activities from the definition of agricultural labor or services would limit employers' flexibility in assigning tasks to workers not specifically included in the job order. Commenters were apprehensive that this proposed change, coupled with the Department's proposed change in the definition of corresponding employment, could subject employers to penalties, including revocation or debarment, if H–2A workers perform work that is outside the scope of the job order for even a small fraction of their time. In response, we have made changes to the incidental employment definition to address several of the concerns raised during the comment period. As discussed more fully elsewhere in this preamble, the Department does not intend to debar an employer whose H–2A workers perform an insubstantial amount of agricultural work not listed in the Application, and will exercise our enforcement discretion when an employer has worked an H–2A worker outside the scope of activities listed in the job order due to unplanned and uncontrollable events. The regulations concerning revocation and debarment require that the violation be substantial

and a number of factors must be considered in making that determination. The good faith assignment of a worker to work not listed in the Application for a small amount of time would not result in debarment. We are unable to make further amendments, as our statutory obligation is to protect U.S. workers from adverse affect and ensure U.S. workers access to these agricultural jobs, without regard to the size of the employer offering those jobs.

Several commenters from the reforestation industry recommended that the Department not implement the proposal to add reforestation and pine straw activities to the definition of agricultural labor or services, as proposed in the NPRM. Currently, employers engaged in these activities may use the H–2B program. Reforestation, a sub-industry of forestry, is commonly performed by migrant crews who are overseen by labor contractors and share the same characteristics as traditional agricultural crews. The same reasoning was used in proposing to include pine straw activities within the scope of H–2A. A number of employer commenters claimed that the way in which contracts are awarded to reforestation companies would preclude applicants from being able to file H–2A applications in realistic timeframes and would make it difficult to comply with H–2A provisions; they asserted that such contracts are often for short duration, making it particularly difficult to provide documentation that housing, typically hotels or motels, had been secured far in advance. Some of the commenters projected their increased costs and predicted the costs could put them out of business or preclude them from using the program to employ an authorized workforce. The Department considered these comments and concerns of the industry, as discussed in more detail above, and we decided against including reforestation and pine straw activities in the Final Rule.

One small business commenter suggested that the Department exempt small employers with marginal net revenues from the requirement to house or hire local workers. After consideration, the Department determined that we are unable to do so, as our statutory obligation is to protect U.S. workers from adverse affect and ensure U.S. workers access to the jobs, without regard to the size or economics of the employer who is participating in the program.

A few commenters suggested that small businesses in particular would be adversely affected by the remote interview requirements in the proposed rule. The Department has clarified in the Final Rule that no interviews are required, but that if interviews are to take place that they do so in a manner to ensure that the referred worker is not adversely impacted. The ability to conduct telephone interviews, to meet at a mutual site (such as a One-Stop Career Center, will limit the potential for adverse monetary impact on all businesses, including small businesses.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This Final Rule has no "Federal mandate," which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H–2A worker is purely voluntary and is; therefore, excluded from any reporting requirement under the Act.

SWA activities under the H–2A program are currently funded by the Department through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this Final Rule, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs. The Department did not receive any comments related to this section.

D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department has determined that this rulemaking will not impose a significant impact on a substantial number of small entities under the RFA, therefore, the Department is not required to produce any Compliance Guides for Small Entities as mandated by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801) (SBREFA). The Department does, however, intend to produce compliance guides for all businesses, in order to provide users with more effective participation in the program. The Department has similarly concluded that this Final Rule is not a major rule requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. The Department did not receive any comments related to this section.

E. Executive Order 13132—Federalism

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

F. Executive Order 13175—Indian Tribal Governments

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

G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub.L. 105–277, 112 Stat. 2681) requires the Department to assess the impact of this Final Rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

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

The Department did not receive any comments related to this section.

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

This Final Rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications. The Department did not receive any comments related to this section.

I. Executive Order 12988—Civil Justice

This Final Rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities. The Department did not receive any comments related to this section.

J. Plain Language

The Department drafted this Final Rule in plain language. The Department did not receive any comments related to this section.

K. Executive Order 13211, Energy Supply

This Final Rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy. The Department did not receive any comments related to this section.

L. Paperwork Reduction Act

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

Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l). The information collected is mandated in this Final Rule at Title 20 CFR 655.122, 655.130, 655.131, 655.132, 655.133, 655.134, 655.135, 655.144, 655.145, 655.150, 655.151, 655.152, 655.153, 655.154, 655.156, 655.157, 655.167, 655.170, 655.171, 655.172, 655.173, 655.180, 655.181, 655, 182, 655.185, and Title 29 CFR 501.2, 501.4, and 501.6.

In accordance with the PRA (44 U.S.C. 3501) information collection requirements, which must be implemented as a result of this regulation, a clearance package containing proposed changes to the already approved collection was submitted to OMB on September 4, 2009, along with the proposed rule to reform the H–2A agricultural foreign labor certification program.

The public was given 60 days to comment on this information collection. The Department did not receive any comments specifically related to this section. The Department did receive one general comment simply stating that the paperwork is becoming repetitious and excessive. However, without more specificity, the Department cannot address this commenter's concerns. The forms used to comply with this Final Rule are the same as those required under the 2008 Final Rule, except that Form ETA–9142 was modified slightly to reflect the assurances and obligations of the H–2A employer as required under the non-attestation based system created by the NPRM and this Final Rule. The Department used a chart format to list all of the information collection requirements in the NPRM, which perhaps gave the impression of being excessive. However, the hourly or cost burden on the public actually decreased from the 2008 Final Rule burden because Appendix A.1 was eliminated by this Final Rule. Therefore, the Department made no changes based on this comment to the Information Collection submitted to OMB.

The Department has made changes to this Final Rule after receiving comments to the proposed rule and has made changes to the forms for clarity. However, these changes do not impact the overall annual burden hours for the H–2A program information collection. The total costs associated with the form, as defined by the PRA, is a maximum of $1,100 per employer for the Form ETA–9142.

The majority of the information collection requirements for the current H–2A program are approved under two OMB control numbers—OMB Control Number 1205–0466 (which includes Form ETA–9142) and OMB Control Number 1205–0134 (which includes Form ETA–790). This Final Rule implements the use of the new information collection, which OMB first approved on November 21, 2008 under OMB control number 1205–0466. The Expiration Date is November 30, 2011. OMB pre-approved the minor changes the Department proposed to the Form ETA–9142 as part of this rulemaking on November 17, 2009 and extended the expiration date to November 30, 2012. The changes recently approved by OMB to the Form ETA–9142 and Appendix A.2 become effective upon the effective date of this Final Rule. The Form ETA–9142 has a public reporting burden estimated to average 1 hour for Form ETA–9142 and Appendix A.2 per response or application filed. (Appendix A.1 will no longer be used in the H–2A program under this Final Rule.) Under this Final Rule, and the implementation schedule it establishes, employers applying to the H–2A program will continue to use the Form ETA–790 to submit a job order. The information collection for the Form ETA–790 (OMB control number 1205–0134) was recently approved by OMB on November 9, 2009 and it extended permission to use the form until November 30, 2012.

For an additional explanation of how the Department calculated the burden hours and related costs, the PRA packages for these information collections may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/* PRAMain or by contacting the Department at: Office of Policy Development and Research, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

List of Subjects

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, Agriculture, 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 part 655 and 29 CFR part 501 as follows:

Title 20—Employees' Benefits

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

■ 1. Revise the authority citation for part 655 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), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Revise the heading of part 655 to read as set forth above.

■ 3. Revise § 655.1 to read as follows:

§ 655.1 Purpose and scope of subpart A.

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the United States (U.S.) in occupations other than agriculture or registered nursing.

■ 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.

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

§ 655.100 Scope and purpose of subpart B.

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) under the authority given in 8 U.S.C. 1188 to acquire information sufficient to make factual determinations of:

(a) Whether there are sufficient able, willing, and qualified United States (U.S.) workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and

(b) Whether the employment of H–2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.

§ 655.101 Authority of the Office of Foreign Labor Certification (OFLC) Administrator.

The Secretary has delegated her authority to make determinations under 8 U.S.C. 1188 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). The determinations are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members; *e.g.,* a Certifying Officer (CO).

§ 655.102 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements, the OFLC Administrator has the authority to establish, continue, revise, or revoke special procedures for processing certain H–2A applications. Employers must demonstrate upon written application to the OFLC Administrator that special procedures are necessary. These include special procedures currently in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine harvesting crews. Similarly, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the OFLC Administrator has the authority to establish monthly, weekly,

or semi-monthly adverse effect wage rates (AEWR) for those occupations for a statewide or other geographical area. Prior to making determinations under this section, the OFLC Administrator may consult with affected employer and worker representatives. Special Procedures in place on the effective date of this regulation will remain in force until modified by the Administrator.

§ 655.103 Overview of this subpart and definition of terms.

(a) *Overview.* In order to bring nonimmigrant workers to the U.S. 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 U.S. workers similarly employed. This rule describes a 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) *Definitions.* For the purposes of this subpart:

Administrative Law Judge (ALJ). A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

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:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

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

(3) 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.

Area of intended employment. The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA.

Attorney. Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. 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, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

Certifying Officer (CO). The person who makes 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.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved H–2A *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.

Date of need. The first date the employer requires the services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

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:

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

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

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

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

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 part, 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 worker. Any temporary foreign worker who is lawfully present in the U.S. 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 U.S. 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 inter- and intra-state job clearance systems based on the employer's *Agricultural and Food Processing Clearance Order* (Form ETA–790), as submitted to the SWA.

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

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 same start date of need for all employer-members listed on the *Application for Temporary Employment Certification;* and may cover multiple areas of intended employment within a single State but no more than two contiguous States.

National Processing Center (NPC). The office 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 the 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 U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

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

Positive recruitment. The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of the 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:

(1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(2) 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. Wage established pursuant to 20 CFR 653.501(d)(4).

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. (1) Where an employer has violated 8 U.S.C. 1188, 29 CFR part 501, or these regulations, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

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

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

(viii) Similarity of products and services; and

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

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

Temporary agricultural labor certification. Certification made by the OFLC Administrator with respect to an employer seeking to file with DHS a visa petition 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.

United States (U.S.). The continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States worker (U.S. worker). A worker who is:

(1) A citizen or national of the U.S.; or

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Wages. All forms of cash remuneration to a worker by an employer in payment for personal services.

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 of the job order and any obligations

required under 8 U.S.C. 1188, 28 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. 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 (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 below.

(1)(i) *Agricultural labor* for the purpose of paragraph (c) of this section 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 section 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)(iv) 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, 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)(iv) and (c)(1)(v) 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 1141j(g) of title 12, 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 sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). 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.* 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 and trees/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.

(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.

Prefiling Procedures

§ 655.120 Offered wage rate.

(a) To comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.

(b) If the prevailing hourly wage rate or piece rate is adjusted during a work contract, and is higher than the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, in effect at the time the work is performed, the employer must pay that higher prevailing wage or piece rate, upon notice to the employer by the Department.

(c) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the AEWRs for each State as a notice in the **Federal Register.**

§ 655.121 Job orders.

(a) *Area of intended employment.*

(1) Prior to filing an *Application for Temporary Employment Certification,* the employer must submit a job order, Form ETA–790, to the SWA serving the area of intended employment for intrastate clearance, identifying 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 submit this job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites.

(2) Where the job order is being placed in connection with a future master application to be filed by an association of agricultural employers as a joint employer, the association may submit a single job order to be placed in the name of the association on behalf of all employers that will be duly named on the *Application for Temporary Employment Certification.*

(3) The job order submitted to the SWA must satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F and the requirements set forth in § 655.122.

(b) *SWA review.*

(1) The SWA will review the contents of the job order for compliance with the requirements specified 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 no later than 7 calendar days after it has been submitted. The SWA notification will direct the employer to respond to the noted deficiencies. The employer must respond to the deficiencies noted by the SWA within 5 calendar days after receipt of the SWA notification. The SWA must respond to the employer's response within 3 calendar days.

(2) 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 above. If upon review of the *Application for Temporary Employment Certification* and the job order and all other relevant information, the CO concludes that the job order is acceptable, the CO will direct the SWA to place the job order into intrastate and interstate clearance and otherwise process the Application in accordance with the procedures contained in § 655.134(c). If the CO determines the job order is not acceptable, the CO will issue a Notice of Deficiency to the employer under § 655.143 of this subpart directing the employer to modify the job order pursuant to paragraph (e) of this section The Notice of Deficiency will offer the employer the right to appeal.

(c) *Intrastate clearance.* Upon its clearance 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 which falls within the jurisdiction of more than one SWA, the originating SWA will also forward a copy of the approved job order to the other SWAs serving the area of intended employment.

(d) *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 for Temporary Employment Certification* is made) for the job opportunity.

(e) *Modifications to the job order.*

(1) Prior to the issuance of the final determination, 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 of this subpart.

(2) The employer may request a modification of the job order, Form ETA–790, 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 amend 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 aliens.* 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 which 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 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, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.

(2) Standards for range housing. Housing for workers principally engaged in the range production of livestock must meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock must meet guidelines issued by OFLC.

(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 which 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) 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 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 labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, 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.

(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) of this subpart with respect to the referrals made after the employer's date of need.

(3) Transportation between living quarters and worksite. The employer must provide transportation between

housing provided or secured by the employer and the employer's worksite at no cost to the worker.

(4) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 29 CFR 500.120 to 500.128. 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 they 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 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 × 48 hours/week = 480 hours × 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 × 48 hours/week = 480 hours − 8 hours (Federal holiday) × 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, 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 the 50 percent rule 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 U.S. 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) The employer must keep accurate and adequate records with respect to the workers' 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 home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, 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.

(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.* If the worker is paid by the hour, the employer must pay the worker at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, 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 hourly wage or piece rate, the legal Federal or 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 piece rate prevailing for the activity in the area of intended employment; 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 H–2A temporary 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 the 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 or DHS in a manner specified in a notice published in the **Federal Register** 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. Abandonment will be 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.

(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 no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the 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 no later than the time an offer of employment is made by the subsequent H–2A employer. 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 required terms of the job order and the certified *Application for Temporary Employment Certification* will be the work contract.

Application for Temporary Employment Certification Filing Procedures

§ 655.130 Application filing requirements.

All agricultural 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. The following section provides the procedures employers must follow when filing.

(a) *What to file.* An employer, whether individual, association, or an H–2ALC, that desires to apply for temporary employment certification of one or more nonimmigrant foreign workers must file a completed *Application for Temporary Employment Certification* form and, unless a specific exemption applies, a copy of Form ETA–790, submitted to the SWA serving the area of intended employment, as set forth in § 655.121(a).

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's date of need.

(c) *Location and method of filing.* The employer may send the *Application for Temporary Employment Certification* and all required supporting documentation by U.S. Mail or private mail courier to the NPC. The Department will publish a Notice in the **Federal Register** identifying the address(es), and any future address changes, to which *Applications for Temporary Employment Certification* must be mailed, and will also post these addresses on the OFLC Internet Web site at *http://www.foreignlaborcert.doleta.gov/*. The Department may also require *Applications for Temporary Employment Certification,* at a future date, to be filed electronically in addition to or instead of by mail, notice of which will be published in the **Federal Register**.

(d) *Original signature.* The *Application for Temporary Employment Certification* must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). An association filing a master application as a joint employer may sign on behalf of its employer members. An association filing as an agent may not sign on behalf of its members but must obtain each member's signature on each *Application for Temporary Employment Certification* prior to filing.

(e) Information received in the course of processing *Applications for Temporary Employment Certification* and program integrity measures such as audits may be forwarded from OFLC to Wage and Hour Division (WHD) for enforcement purposes.

§ 655.131 Association filing requirements.

If an 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.

(a) *Individual applications.* Associations of agricultural employers may file an *Application for Temporary Employment Certification* for H–2A workers as a sole employer, a joint employer, or agent. The association must identify in the *Application for Temporary Employment Certification* in what capacity it is filing. The association must retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation in response to a Notice of Deficiency from the CO prior to issuing a Final Determination, or in the event of an audit.

(b) *Master applications.* An association may file a master application on behalf of its employer-members. The master application is available only when the association is filing as a joint employer. An 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, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the *Application for Temporary Employment Certification* and all employer-members are located in no more than two contiguous States. The association must identify on the *Application for Temporary Employment Certification* by name, address, total number of workers needed, and the crops and agricultural work to be performed, each employer that will employ H–2A workers. The association, as appropriate, will receive a certified *Application for Temporary Employment Certification* that can be copied and sent to the United States Citizenship and Immigration Services (USCIS) with each employer-member's petition.

§ 655.132 H–2A labor contractor (H–2ALC) filing requirements.

If an H–2ALC intends to file an *Application for Temporary Employment Certification,* the 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 Assurances and Obligations of H–2A Employers, and in part 653, subpart F, of this chapter.

(a) *Scope of H–2ALC Applications.* An *Application for Temporary Employment Certification* filed by an H–2ALC must be limited to a single area of intended employment in which the fixed-site employer(s) to whom an H–2ALC is furnishing employees will be utilizing the employees.

(b) *Required information and submissions.* An H–2ALC must include in or with its *Application for Temporary Employment Certification* the following:

(1) 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.

(2) 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.

(3) Proof of its ability to discharge financial obligations under the H–2A program by including with the *Application for Temporary Employment Certification* the original surety bond as required by 29 CFR 501.9. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 CFR 501.9) and any identifying designation used by the surety for the bond.

(4) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section.

(5) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that:

(i) 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

(ii) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local 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 500.105 and 500.120 to 500.128, except where workers' compensation is used to cover such transportation as described in § 655.125(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 alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that 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 concurrently submit to the NPC and to the SWA serving the area of intended employment a completed *Application for Temporary Employment Certification,* a completed job order on the Form ETA–790, 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 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 which 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 weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

(c) *Processing of emergency applications.* 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 advise the employer in writing that the certification cannot be granted 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 using the procedures applicable to a denial of certification set forth in § 655.164.

§ 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. 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 worksite for which the employer is requesting H–2A certification does not currently have workers on strike or being locked out in the course of a labor dispute.

(c) *Recruitment 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 for Temporary Employment Certification* 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 work. 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 business.

(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 provision will not apply to any employer who certifies to the CO 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 sec. 203(u) of Title 29;

(2) Is not a member of an association which has petitioned for certification under this subpart for its 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 work week.

(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 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 other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder.

(i) *Notify workers of duty to leave United States.*

(1) The employer must inform H–2A workers of the requirement that they leave the U.S. 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 defined further in DHS regulations, a temporary labor certification limits the validity period of an H–2A petition, and therefore, the authorized period of stay for an H–2A worker. See 8 CFR 214.2(h)(5)(vii) A foreign worker may not remain beyond his or her 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 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 attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(k) *Contracts with third parties comply with prohibitions.* The employer has contractually forbidden 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. 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.

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.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO(s) to an employer requiring a response will be sent using the provided address via traditional methods to assure next day delivery. The employer's response to such a notice or request must be filed using traditional methods to assure next day delivery and 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 are incomplete, contain errors or inaccuracies, or do 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) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 5 business days from date of receipt stating the modification that is needed for the CO to issue the Notice of Acceptance;

(3) Except as provided for under the expedited review or de novo administrative hearing provisions of this section, state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* within 5 business days and in a manner specified by the CO;

(4) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the Notice of Deficiency. The notice will state that in order to obtain such a review or hearing, the employer, within 5 business days of the receipt of the notice, must file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(5) State that if the employer does not comply with the requirements of § 655.142 or request an expedited administrative review or a de novo hearing before an ALJ within 5 business days the CO will deny the *Application for Temporary Employment Certification*. That denial is final cannot be appealed and the Department will not further consider that *Application for Temporary Employment Certification*.

(c) *Appeal from Notice of Deficiency.* The employer may timely request an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

§ 655.142 Submission of modified applications.

(a) *Submission requirements and certification delays.* If the employer chooses to submit a modified *Application for Temporary Employment Certification,* 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,* up to maximum of 5 days. The *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Employment Certification* within 12 calendar days after the notice of deficiency was issued.

(b) *Provisions for denial of modified Application for Temporary Employment Certification.* If the modified *Application for Temporary Employment Certification* is not approved, 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 are complete and 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 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 the SWA to circulate a copy of the job order to other such States the CO determines to be potential sources of U.S. workers;

(2) Direct the employer to engage in positive recruitment of U.S. workers in a manner consistent with § 655.154 and to submit a report of its positive recruitment efforts as specified in § 655.156;

(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 of this subpart and will terminate on the actual date on which the H–2A workers depart for the place of work, or 3 calendar days prior to the first date the employer requires the services of the H–2A workers, whichever occurs first; and

(4) State that the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* no later than 30 calendar days before the date of need, except as provided for under § 655.144 for modified *Applications for Temporary Employment Certification*.

§ 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. This procedure will be implemented once the Department initiates operation of the registry.

(b) *Length of posting on electronic job registry.* Unless otherwise provided, the Department will keep the job order posted on the Electronic Job Registry until the end of 50 percent of the contract 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 start date and is made after workers have departed for the employer's place of work, 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 job site 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) *SWA posts in interstate clearance system.* The SWA must promptly place the job order in interstate clearance to all States designated by the CO. At a minimum, the CO will instruct the SWA to transmit a copy of its active job order to all States listed in the job order as anticipated worksites covering the area of intended employment.

(b) *Duration of posting.* Each of the SWAs to which the job order was transmitted must keep the job order on its active file until 50 percent of the contract term has elapsed, and must refer each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

§ 655.151 Newspaper advertisements.

(a) The employer must place an advertisement (in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (b) of this section), in a newspaper of general circulation serving the area of intended employment and is appropriate to the occupation and the workers likely to apply for the job opportunity. Newspaper advertisements must satisfy the requirements set forth in § 655.152.

(b) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

§ 655.152 Advertising requirements.

All advertising conducted to satisfy the required recruitment activities under § 655.151 must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those offered to the H–2A workers. All advertising must contain the following information:

(a) The employer's name, or in the event that a master application will be filed by an association, a statement indicating that the name and location of each member of the association can be obtained from the SWA of the State in which the advertisement is run;

(b) The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(c) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of services or labor to be performed and the anticipated start and end dates of employment of the job opportunity;

(d) The wage offer, or in the event that there are multiple wage offers (such as where a master application will be filed by an association and/or where there are multiple crop activities for a single employer), the range of applicable wage offers and, where a master application will be filed by an association, a statement indicating that the rate(s) applicable to each employer can be obtained from the SWA of the State in which the advertisement is run;

(e) The three-fourths guarantee specified in § 655.122(i);

(f) If applicable, a statement that work tools, supplies, and equipment will be provided at no cost to the worker;

(g) A statement that housing will be made available at no cost to workers, including U.S. workers who cannot reasonably return to their permanent residence at the end of each working day;

(h) A statement that transportation and subsistence expenses to the worksite will be provided by the employer or paid by the employer upon completion of 50 percent of the work contract, or earlier, if appropriate;

(i) A statement that the position is temporary and a specification of the total number of job openings the employer intends to fill;

(j) A statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the State in which the advertisement appeared. Employers who wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited at little or no cost to the worker. Employers cannot provide potential H–2A workers more favorable treatment with respect to the requirement and conduct of interviews; and

(k) Contact information for the applicable SWA and, if available, the job order number.

§ 655.153 Contact with former U.S. employees.

The employer must contact, by mail or other effective means, its former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year 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 and documentation sufficient to prove contact must be maintained in the event of an audit.

§ 655.154 Additional positive recruitment.

(a) *Where to conduct additional positive recruitment.* The employer must conduct positive recruitment within a multistate region of traditional or expected labor supply where the CO 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.

(b) *Additional requirements should be comparable to non-H–2A employers in the area.* The CO will ensure that the effort, including the location(s) and method(s) of the positive recruitment required of the potential H–2A 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, and the kind and degree of recruitment efforts which the potential H–2A employer made to obtain foreign workers.

(c) *Nature of the additional positive recruitment.* The CO will describe the precise nature of the additional positive recruitment but 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.

(d) *Proof of recruitment.* The CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the positive recruitment requirements were met.

§ 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 he or she is 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 Notice of Acceptance set forth in § 655.141 and contain the following information:

(1) Identify the name of each recruitment source;

(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. employees were contacted and by what means; 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 maintain the recruitment report throughout the recruitment period including the 50 percent period. The updated report is not to be automatically submitted to the Department, but must be made available in the event of a post-certification audit or upon request by authorized representatives of the Secretary.

§ 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 worksite 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 application of the 50 percent rule of the 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 shall terminate on the date H–2A workers depart for the employer's place of work. 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 business.

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* no later than 30 calendar days before the 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 established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; complied with the requirements of parts 653 and 654 of this chapter; complied with all of this subpart, including but not limited to the timeliness requirements in § 655.130(b); complied with the offered wage rate criteria in § 655.120; made all the assurances in § 655.135; and met all the recruitment obligations required by § 655.121 and § 655.152.

(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, but who was rejected by the employer for other than a lawful job-related reason or who has not been provided with a lawful job-related reason for rejection by the employer.

§ 655.162 Approved certification.

If temporary labor certification is granted, the CO will send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer's agent or attorney.

§ 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 associations, which may not be assessed a fee in addition to the fees assessed to the members of the 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 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 labor certification is denied, the Final Determination letter will be sent to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer's agent or attorney. The Final Determination Letter will:

(a) State the reason(s) certification is denied;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the denial. The notice must state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, must file by facsimile (fax), or other means normally assuring next day delivery, a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ, of the denial, the denial is final and the Department will not further consider that *Application for Temporary Employment Certification.*

§ 655.165 Partial certification.

The CO may issue a partial certification, reducing either the period of need 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 referred 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 services or labor. If a partial labor certification is issued, the Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H–2A workers requested has been reduced;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the decision. The notice will state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, will file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within the 7 calendar days, the partial certification is final and the Department will not further consider 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 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 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 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. 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 by telephone or electronic mail, and must be confirmed by the employer in writing as required by this paragraph. If the employer telephonically or via electronic mail 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. 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.

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H–2A agricultural workers under this subpart are required to retain the documents and records proving 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 applicants.*

(1) Proof of recruitment efforts, including:

(i) Job order placement as specified in § 655.121;

(ii) Advertising as specified in § 655.152, or, if used, professional, trade, or ethnic publications;

(iii) Contact with former U.S. workers as specified in § 655.153; or

(iv) 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).

(d) *Additional retention requirement for associations filing Application for Temporary Employment Certification.* In addition to the documents specified in paragraph (c) above, 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 be 12 months or more, 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.

Where authorized in this subpart, employers may request an administrative review or de novo hearing before an ALJ of a decision by the CO. In such cases, the CO will send a copy of the OFLC administrative file to the Chief ALJ by means normally assuring next-day delivery. The Chief ALJ will immediately assign an ALJ (which may be a panel of such persons designated by the Chief ALJ from the Board of Alien Labor Certification Appeals (BALCA)).

(a) *Administrative review.* Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

(b) *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 5 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; and

(iii) The ALJ's decision must be rendered within 10 calendar days after the hearing.

(2) Decision. After a de novo hearing, the ALJ must affirm, reverse, or modify the CO's determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, CO, OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

§ 655.172 Withdrawal of job order and application for temporary employment certification.

(a) Employers may withdraw a job order from intrastate posting if the employer no longer plans to file an *Application for Temporary Employment Certification.* However, a 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 or the filing of an *Application for Temporary Employment Certification.*

(b) Employers may withdraw an *Application for Temporary Employment Certification* once it has been formally accepted by the NPC. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* with respect to workers recruited in connection with that application.

§ 655.173 Setting meal charges; petition for higher meal charges.

(a) *Meal charges.* Until a new amount is set under this paragraph, an employer may charge workers up to $10.64 for providing them with three meals per day. 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 as a Notice 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 29 U.S.C. 203(m) of the FLSA, including the recordkeeping requirements found at 29 CFR 516.27.

(b) *Filing petitions for higher meal charges.* The employer may file a petition with the CO to charge more than the applicable amount for meal charges if the employer justifies the charges and submits to the CO the documentation required by paragraph (b)(1) of this section.

(1) Documentation submitted must include 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: 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 by the CO for a period of 1 year.

(2) The employer may begin charging the higher rate upon receipt of a favorable decision from the CO unless the CO sets a later effective date in the decision.

(c) *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 applications selected for audit will be chosen within the sole discretion of the CO.

(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) State the documentation that must be submitted by the employer;

(2) Specify a date no more than 30 days from the date of the audit letter by which the required documentation must be received by the CO; and

(3) Advise that failure to 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.

(d) *Potential referrals.* In addition to steps in this subpart, the CO may determine to provide the audit findings and underlying documentation to DHS or another appropriate enforcement agency. The CO will refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.181 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 the 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 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. If the employer does not file rebuttal evidence or an appeal within 14 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 according to the procedures of § 655.171. The employer must file the appeal within 10 calendar days after the OFLC Administrator's final determination, or the OFLC Administrator's determination is the final agency action and will take effect immediately at the end of the 10-day period.

(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. The ALJ's decision is the final agency action.

(4) Stay. The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) Decision. If the temporary agricultural labor certification is revoked, the OFLC Administrator will send a copy of the final agency action of the Secretary 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 pursuant to this section, 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 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.* The OFLC Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer substantially violated a material term or condition of its temporary 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) *Debarment of an agent or attorney.* The OFLC Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501, if the OFLC Administrator finds that the agent or attorney participated in an employer's substantial violation. The OFLC Administrator may not issue future labor certifications under this subpart to any employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of Limitations and Period of Debarment.*

(1) The OFLC Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent 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 of this subpart;

(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) Fraud involving the *Application for Temporary Employment Certification;* or

(4) A material misrepresentation of fact during the application process.

(e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial so 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;

(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, attorney, or agent, 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 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 § 655.182(f)(3). 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 order and the debarment will take effect at the end of the 30-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 § 655.182(f)(2). To obtain a debarment hearing, the debarred party must, within 30 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 days from the date the Notice of Debarment or final determination is issued, unless a request for review is properly filed within 30 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 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 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 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 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 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 final decision must be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ. If the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final agency decision.

(g) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and the 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 involving members of associations.* If the OFLC Administrator determines that an individual employer-member of a joint employer association has committed a substantial violation, the debarment determination will apply only to that member unless the OFLC Administrator determines that the association or another association member participated in the violation, in which case the debarment will be invoked against the association or other complicit association member(s) as well.

(i) *Debarment involving associations acting as joint employers.* If the OFLC Administrator determines that an association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association. However, if the OFLC Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit association member as well. An association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(j) *Debarment involving associations acting as sole employers.* If the OFLC Administrator determines that an association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the association and any successor in interest to the debarred 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 the OFLC Administrator 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 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 the OFLC Administrator's written 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 the DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If the WHD, a court or the 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 will be cause to revoke the certification. The finding of fraud or willful misrepresentation may also constitute a debarrable 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 worker contracts must be referred by the SWA to the WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, the 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, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if OSC becomes aware of a violation of the regulations in this subpart, it may provide such information to the appropriate SWA and the CO.

Title 29—Labor

■ 5. Revise part 501 to read as follows:

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

Subpart A—General Provisions

Subpart B—Enforcement

Subpart C—Administrative Proceedings

Procedures Relating To Hearing

Rules of Practice

Referral for Hearing

Procedures Before Administrative Law Judge

Post-Hearing Procedures

Review of Administrative Law Judge's Decision

Record

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

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.* 8 U.S.C. 1188 provides that:

(1) A petition to import an alien as 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 labor certification from the U.S. Secretary of Labor (Secretary). The temporary 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 petition, and

(ii) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. 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) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certification under 8 U.S.C. 1188 has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment and assuring program integrity. The regulations pertaining to the issuance, denial, and revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, subpart B.

(c) *Role of the Wage and Hour Division (WHD).* 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. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing 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) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and the regulations in 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* filed with the Department on and after March 15, 2010.

§ 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 employee 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 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 the WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to the DHS promptly.

§ 501.3 Definitions.

(a) *Definitions of terms used in this part.*

Administrative Law Judge (ALJ). A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

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:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this section with respect to a specific *Application for Temporary Employment Certification;* and

(3) 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, 20 CFR part 655, subpart B, or this part. 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.

Area of intended employment. The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved H–2A *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.

Date of need. The first date the employer requires the services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

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:

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

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

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

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

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 worker. Any temporary foreign worker who is lawfully present in the U.S. 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).

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 U.S. 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 inter- and intra-state job clearance systems based on the employer's Form ETA–790, as submitted to the SWA.

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

Prevailing wage. Wage established pursuant to 20 CFR 653.501(d)(4).

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. Where an employer has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

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

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

(8) Similarity of products and services; and

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

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 violations at issue.

Temporary agricultural labor certification. Certification made by the OFLC Administrator with respect to an employer seeking to file with DHS a visa petition 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.

United States (U.S.). The continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States worker (U.S. worker). A worker who is:

(1) A citizen or national of the U.S.; or

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the Immigration and Nationality Act (INA) or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

WHD Administrator. The Administrator of the Wage and Hour Division (WHD), and such authorized representatives as may be designated to perform any of the functions of the WHD Administrator under this part.

Wages. All forms of cash remuneration to a worker by an employer in payment for personal services.

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 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 (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 shall be agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed below.

(1) (i) *Agricultural labor* for the purpose of paragraph (b) of this section 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 section 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)(iv) but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, 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)(iv) and (b)(1)(v) 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 1141j(g) of title 12, 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 sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). 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 FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* 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 and trees/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.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this part, 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 the regulations in this part;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188 or the regulations in this part;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or the regulations in this part;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, or to this subpart or any other Department regulation promulgated pursuant to 8 U.S.C. 1188; or

(5) Exercised or asserted on behalf of himself or others any right or protection afforded by 8 U.S.C. 1188 or the regulations in this part.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any such violator's current labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

§ 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 the regulations in these parts. Any agreement by an employee purporting to waive or modify any rights given to said person under these provisions shall be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder 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 Secretary.

(a) *General.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in 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.* The 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 the regulations in 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 the regulations in this part during the performance of such duties. The 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, the WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing 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 18 U.S.C. 114.

§ 501.8 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with 8 U.S.C. 1188 or the regulations in 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 U.S., knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 501.9 Surety bond.

(a) Every H–2ALC must obtain a surety bond demonstrating its ability to discharge financial obligations under the H–2A program. The original bond instrument issued by the surety must be submitted with the *Application for Temporary Employment Certification.* At a minimum, the bond instrument must identify the name, address, phone number, and contact person for the surety, and specify the amount of the bond (as required in paragraph (c) of this section), the date of issuance and expiration and any identifying designation used by the surety for the bond.

(b) 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. The bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits 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 20 CFR part 655, subpart B 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 be written to cover liability incurred during the term of the period listed in the *Application for Temporary Employment Certification* for labor certification made by an H–2ALC, and shall be amended to cover any extensions of the labor certification requested by an H–2ALC.

(c) The bond must be in the amount of $5,000 for a labor certification for which an H–2ALC will employ fewer than 25 workers; $10,000 for a labor certification for which an H–2ALC will employ 25 to 49 workers; $20,000 for a labor certification for which an H–2ALC will employ 50 to 74 workers; $50,000 for a labor certification for which an H–2ALC will employ 75 to 99 workers; and $75,000 for a labor certification for which an H–2ALC will employ 100 or more workers. 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.

(d) The bond must remain in force for a period of no less than 2 years from the date on which the labor certification expires. If the WHD has commenced any enforcement action under the regulations in this part against an H–2ALC employer or any successor in interest by that date, the bond shall remain in force until the conclusion of such action and any related appeal or related litigation. Surety bonds may not be canceled or terminated unless 45 days' notice is provided by the surety in writing to the WHD Administrator at the address set forth in paragraph (b) of this section.

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 the regulations in this part, as provided in the regulations in this part for enforcement by the 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 the regulations in 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 the regulations in 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, 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, 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 of this part.

(b) Petition any appropriate District Court of the U.S. 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 the regulations in this part, by any person.

(c) Petition any appropriate District Court of the U.S. 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 § 501.1(b) of this part and in 20 CFR part 655, subpart B. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c) of this part. 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 the regulations in this part. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.182 or under § 501.20 of the regulations in this part.

§ 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 the regulations in 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 the regulations in 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 the regulations in 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 may be considered 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 the regulations in 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 the regulations in 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;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(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 the regulations in this part will not exceed $1,500 per violation, with the following exceptions:

(1) A civil money penalty for each willful violation of the work contract, or of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part, or for each act of discrimination prohibited by § 501.4 shall not exceed $5,000;

(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 the regulations in this part, that proximately causes the death or serious injury of any worker shall not exceed $50,000 per worker;

(3) For purposes of 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.

(4) 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 the regulations in this part, that proximately causes the death or serious injury of any worker, shall not exceed $100,000 per worker.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed $5,000 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 days preceding the 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 $15,000 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 the regulations in this part, shall not exceed $15,000 per violation per worker.

§ 501.20 Debarment and revocation.

(a) *Debarment of an employer.* The WHD Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under 20 CFR part 655, subpart B, subject to the time limits set forth in paragraph (c) of this section, if: the WHD Administrator finds that the employer substantially violated a material term or condition of its temporary 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) *Debarment of an agent or an attorney.* The WHD Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B or 29 CFR part 501, if the WHD Administrator finds that the agent or attorney participated in an employer's substantial violation, by issuing a Notice of Debarment. The OFLC Administrator may not issue future labor certifications to any employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of Limitations and Period of Debarment.*

(1) The WHD Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent 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, 20 CFR part 655, subpart B, or the regulations in this part;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188, 20 CFR part 655, Subpart B, or the regulations in this part;

(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) of this subpart; 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 days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 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 involving members of associations.* If, after investigation, the WHD Administrator determines that an individual employer-member of a joint employer association has committed a substantial violation, the debarment determination will apply only to that member unless the WHD Administrator determines that the association or another association member participated in the violation, in which case the debarment will be invoked against the association or other complicit association member(s) as well.

(g) *Debarment involving associations acting as sole employers.* If, after investigation, the WHD Administrator determines that an association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

(h) *Debarment involving associations acting as joint employers.* If, after investigation, the WHD Administrator determines that an association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association. However, if the WHD Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit association member as well. An association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(i) *Revocation.* The WHD may recommend to the OFLC Administrator the revocation of a temporary agricultural labor certification if the WHD finds that the employer:

(1) Substantially violated a material term or condition of the approved temporary 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 the 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 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 ordered to the WHD Administrator by certified check or by money order, made payable to the Wage and Hour Division, United States Department of Labor. The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to assess civil money penalties, to debar, or to 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 the regulations in 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 Federal court 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, to debar, to increase a surety bond, or to proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in 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 the regulations in this part, the amount of any civil money penalty assessment, whether debarment is sought and the 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 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 why 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 the regulations 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 subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The ALJ may exclude evidence which 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 by 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 by the authorized representative of such person, to the Chief ALJ, for a determination in an administrative proceeding as provided herein. 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 the regulations in this part or 29 CFR part 18.

(b) A copy of the Order of Reference, together with a copy of the regulations in 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 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 herein shall be served on the attorneys for the 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 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 shall prepare, within 60 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, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ shall, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition shall 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 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ shall 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 (OALJ).

Upon receipt of the ARB's Notice pursuant to § 501.42, the OALJ shall 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 shall notify the parties of:

(a) The issue or issues raised;

(b) The form in which submissions shall be made (*i.e.,* briefs, oral argument, etc.); and

(c) The time within which such presentation shall be submitted.

§ 501.45 Final decision of the Administrative Review Board.

The ARB's final 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 U.S. District Court, 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 U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Signed in Washington this 3rd day of February, 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

Nancy Leppink,

Deputy Administrator, Wage and Hour Division.

Editorial Note: The following attachment will not appear in the Code of Federal Regulations.

BILLING CODE 4510–FN–P

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

Please read and review the filing instructions carefully before completing the ETA Form 9142. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/. In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. If submitting this form non-electronically, ALL required fields/items containing an asterisk (*) must be completed as well as any fields/items where a response is conditional as indicated by the section (§) symbol.

A. Employment-Based Nonimmigrant Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)*: *	

B. Temporary Need Information

1. Job Title *		
2. SOC (ONET/OES) code *	3. SOC (ONET/OES) occupation title *	
4. Is this a full-time position? * ❑ Yes ❑ No	**Period of Intended Employment**	
	5. Begin Date * *(mm/dd/yyyy)*	6. End Date * *(mm/dd/yyyy)*

7. Worker positions needed/basis for the visa classification supported by this application

☐ **Total Worker Positions Being Requested for Certification ***

Basis for the visa classification supported by this application
(*indicate the total workers in each applicable category based on the total workers identified above*)

☐ a. New employment *	☐ d. New concurrent employment *
☐ b. Continuation of previously approved employment * without change with the same employer	☐ e. Change in employer *
☐ c. Change in previously approved employment *	☐ f. Amended petition *

8. Nature of Temporary Need: (Choose only one of the standards) *

☐ Seasonal ☐ Peakload ☐ One-Time Occurrence ☐ Intermittent or Other Temporary Need

9. Statement of Temporary Need *

Case Number: _____ Case Status: _____ Validity Period: _____ to _____

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

C. Employer Information

Important Note: Enter the full name of the individual employer, partnership, or corporation and all other required information in this section. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, identify the main or primary employer in the section below and then submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application.

1. Legal business name *		
2. Trade name/Doing Business As (DBA), if applicable		
3. Address 1 *		
4. Address 2		
5. City *	6. State *	7. Postal code *
8. Country *	9. Province	
10. Telephone number *	11. Extension	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	
14. Number of non-family full-time equivalent employees	15. Annual gross revenue	16. Year established

17.. Type of employer application (choose only one box below) *

☐ Individual Employer
☐ H-2A Labor Contractor or Job Contractor
☐ Association – Sole Employer (H-2A only)
☐ Association – Joint Employer (H-2A only)
☐ Association – Filing as Agent (H-2A only)

D. Employer Point of Contact Information

Important Note: The information contained in this Section must be that of an employee of the employer who is authorized to act on behalf of the employer in labor certification matters. The information in this Section must be different from the agent or attorney information listed in Section E, unless the attorney is an employee of the employer. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, enter only the contact information for the main or primary employer (e.g., contact for an association filing as joint employer) under the application.

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Contact's job title *		
5. Address 1 *		
6. Address 2		
7. City *	8. State *	9. Postal code *
10. Country *	11. Province	
12. Telephone number *	13. Extension	14. E-Mail address

Case Number: _____ Case Status: _____ Validity Period: _____ to _____

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

E. Attorney or Agent Information (If applicable)

1. Is/are the employer(s) represented by an attorney or agent in the filing of this application (including associations acting as agent under the H-2A program)? If "Yes", complete Section E. *			❑ Yes ❑ No
2. Attorney or Agent's last (family) name §	3. First (given) name §	4. Middle name(s) §	
5. Address 1 §			
6. Address 2			
7. City §	8. State §	9. Postal code §	
10. Country §	11. Province		
12. Telephone number §	13. Extension	14. E-Mail address	
15. Law firm/Business name §		16. Law firm/Business FEIN §	
17. State Bar number (only if attorney) §		18. State of highest court where attorney is in good standing (only if attorney) §	
19. Name of the highest court where attorney is in good standing (only if attorney) §			

F. Job Offer Information

a. Job Description

1. Job Title *		
2. Number of hours of work per week Basic *: _____ Overtime: _____	3. Hourly Work Schedule * A.M. *(h:mm)*: ___ : ___ P.M. *(h:mm)*: ___ : ___	
4. Does this position supervise the work of other employees? * ❑ Yes ❑ No	4a. If yes, number of employees worker will supervise (if applicable) § _____	
5. Job duties – A description of the duties to be performed **MUST** begin in this space. If necessary, add attachment to continue and complete description. *		

Case Number: _____ Case Status: _____ Validity Period: _____ to _____

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

F. Job Offer Information *(continued)*

b. Minimum Job Requirements

1. Education: minimum U.S. diploma/degree required * ☐ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)	
1a. If "Other degree" in question 1, specify the diploma/ degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
2. Does the employer require a second U.S. diploma/degree? *	❑ Yes ❑ No
2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §	
3. Is training for the job opportunity required? *	❑ Yes ❑ No
3a. If "Yes" in question 3, specify the number of months of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)
4. Is employment experience required? *	❑ Yes ❑ No
4a. If "Yes" in question 4, specify the number of months of experience required §	4b. Indicate the occupation required §
5. Special Requirements - List specific skills, licenses/certifications, and requirements of the job opportunity. *	

c. Place of Employment Information

1. Worksite address 1 *	
2. Address 2	
3. City *	4. County *
5. State/District/Territory *	6. Postal code *
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	❑ Yes ❑ No
7a. If Yes in question 7, identify the geographic place(s) of employment with as much specificity as possible. If necessary, submit an attachment to continue and complete a listing of all anticipated worksites. §	

Case Number: _____ Case Status: _____ Validity Period: _____ to _____

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

G. Rate of Pay

1. Basic Rate of Pay Offered *	1a. Overtime Rate of Pay *(if applicable)* §
From: $ _____ . _____ To (Optional): $ _____ . _____	From: $ __ . __ To (Optional): $ __ . __
2. Per: (Choose only one) * ☐ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate	
2a. If Piece Rate is indicated in question 2, specify the wage offer requirements: §	
3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures). If necessary, add attachment to continue and complete description. §	

H. Recruitment Information

1. Name of State Workforce Agency (SWA) serving the area of intended employment *		
2. SWA job order identification number *	2a. Start date of SWA job order *	2b. End date of SWA job order (In H-2A this date is 50% of contract period) *
3. Is there a Sunday edition of a newspaper (of general circulation) in the area of intended employment? *		☐ Yes ☐ No

Name of Newspaper/Publication *(in area of intended employment for H-2B only)* *	Dates of Print Advertisement §	
4.	From:	To:
5.	From:	To:

6. Additional Recruitment Activities for H-2B program. Use the space below to identify the type(s) or source(s) of recruitment, geographic location(s) of recruitment, and the date(s) on which recruitment was conducted. If necessary, add attachment to continue and complete description. *

Case Number: _____ Case Status: _____ Validity Period: _____ to _____

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification
ETA Form 9142
U.S. Department of Labor

I. Declaration of Employer and Attorney/Agent

In accordance with Federal regulations, the employer must attest that it will abide by certain terms, assurances and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Applications that fail to attach Appendix A.2 or Appendix B.1 will be considered incomplete and not accepted for processing by the ETA application processing center.

1. For H-2A Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in **Appendix A.2.** §	❑ Yes ❑ No N/A
2. For H-2B Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in **Appendix B.1.** §	❑ Yes ❑ No N/A

J. Preparer

Complete this section if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Last (family) name §	2. First (given) name §	3. Middle initial §
4. Job Title §		
5. Firm/Business name §		
6. E-Mail address §		

K. U.S. Government Agency Use (ONLY)

Pursuant to the provisions of Section 101 (a)(15)(h)(ii) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. By virtue of the signature below, the Department of Labor hereby acknowledges the following:

This certification is valid from _____ to _____.

_____ Department of Labor, Office of Foreign Labor Certification

_____ Determination Date (date signed)

_____ Case number

_____ Case Status

L. OMB Paperwork Reduction Act *(1205-0466)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 1 hour per response for H-2A and 2 hours 45 minutes for H-2B, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Case Number: _____ Case Status: _____ Validity Period: _____ to _____

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
U.S. Department of Labor

For Use in Filing Applications Under the H-2A Agricultural Program ONLY

A. Attorney or Agent Declaration

I hereby certify that I am an employee of, or hired by, the employer listed in Section C of the ETA Form 9142, and that I have been designated by that employer to act on its behalf in connection with this application. If I am an agent and not an employee of the employer, then I have attached a Letter of Representation from the employer. I also certify that to the best of my knowledge the information contained herein is true and correct. *I understand that to knowingly furnish false information in the preparation of this form and any supplement hereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in a Federal penitentiary or both (18 U.S.C. 1001).*

1. Attorney or Agent's last (family) name	2. First (given) name	3. Middle initial
4. Firm/Business name		
5. E-Mail address		
6. Signature		7. Date signed

B. Employer Declaration

By virtue of my signature below, ***I HEREBY CERTIFY*** *the following conditions of employment:*

1. The job opportunity is a full-time temporary position, the qualifications for which do not substantially deviate from the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.
2. The specific job opportunity for which the employer is requesting H-2A certification is not vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage.
3. The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections as required by 20 CFR 655.167.
4. The job opportunity offers 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 and complies with the requirements at 20 CFR 655, Subpart B.
5. The employer understands that it must offer, recruit at, and pay a wage that is the highest of the adverse effect wage rate in effect at the time the job order is placed, the prevailing hourly or piece rate, the agreed-upon collective bargaining rate (CBA), or the Federal or State minimum wage, and, furthermore, that if a new Adverse Effect Wage Rate is published, or the employer is notified of a new prevailing wage rate during the contract period, and that new rate is higher than the wage determined by the NPC (except the CBA) during the application process the employer will increase the pay of all employees in the same job occupation to the higher rate.
6. There are no U.S. workers available in the area(s) capable of performing the temporary services or labor in the job opportunity, and the employer will conduct positive recruitment as specified by the NPC and 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 completion of 50% of the contract period calculated from the first date of need indicated in Section B.5 of ETA Form 9142.
7. All fees associated with processing the temporary labor certification will be paid in a timely manner.

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
U.S. Department of Labor

8. During the period of employment that is the subject of the labor certification application, the employer:
   (i) Will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;
   (ii) Will provide for or secure housing for workers who are not reasonably able to return to their permanent residence at the end of the work day that complies with the applicable local, State, or Federal standards and guidelines for housing without charge to the worker;
   (iii) Where required, has timely requested a preoccupancy inspection of the housing and received certification;
   (iv) Will provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements of 20 CFR 655.122(e).
   (v) Will provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer under 20 CFR 655.122(h)) and the employer's worksite without cost to the worker.
9. 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 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 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.
10. The employer and its agents have not sought or received payment of any kind from the H-2A worker for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.
11. The employer has and will contractually forbid any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees, except as provided for in DHS regulations.
12. The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, 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 with just cause:
   (i) Filed a complaint under or related to Sec. 218 of the INA (8 U.S.C. 1188), or any Department regulation promulgated under Sec. 218 of the INA;
   (ii) Instituted or caused to be instituted any proceeding under or related to Sec. 218 of the INA, or any Department regulation promulgated under Sec. 218 of the INA;
   (iii) Testified or is about to testify in any proceeding under or related to Sec. 218 of the INA or any Department regulation promulgated under Sec. 218 of the INA;
   (iv) Consulted with an employee of a legal assistance program or an attorney on matters related to Sec. 218 of the INA or any Department regulation promulgated under Sec. 218 of the INA; or
   (v) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by Sec. 218 of the INA, or any Department regulation promulgated under Sec. 218 of the INA.
13. The employer has not and will not discharge any person because of that person's taking any action listed in paragraph 12(i) through (v) listed above.
14. The employer will inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under 20 CFR 655.135(i), unless the H-2A worker is being sponsored by another subsequent employer.
15. The employer has posted the Notice of Workers' Rights as required by 20 CFR 655.135(l) in a conspicuous place frequented by all employees,
16. If the application is being filed as an H-2A Labor Contractor the following additional attestations and obligations apply under 20 CFR 655.132:
   (i) The H-2A Labor Contractor has provided a copy of the MSPA Farm Labor Contractor (FLC) certificate of registration if required under MSPA, 1801 U.S.C. et seq., to have such a certificate identifying the specific farm labor contracting activities it is authorized to perform;
   (ii) The H-2A Labor Contractor has provided with this application a list of the names and locations of each fixed-site agricultural business to which the H-2A Labor Contractor expects to provide H-2A workers, the expected beginning and ending dates when the H-2A Labor Contractor 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;

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

OMB Approval: 1205-0466
Expiration Date: 11/30/2011

Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2
U.S. Department of Labor

The H-2A Labor Contractor is able to provide proof of its ability to discharge financial obligations under the H-2A program and has secured a surety bond as required by 29 CFR 501.9, the original of which is attached and shows

(iii) the name, address, phone number, and contact person for the surety, and provides the amount of the bond (as calculated pursuant to 29 CFR 501.9);
(iv) The H-2A Labor Contractor has engaged in and will engage in recruitment efforts in each area of intended employment in which it has listed a fixed-site agricultural business as required in 20 CFR 655.121, 655.150-155; and
(v) The H-2A Labor Contractor has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a written statement stating that:
  a. All housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable housing standards in 20 CFR 655.122(d); and
  b. All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and will 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 part 500, except where workers' compensation is used to cover such transportation as described in § 655.122(e); and
  c. Attach to the statement certificates of occupancy from the SWA for all employer owned housing and copies of all drivers' licenses, vehicle registration, and insurance policies for all drivers and vehicles used to transport H-2A workers.

I hereby acknowledge that the agent or attorney identified in section E (if any) of the ETA Form 9142 and section A above is authorized to represent me for the purpose of labor certification and, by virtue of my signature in Block 5 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).*

1. Last (family) name	2. First (given) name	3. Middle initial
4. Title		
5. Signature		6. Date signed

OMB Paperwork Reduction Act

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Room C4312 * 200 Constitution Ave., NW * Washington, DC * 20210. **Do NOT send the completed application to this address.**

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

[FR Doc. 2010–2731 Filed 2–11–10; 8:45 am]
BILLING CODE 4510–FN–C